

40

DECISIONS

OF

R.M.P.

125968
Dist.

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JUNE 30 TO DECEMBER 31, 1892.

VOLUME XV.

Edited by S. V. PROUDFIT,
REPORTER OF LAND DECISIONS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1893.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.

This publication is held for sale by the Department at cost price, as follows:

Volume 1, from July, 1881, to June, 1883	\$1.05
Volume 2, from July, 1883, to June, 1884	1.15
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Volume 15, from July, 1892, to December, 1892	1.05
Digest, volumes 1 to 10, inclusive	1.00

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

HOMESTEAD CONTEST—MINOR HEIRS—NOTICE.

BROWN v. GALLANTINE.

In proceedings against an entry made in the name of minor heirs jurisdiction is not acquired by the appearance of one of the defendants where legal service of notice is not made upon any of said heirs.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 1, 1892.

The land in controversy is the NE. $\frac{1}{4}$ of Sec. 26, T. 16 S., R. 30 W., 6th p. m., Wa-Keeney, Kansas, land district.

The record shows that John R. Gallantine was appointed guardian, under the laws of Nebraska, of Virginia and William Burley, minor heirs of De Clifford M. Burley, deceased, and as such, filed soldiers' homestead declaratory statement June 10, 1886, for the land in question for said minor heirs, under the act of June 8, 1872. On April 11, 1888, Hiram N. Brown filed an affidavit of contest alleging that said tract had not been settled upon or cultivated as required by law. The application to make entry shows the residence of the defendants to be Farnsworth, Lane Co., Kansas, but as a matter of fact they lived in Bloomfield, Nebraska. Publication of notice was therefore made in a paper published in the county where the land is situated for the required length of time. Notices were also posted in the local office and on the claim, and a notice sent to the guardian by registered letter and received by him at Bloomfield, Nebraska, thirty days before the hearing. These several notices were each addressed to "John R. Gallantine, Guardian of Virginia and William Burley, minor heirs of De Clifford M. Burley." The hearing was set for June 15, at the local office where, on said day the contestant and his attorney appeared, also William Burley by attorney. Virginia Burley and the guardian made default. The testimony was all taken on the 15th, and as a result thereof the local officers found in favor of the contestant and recommended the cancellation of the entry. From this decision there was no appeal.

After the hearing had closed Virginia Burley appeared specially and

moved that the contest be dismissed for want of service on her. This motion is not dated, but the affidavit accompanying it is dated at Bloomfield, Nebraska, June 19, 1888. It is stated, however, by counsel for Virginia that this motion was presented to the local officers before their decision on the merits was rendered. It is stated in her affidavit that no notice of the hearing had been served on her in any manner and that she was over twenty-one years of age, when the contest was initiated. This motion was overruled by the local officers. Virginia appealed and you by letter of May 14, 1891, affirmed their decision both on the motion and on the merits of the case. From this decision she again appeals assigning as error your action in denying her motion.

Rule 11 (Rules of Practice) reads as follows:

Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service can not be made. The party will be required to state what effort has been made to get personal service.

There is nothing in the record showing that such affidavit was presented or that any attempt had been made to get personal service. Under the rule above quoted this is absolutely required as the foundation for publication of service. *Parker v. Castle* (4 L. D., 84); *Nanney v. Weasa* (9 L. D., 606).

I do not think, however, that this motion should be granted to the full extent asked for, that is, to dismiss the contest, but should be treated rather as a request to be heard on the merits of the case, and inasmuch as the entry is an indivisible one, having been made in the name of and for the minor heirs; I think the entire proceeding, so far as they are concerned, should be set aside, proper service obtained and then the case adjudicated as an entirety.

Your judgment is therefore reversed, and you are directed to remand the case to the local officers with instructions to proceed as herein directed.

INDIAN RESERVATION—DESERT LAND ENTRY.

JAMES M. GILMAN.

An executive order creating a reservation for a public purpose, and embracing land covered by a *prima facie* valid entry, will take effect thereon if the entry is subsequently canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 1, 1892.

James M. Gilman has appealed from your decision of July 15, 1891, sustaining the action of the local officers in rejecting his application to make homestead entry of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 8, T. 3 S. R. 1 E., S. B. M., Los Angeles land district, California.

The reason for said rejection was that, by executive order of August 25, 1877, all the even numbered sections in said township, except sections sixteen and thirty-six, and excepting all tracts the title to which had passed out of the United States, were withdrawn from sale and settlement, and set apart as a reservation for Indian purposes.

At the date of the executive order above referred to, the tract above described was embraced in the desert-land entry of one C. B. Richardson, which was canceled on September 24, 1885, because of non-compliance with the requirements of the statute. Appellant contends that, by reason of said desert land entry, the tract "was excepted from said order of withdrawal of said tract for Indian purposes, and is now, and at all times has been public land of the United States, subject to entry."

This exact question arose in the case of Charles W. Filkins (5 L. D., 49) involving a part of section 10, of this same township and range. In that case the Department held (to quote from the syllabus), that "land embraced within the limits of an executive order of reservation, made for a public purpose, but covered at the date of such order by a *prima facie* valid entry, is subject to said reservation on the cancellation of the entry." The same ruling was again made in the case of Stultz *v.* White Spirit, *et al* (10 L. D., 144), and others not reported.

Your decision is affirmed.

RAILROAD GRANT—RELINQUISHMENT—SETTLEMENT CLAIM.

FLORIDA RY. AND NAVIGATION CO. *v.* MATTHEWS.

The effect of the general relinquishment executed by the company June 25, 1881, for the benefit of certain *bona fide* settlers, was not dependent upon the subsequent compliance with law on the part of such settlers, but operated as a final waiver of all right to lands embraced therein.

Secretary Noble to the Commissioner of the General Land Office, July 2, 1892.

I have considered the case of the Florida Railway and Navigation Company *v.* Duncan D. Matthews, involving the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 5, T. 15 S., R. 22 E., Gainesville land district, Florida, on appeal by the company from your decision of June 9, 1891, sustaining the rejection of its attempted listing of the land as inuring under the grant made to aid in the construction of its road.

This land is within the primary limits of the grant for said company, under the act of May 17, 1856 (11 Stat., 15), as shown by the map of definite location filed December 14, 1860.

This road was not built within the time required by the act of 1856, and for a long time all rights under the grant were disregarded and the lands disposed of as other public lands.

On March 1, 1878, one Charles A. Rapp made homestead entry No.

6383, for this tract, which was canceled for abandonment, April 5, 1881, and Charles E. L. Schmidt thereupon applied to make entry of the land. His application was rejected by the local officers, but your office reversed that action and held it for allowance.

Upon appeal, this Department held, in its decision of April 22, 1884 (not reported):

As Schmidt "made a *bona fide* improvement and settlement" on the land, commencing in March, 1879, this case comes within the terms of the relinquishment made by the company, and is ruled by my decision of January 21, 1884, in the case of said company against Josiah E. Harrelson.

The relinquishment referred to is that of June 25, 1881, which extended a previous relinquishment executed in April, 1876, and is in the following terms:

In due consideration of all the circumstances, the company has decided to extend the relinquishment or waiver heretofore made to actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881, upon which day your instructions were issued to the local land office. The Department can accordingly apply this waiver or relinquishment in its action upon the cases of all such actual settlers who shall have entitled themselves to patents.

Upon said departmental decision Schmidt made entry of the land, but said entry was canceled upon the report of a special agent, and, on September 30, 1887, the company applied to list the land as inuring under its grant, and upon the rejection of its list an appeal was filed.

On December 15, 1890, the local officers rejected an application by Duncan D. Matthews to make entry of this land, on account of the pendency of the company's appeal from the rejection of its list, and he also appealed to your office.

In your decision of June 9, 1891, you held, in effect, that by its relinquishment, the company had waived all claim to this land, and that it could not thereafter be listed on account of the grant.

The sole question raised by the appeal is, whether this tract was included in the relinquishment executed in 1881, the company urging that it was not, as the waiver was only intended to apply to those settlers who had entitled themselves to patent, and upon the cancellation of Schmidt's entry, it remained, as before, subject to the grant.

The question as to whether this tract was covered by the general relinquishment of 1881 was properly before this Department upon the application by Schmidt, and it was then held to have been embraced in said relinquishment, and thereby the company was divested of any further interest in this land.

Its right to select other land under the act of June 22, 1874 (16 Stat., 194), then arose, and was not dependent upon Schmidt's compliance with law.

Had it then made selection under said act, and the same had been approved, would it be urged that Schmidt's failure to comply with the law worked a forfeiture of any of rights under that selection.

It has been repeatedly held that a relinquishment under the act of June 22, 1874 (*supra*), relieves the land included therein from all claim on the part of the railroad. Northern Pacific R. R. Co. *v.* Munsell (9 L. D., 237), and cases therein cited.

It was therefore no concern to the company that Schmidt failed to comply with the law, and it acquired no rights under its attempted listing of the land in 1887.

This is no wise in conflict with the decision in the case of this company against Carter (14 L. D., 103), as it was there held that Carter was not shown to have been a *bona fide* settler, and that his entry was not included in the relinquishment of 1881.

Your decision is therefore affirmed.

DESERT LAND ENTRY—FRAUDULENT FINAL PROOF—TRANSFEE.**WILSON *v.* BECK.**

A desert land entry secured by testimony falsely showing reclamation must be canceled, though it may appear that prior to the initiation of contest the land was reclaimed by a transferee.

Secretary Noble to the Commissioner of the General Land Office, July 5, 1892.

I have considered the case of James C. Wilson *v.* Charles W. Beck on appeal by the former from your decision of May 19, 1891, dismissing his contest as to certain tracts of land covered by the desert land entry of the latter.

On July 19, 1884, Beck made desert land entry for the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, the SE $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of section 17; the N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, T. 44 N. R. 82 W., Buffalo, Wyoming Land District, and made final proof thereon and received final certificate April 30, 1888.

This entry and proof was contested by Wilson, and upon a hearing being had the register and receiver recommended the cancellation of the entry, from which action Beck appealed.

You found the evidence, substantially, that at the date of final proof the entryman had not reclaimed the land as required by law, but that some work tending to reclaim a part of it had been done by the "Frontier Land and Cattle Company" in the interest of which company it was charged the entry had been made, and you held that "from plaintiff's own showing it is clear that before jurisdiction was acquired in this case all of said tract had been reclaimed with the exception of the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 17, and N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ section 20" and you state that "it will be presumed in the absence of proof to the contrary that the improvements placed on the land after final proof, and up to date of transfer" (to said cattle company) "were put there with the full knowl-

edge and consent of defendant and for his sole use and benefit." You found, substantially, that the entryman had not shown any right to water for irrigating the land and as on November 17, 1885, you had directed that supplemental proof be furnished on this point, you say in your decision that "inasmuch as it now appears from the record in this case that the title to the water right is controlled by said cattle company transferees of the entry no action is necessary to be taken thereon."

You held said entry for cancellation as to the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ section 17, and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 20 and dismissed the contest as to the remaining tracts, from which decision Wilson appealed.

A number of motions had been filed in the case and I do not find that you erred in disposing of them. None of them are of any importance in the case and will not be further noticed.

As to the main points in the case I will say that while it is well settled that a contest must fail when the default is cured prior to notice of contest, where this is not induced by the contest but is the result of the good faith of the entryman, I find no case where final proof which was insufficient, and founded upon false statements, is rendered sufficient by subsequent acts.

The final proof in this case is entirely broken down by the evidence presented at the hearing. In his affidavit, made as part of his final proof, Mr. Beck having attached a small map, which he calls a "diagram" to his affidavit and made it a part of the same, says that it shows how and where the water is being distributed by the ditches on the land. This shows a main ditch running east along the north line of the tract just north of the line, with two laterals, one entering at the northwest corner of the tract and running nearly south through three forty acre lots in section 17, nearly across the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, which is part of the entry. The other entering about the center of the north line of the tract runs south, bearing a little east across the land lying in section 17, and over half way across the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 20. It appears by the testimony of surveyor Shannan, county surveyor of Johnson county, who testified at the hearing, that the north fork of Powder River cuts off the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and nearly all of the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 20 and about half of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 17, so that it cannot be irrigated by the water from the ditch spoken of.

According to the statement of surveyor Johnson, the main ditch laid down in Beck's map as being north of the tract and running entirely across it, is not there as represented but in fact it enters a short distance in the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 17, and empties into a gulch which runs on a curve to the right around the hills, a short distance, from which a plow furrow runs south of east into the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section. There was, when the hearing was held, a few furrows plowed in the eastern part of the last mentioned tract but

the earth was not scraped out, and there was, when the survey was made in July 1888, no water in any ditch on the land. Surveyor Shannon was disinterested and testified like an intelligent and fair man. He gave a description in detail of the manner in which he made the survey from which the map introduced in evidence at the hearing was made. He says the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 17 are hills and "buttes" that cannot be irrigated from the ditches on the land. That not to exceed $\frac{1}{8}$ of an acre in the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 17 lies under the main ditch and not over seven acres of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section lies under it. That there are no ditches south of the north fork of Powder River. There was when the survey was made a lateral ditch leaving the main ditch in the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 17, which runs in curves across the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and into the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 17, and another lateral east of this about $\frac{1}{8}$ of a mile, which runs into the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 17 and there ends. There are no ditches in section 20. The testimony shows that nearly all of this ditching was done after final proof was made, and that the final proof was utterly false and fraudulent. It seems from all the evidence that it is hardly possible that Mr. Beck ever saw the land about which he testified when he made final proof. In answer to question 9 of final proof he says there was no natural water supply on the land sufficient to invigorate or fertilize any part of the land, and in his "diagram" evidently made with care, he does not show the north fork of Powder River, on the land, nor does he mention it, but represents two ditches running across the land over which it flows. He probably did not know anything about the river being on the land.

In the case of Charles H. Schick (5 L. D., 15) it was said:

The source and volume of the water supply, the carrying capacity of the ditches and the number and length of all ditches on each legal subdivision should be specifically shown, the witnesses stating in full their means of knowledge.

See also Lee v. Alderson (11 L. D., 58) and Gilkison v. Coughanhour (11 L. D., 246).

In the case at bar, it does not appear that there had ever been any water conducted on to the land, in fact, the final proof does not show that there had been, but it speaks of ditches being made and shows them to be where they were not. There was nothing in the final proof to show that the entryman had any water right in any ditch that could conduct water onto the land. The cattle company, a corporation, had a ditch partly constructed but this entryman Beck from the evidence before me was not a stockholder therein and had no right to any benefit therefrom. The law and regulations require reclamation of the land, and final proof cannot be made without it, except the proof be false and fraudulent, as in this, and when so made it should be rejected. It cannot be helped out by a transferee subsequent to its submission. A mere omission to prove an existing material fact, may be covered by

supplemental proof as was proposed in this case, in relation to the water right, but it would be an unsafe practice to allow proof, fraudulent when made to be purged and made sufficient by subsequent acts.

The entry will be canceled and your decision modified accordingly.

RAILROAD GRANT—INDEMNITY SELECTION—UNSURVEYED LAND.**NORTHERN PACIFIC R. R. Co.**

An indemnity selection cannot be allowed until the land included therein has been surveyed and a plat of the survey duly approved and filed in the local office.

Secretary Noble to the Commissioner of the General Land Office, July 5, 1892.

On July 16, 1890, the Northern Pacific Railroad Company made selection of the S. W. $\frac{1}{4}$ of Sec. 33, T. 11 N., R. 9 W., and the S. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of Sec. 35 T. 14 N., R. 10 W., Vancouver land district, Washington, as indemnity for certain losses specified in the list then filed. On September 19, 1890, said selections were rejected by the local officers for the reason that the lands embraced therein were unsurveyed. On appeal the rejection was approved by your office on June 25, 1891, for the same reason.

After an examination of the plats, it having been found practicable to protract the lines of survey of the adjoining sections of which survey had theretofore been made, so as to include the two south west quarters, selected by the company, and such protraction having been made by your orders, June 15, 1891, in your said decision you recited these facts and said there was no objection to the company now selecting said tracts, provided, of course they are free from adverse claim or right.

From your action rejecting said selections the company has appealed; and as a reason for asking a reversal of your judgment, it specifies that it is—

Error not to have ruled that the establishment of the three corners and survey of the exterior lines completed the field survey and the making and filing of plat of same by the surveyor general sufficiently identified the land to admit of their selection.

I have caused the records of your office to be examined and it is found therefrom that at time said tracts were selected the township lines had been run and some of the adjoining sections had been surveyed and a plat of them returned to the local office. In thus surveying the township and the adjoining sections, lines have been run which will be adopted as the lines of the tracts selected when survey of them is made; and it is because of the running of these lines it is insisted that practically the selected lands have been surveyed. But there is error in this contention. Lands in this condition are not considered

by the Department as surveyed lands. They are not subject to entry and cannot be selected.

Under the law, a survey to be effective, so as to authorize such a disposition of the public lands, must be approved by the proper officer and a plat thereof filed in the district land office. No plat of a survey of the tracts in question was approved or on file in the district office or anywhere else at the date of the railroad selections.

It follows that said selections were properly rejected and your judgment to that effect is affirmed.

TIMBER CULTURE CONTEST—BREAKING—CULTIVATION.

SEIFER *v.* DODD.

Failure to break or cultivate land the first year does not warrant the cancellation of a timber culture entry, where it appears that a former entryman has left the land in a condition of cultivation to be utilized in accordance with the requirements of the timber culture law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 5, 1892.

John Seifer has appealed from your decision of June 4, 1891, dismissing his contest against the timber-culture entry of Richard H. Dodd for the SW. $\frac{1}{4}$ of Sec. 20, T. 17 N., R. 47 W., Sidney land district, Nebraska.

Prior to Dodd's entry, the tract had been covered by the timber-culture entry of one Fleming Dempster, who held it for about two years, meanwhile complying with the requirements of the timber-culture law. Dodd made entry on February 11, 1888, and did nothing on the land within a year after that date. On March 2, 1889, Seifer initiated contest. At the date set for hearing, the defendant did not appear, and the testimony of but one witness was taken, who testified:

When I came there was five acres broken; and during the month of April, 1887, there was five acres more broken and the five acres backset that had previously been broken. Nothing has been done on the land since that time. The present condition of said tract is unbroken prairie in its natural state, with the exception of the ten acres above mentioned, which was overgrown with weeds and grass.

You held that "as the first and second years' work had been well done in compliance with law, by a prior entryman, this defendant was justified in not breaking fresh prairie-land the first year."

The appellant contends that it was the duty of the second entryman—

To do some act toward meeting the requirements of the law, either by plowing or otherwise cultivating five acres of the land already broken, or by breaking five acres of new prairie, and thus commencing in good faith to perform the work which the timber-culture laws require at his hands.

The fact that "the first and second years' work had been well done, in compliance with law, by a prior entryman," would be sufficient to justify the present entryman in not breaking or cultivating any land the first year, if the land was found to be in a condition to be utilized by him in accordance with the requirements of the law. In the cases of *Lamson v. Burton* (11 L. D., 43), and *Davis v. Monger* (13 L. D., 304), the entryman did no breaking nor cultivating the first year; but it was found that a prior entryman had left land in a condition to be utilized by the defendant; hence, the Department dismissed the contest. In the case at bar the condition of the land is not clearly shown. It appears that five acres of the tract were broken in 1886; five acres more in 1887; and that the five acres broken in 1886 were back-set in 1887. These dates were not so long prior to that of the initiation of contest as to lead necessarily to the conclusion that the land had reverted to its natural state, so that it could not be utilized by the defendant. The burden of proof is on the contestant to show that the ground was not in a proper condition to be used for planting and this he has not done.

Your decision is affirmed and the contest dismissed.

*Overruled
23 L. D. 423*
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SCHOOL LANDS—INDEMNITY—SWAMP GRANT.

STATE OF CALIFORNIA.

The phrase "reserved for public uses" as employed in section 6, act of July 23, 1866, does not authorize the allowance of school indemnity for lands that passed to the State under the provisions of the swamp grant.

The segregation of swamp lands in a township does not render it fractional within the meaning of the act of February 26, 1859, and thereby furnish a basis for school indemnity.

Section 2275 R. S., as amended by the act of February 28, 1891, does not authorize the allowance of school indemnity to the State of California for lands that are swamp in character, as said section is not applicable to said State, which derives its right to indemnity through special provisions made by the act of July 23, 1866.

Secretary Noble to the Commissioner of the General Land Office, July 6, 1892.

With your letter of July 12, 1889, you transmit the appeal of the State of California from your office decision of April 8, 1889, rejecting certain applications by said State to select indemnity school lands, on the ground, mainly, that the decision of my predecessor, Secretary Vilas, of January 3, 1889, in the case of *United States v. California* (8 L. D., 4), does not and was not intended to authorize new or future selections by the State upon the bases of townships made fractional by reason of portions thereof being swamp lands.

The applications are made for lands in the Visalia, California, land district, and are numbers 3344, 3345, 3346, 3347, 3348, 3349, and 3334 and 3340, and described in your said office decision.

There are two grounds of error assigned:—

1. In holding that the State is not entitled to select indemnity school lands in lieu of townships made fractional by the existence of swamp and overflowed lands.

2. In holding that the decision of Mr. Secretary Vilas of January 3, 1889 (8 L. D., 4), in case of the United States *v.* State of California, wherein the validity of certain approved indemnity school selections resting on the same basis was considered and disturbance thereof refused, does not and was not intended to authorize new or future selections by said State in lieu of townships made fractional for the same reason.

It is evident that Secretary Vilas, in the case referred to, decided that school indemnity selections, certified prior to the passage of the act of March 1, 1877, on the basis of losses alleged in townships made fractional by reason of the segregation of swamp lands, would not be disturbed. And, following the opinion of Attorney General Devens of March 4, 1878 (Vol. 15, p. 454), he decided that the sixth section of the act of July 23, 1866 (14 Stat., 218), did not give to the State of California indemnity for the sixteenth and thirty-sixth sections, where such sections are found to be swamp and overflowed lands.

On a careful reading of said decision, I do not think it was intended to apply to future selections, but only to such as had already been certified, and presenting the question whether such selections were confirmed by the act of March 1, 1877 (19 Stat., 267). *Wright et al. v. State of California*, 8 L. D., 24.

The State of California takes its right to indemnity school land under the seventh section of the act of March 3, 1853 (10 Stat., 244), construed by the sixth section of the act of July 23, 1866 (14 Stat., 218), which is as follows:

That an act entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' approved March 3, 1853, shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines shall have been extended over such land, and in case of Spanish or Mexican grants, when the final survey of such grants shall have been made.

It is insisted that the State is entitled to indemnity for school lands under this statute, the argument being that California is the only State in the Union to which the grant of swamp lands was made before the grant of school lands; and that, while other States took the sixteenth and thirty-sixth sections as school lands whether swamp or dry, Cali-

fornia, having by the swamp land act taken such sixteenth and thirty-sixth sections as were "wet and unfit for cultivation," the subsequent grant to the State for school purposes, made March 3, 1853 (10 Stat., 244), was by that much diminished; that any other construction of the act of 1866 would be thus to create a diminution for school purposes not suffered by other States, and that this difference was certainly not intended by Congress, but, on the contrary, it was intended by the act of 1866 to make good this loss by taking indemnity for such sections, as were "*swamp or overflowed*." The State insists that the authority for making these selections, in lieu of the swamp land lost from the school grant is contained in the sixth section of the act of July 23, 1866 (above quoted), and in the phrase "*reserved* for public uses;" that the swamp land act of September 28, 1850 (9 Stat., 519), "turned them" (the swamp lands) "over to the several States upon condition that they would reclaim them as far as possible." "It was in every sense a reservation of these lands from all other modes of disposal," etc., and, hence, it is insisted, the lands were "*reserved for public uses*" and the State entitled to other lands in lieu of them.

It is well settled that the swamp land act was a grant *in praesenti*, by which the title to those lands passed at once to the State in which they lay, except to the State admitted into the Union after its passage. *French v. Fyan et al.*, 93 U. S., 169; *Rice v. Sioux City and St. Paul Railroad Company*, 110 U. S., 695.

By sections 3476 and 3477 of the Political Code of California, it appears that the State realizes no revenue from the sale of its swamp lands, the money paid into the State treasury therefor being repaid when the work of reclamation is completed; and counsel for the State, in very elaborate arguments, both written and oral, insist that the State thus suffers a loss from the school grant where the sixteenth and thirty-sixth sections are swamp, and thus subject to the grant of 1850.

Counsel take peculiar views as to the nature of the swamp land grant, as shown by the following quotations, taken from different briefs:

It (the swamp land grant) was a public trust, and not an unconditional donation of lands to the State to be applied and used for any and all purposes.

But the State did not receive the proceeds, and never did own the lands (swamp). Whether sold or unsold, the swamp lands are not the property of the State.

Admitting these premises, it is easily shown that, if the State only took section sixteen and thirty-six, where swamp, as a mere trust, and in such case "never did own those sections, the State would suffer a wrongful diminution of her school lands, unless given indemnity therefor. But such is not the character of the swamp land grant.

In the case of the *United States v. Louisiana*, 127 U. S., 191, the court says:

The swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, '*as far as necessary*,' to the pur-

pose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other purpose is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary.

It thus appears that the swamp lands are the property of the States to which they were granted by the act of 1850, and the necessity for the application of the proceeds of these lands to their reclamation is left alone to the determination of the States; and the State may, in its own discretion, divert the proceeds of the swamp lands in part or in whole from the reclamation of the lands to other purposes.

On February 2, 1853, the legislature of the State of Iowa passed a law, declaring it "competent and lawful" to divert the proceeds of the swamp lands, in whole or in part, to the erection of public buildings, *for the purposes of education*, the building of bridges, roads, highways, or for making railroads. The right of the State to thus make a law by which the proceeds of the sales of swamp lands could be used for county purposes came before the supreme court of the United States in the case of *Emigrant Company v. County of Adams*, 100 U. S., p. 61, where it is said:

The proviso of the second section of the act of Congress (swamp land act) declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, *as far as necessary* to these purposes.

This language implies that the State was to have *full power of disposition* of the lands, and only gives direction as to the application of the proceeds, and of this application only "as far as necessary," to secure the object specified.

In *Mills County v. Railroad Companies*, 107 U. S., 566, it is said:

The application of the proceeds of these lands (swamp) to the purpose of the grant rests upon the good faith of the State, and that the State may exercise its discretion as to the disposal of them is the only correct view

It was a wise measure on the part of Congress to cede these lands to the States in which they lay—*subject to the disposal* of their respective legislatures.

In place of the grant being "essentially only a trust," as contended for by counsel, the court says:

Although it is specially provided that the proceeds of such lands shall be applied "as far as necessary" to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the States alone when they accepted the grant; and whether faithfully performed or not is a question between the United States and the State, and is neither a trust following the lands nor a duty which private parties can enforce against the State.

In the case of *Hagar v. Reclamation District*, 111 U. S., 701, the court says:

The appropriation of the proceeds (of swamp lands) rests solely in the good faith of the State. Its discretion in disposing of them is not controlled by that condition, as neither a contract nor a trust following the lands was thereby created.

The act of March 2, 1855 (10 Stat., 634), provides cash indemnity to be paid to the various States to which the swamp lands had been granted, equivalent to the amount of money received by the United

States on account of the sale of swamp lands, and the money thus raised by the States may be legally used for general county purposes. *United States v. Louisiana (supra)*.

And the act of March 3, 1857 (11 Stat., 251), confirmed to the several States the swamp and overflowed lands selected under the swamp land act.

It thus appears that the swamp act imposed no condition in default of which the grant would be defeated. The several States took an absolute title to all the swamp lands from the date of the passage of the act. The proviso to the second section of the act, viz: "That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid," is not such a condition as would defeat the grant in default of its provisions; but it was simply a legislative direction to appropriate the proceeds of the sale of the lands, as far as necessary, to a specific purpose, in constructing levees and drains to reclaim the lands. The proviso itself contemplated the disposal of the lands by the grantee—the States—and, hence, the lands were not such as were "reserved for public uses." The proviso contains a direction to use the means obtained by the sale of the lands, as far as necessary, in a certain way; but the lands were nevertheless "*granted*" and not reserved to the United States for any purpose.

The act of September 28, 1850, and that of March 3, 1853, granted to the State of California certain lands; the first was the grant of the swamp lands, the second the grant of sections sixteen and thirty-six in each township, for school purposes, but both grants were made to the State; and while the State lost from the grant for school purposes the sixteenth and thirty-sixth sections when swamp, yet the grant of the swamp land (much of which is now confessedly the best in the State) was by that much the greater, and thus an equality with the other States maintained. If, however, it were shown that the grant to the State were a restricted one—one of inequality to other States—(and that may be conceded as to the lands for school purposes), yet that would not authorize the selection and certification of other lands to make up such deficiency, in the absence of statutory authority for so doing; and I do not think the phrase "reserved for public uses," in the act of 1866, authorizes such selections.

The State of California, "in its discretion," appears to realize no revenue from the sale of its swamp lands, preferring to deem it necessary to use all the funds derived from that source in their reclamation. It is manifest that its area of school lands will be diminished to the extent of the 16th and 36th sections, when swamp, unless indemnity is allowed therefor.

But it is shown above that the State might have exercised its right, as Iowa did, to use its swamp lands, in whole or in part, for school and

other purposes, and no individual could have questioned its authority for so doing. It preferred, however, in its discretion, to use all the swamp land funds for the purposes of increasing the value of these lands, and, if by that policy it used funds for reclamation, which otherwise might legally have been used for school purposes, it in a measure received compensation for the apparent loss by increased taxable valuation.

At all events, the State received the swamp lands as an "absolute gift"—charged with no trust, no contract—and its judgment as to the necessity of reclamation is paramount; it results, therefore, that, as the owner of these lands, it can use the surplus funds derived from their sale for school purposes.

To give California indemnity for such school sections as passed to the State under the act of 1850 would be to give it a quantity of land in excess of the other States, equal to the indemnity acreage.

If equality with other States as to general value of donated lands (both swamp and school) be the criterion, it can only be maintained by refusing indemnity for such school sections as passed to the State under the swamp land act.

It is also claimed that the act of February 26, 1859 (11 Stat., 385), contains a provision, entitling the State to indemnity for school lands made fractional by reason of swamp or overflowed lands.

Said act provides that:

Other lands are hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-sixth are fractional in quantity, or where one or both are wanting by reason of the townships being fractional, or from any natural cause: *Provided*, That the lands by this section appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May 20, 1826, entitled "An act to appropriate lands for the support of schools in certain townships not before provided for."

The act of March 3, 1853, *supra*, provides "that none other than township lines shall be surveyed when the lands are mineral or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked in the field and were actually necessary to be run," and the act of July 23, 1866 (14 Stat., 218), provides that: "in segregating large bodies of land notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of the same."

Construing these statutes with the act of February 26, 1859, providing that other lands are hereby appropriated to compensate deficiencies for school purposes, when said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause (found in the statute of 1859, above quoted), the State insists that fractional townships necessarily occurred whenever the surveys abut upon large tracts of swamp and overflowed land in the same way as if they abutted upon a lake or the

ocean, or upon interstate or international lines, or upon lines of a permanent reservation.

Counsel for the State in their brief say: "These townships were made fractional by the operation of peculiar statutes applicable to California alone. This may be conceded, and, if so, such townships were not made fractional "from any natural cause whatever," but by reason of the statute.

Moreover, the law segregating large bodies of swamp land does not change the character of the land within the township. If the survey show that all the sections of the township are in place or would be found in place, when "the lines of the public surveys were extended over such lands," it would show beyond all question that the township was not fractional, although part of the township might be swamp.

A swamp land section is a section of land in place, as much so as a section of dry land, and to admit that sections sixteen and thirty-six are swamp land is to admit that such sections exist, and that the township, so far as those sections are concerned, is not fractional, and that those sections are not wanting.

In consideration of the views above expressed, I do not think the State is entitled to indemnity for swamp land upon the theory that townships are made fractional by reason of swamp land found therein.

Counsel for the State has recently filed a supplemental brief, calling attention to the act of February 28, 1891 (26 Stat., 796), which amends sections 2275 and 2276 of the Revised Statutes of the United States. The particular provisions referred to are in section 2275, as amended, which is as follows:

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two

sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation, and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

An examination of section 2275 as amended, in the light of the decisions of the Department, construing the grants for school purposes, will show that no additional grant of school land was made by said amended section, nor were any bases therein prescribed, which might not have been legally assigned under prior laws and regulations. The only additional right given by said section was in the adjustment of the grant by providing that indemnity may be taken in advance of the surveys, and from any unappropriated public land in the State or Territory where the loss occurs, instead of from lands most contiguous to the same.

If section 2275, as amended, applies to the State of California, it would seem that indemnity should now be allowed for sections sixteen and thirty-six, or any part thereof when swamp. For, if swamp, those sections went to the State under the act of 1850, and were, therefore, "otherwise disposed of," although the grantee of both swamp and school lands was identical.

California takes her school grant under the 6th section of the act of March 3, 1853 (*supra*). It was a special act, applicable only to that State. By the 7th section of that act, it was provided:

That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, etc.

The 6th section of the act of July 23, 1866 (14 Stat., 218), provides that the act of 1853 (*supra*) "shall be construed as giving the State of California the right to select for school purposes other lands, in lieu of such sixteenth and thirty-sixth sections as were"—

1. Settled upon prior to survey.
2. Reserved for public uses.
3. Covered by grants made under the Spanish or Mexican authority.
4. By other private claims.

The act of 1866 was also a special act, entitled: "An act to quiet land titles in California." By it the State took its right to indemnify school lands—additional bases therefor being specifically set out in the section last above quoted.

Seven years prior to the act of 1866 (February 26, 1859, 11 Stat., 385), an act was passed, entitled "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public lands, to pre-empt their settlements."

This act was passed in view of the acts authorizing settlement upon unsurveyed lands in certain States and Territories with a view to pre-emption. It provides that:

Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The right to make settlement upon unsurveyed land with a view to pre-emption was afterward extended to all the public lands, and the act of 1859 therefore became general in its operations.

It was afterward incorporated as section 2275 of the Revised Statutes, and refers to and is explanatory the act of 1826 (4 Stat., 179), which was a general act, applicable to all the States, "where section sixteen, or other land equivalent thereto, is by law directed to be reserved for support of schools in each township," except to those for which special legislation was made. The act of 1826 was "An act to appropriate lands for the support of schools in certain townships and *fractional townships*," and prescribes the principle of adjustment in awarding indemnity for school sections, "fractional in quantity," did not therefore give any rights to the various States which did not then exist. So the act of 1859, as to its indemnity provisions for school sections, "fractional in quantity," was a general act, applicable alike to all the states and territories, except as above stated. *Sharpstein v. State of Washington*, 13 L. D., 378.

The State unquestionably acquired the right to indemnity for school sections under the act of 1853, construed by the 6th section of the act of 1866. This is recognized by the Department in *United States v. State of California*, 8 L. D., 4; by Attorney General Devens, vol. 15, p. 454, Attorney General's Opinions; and by the supreme court, in *Mining Company v. Consolidated Mining Company*, 102 U. S., 167.

The act of 1866, specially applicable to California, purported to and did designate such and only such bases (not provided for by the act of 1826) as entitled the State to indemnity school lands. It made no reference to the former general act of 1859, but was complete in itself as to its indemnity provisions, designating additional bases; and there is no authority given in the act of 1859 (section 2275) by which California is authorized to select indemnity school lands, that authority being found above, in the special act of 1866, construing the special act of 1853.

The act of February 28, 1891, in amending section 2275 did not give additional indemnity rights—its indemnity provisions merely enunciated existing laws.

If, as above shown, the act of 1859 (section 2275) is not applicable in its indemnity school provisions to California, it can not be said that the section, as amended, applies to that State, unless the State is specially designated.

As above seen, to apply the amended section to California and award indemnity for lands "otherwise disposed of" would result in giving the State indemnity for sections sixteen and thirty-six when swamp. It would be to give the State indemnity for a class of lands already donated to the States.

The principle upon which indemnity is given to a State is for a loss; it is not given for that which the State has already received. Moreover, it is not presumed that Congress intended a grant of lands for California in excess of existing provisions for other States; and I do not feel justified in so holding on the authority contended for.

I therefore conclude that the clause, "or otherwise disposed of by the United States," found in section 2275, as amended, does not authorize new or future selections in California on the basis of sections sixteen or thirty-six when swamp.

It is unnecessary to discuss the other questions raised by this appeal.

The decision appealed from is affirmed.

HOMESTEAD CONTEST—CONTESTANT—INDIAN OCCUPANCY.

POISAL v. FITZGERALD.

The rule that the right of a contestant is personal, and does not descend to his heirs, is not applicable to a case where the contestant asserts a prior settlement right to the land in question.

Lands embraced within the occupancy of an Indian are not subject to homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 7, 1892.

The land involved in this appeal is the NE. $\frac{1}{4}$ of Sec. 17, T. 12 N., R. 6 W., Kingfisher, Oklahoma, land district.

The record shows that Thomas Fitzgerald made homestead entry for said tract April 30, 1889. On July 10, following, Mrs. Poisal, or "Snake-Woman," filed an affidavit of contest, alleging that she had lived upon said land and made it her home for over twelve years last past; that she had improved the same and had not abandoned it; that Fitzgerald was not a qualified entryman for the reason that he was in the Territory of Oklahoma and on the lands embraced in the President's proclamation of March 23, 1889, and violated said proclamation and the act of March 2, 1889; that he has no improvements of his own on the land; that he has threatened and tried to expel contestant from the land and has taken the crops planted by her. At the same time she filed her appli-

cation to enter the land as a homestead under the act of July 4, 1884 (23 Stat., 96). A hearing was had before the local officers and the testimony closed April 23, 1890. On August 13, following, the death of Mrs. Poisal was suggested and her heirs substituted by order of the local officers. On August 30, the attorneys for Fitzgerald filed a motion asking for the dismissal of the contest because "the death of the contestant terminates the contest." On November 13, 1890, the local officers overruled said motion and at the same time decided that the homestead entry of Fitzgerald should be canceled and the land should be awarded to the heirs of the plaintiff, to wit: Annie Joseph and Mary Poisal. Fitzgerald appealed, and you, by letter of March 19, 1891, affirmed their decision generally with the modification that the entry of Mrs. Poisal be made of "record for the benefit of the heirs generally, who are determined to be such according to the laws of Oklahoma. Fitzgerald again appealed, assigning error substantially, that your decision is against the law and the evidence.

A careful examination of the voluminous record in this case convinces me that you have fully stated the facts. The question of law raised by the motion to dismiss on the ground of the death of the contestant, was, in my opinion, properly disposed of by overruling it: While it is true that the department has frequently held that the right to contest conferred by the act of May 14, 1880, 21 Stats., 140, is a personal one and can not be assigned, and abates with the death of the contestant, *Morgan v. Doyle*, 3 L. D., 5; *Hurd v. Smith* 7 L. D., 491, yet generally the rule has been applied where the contestant had no interest in the land by settlement and improvement, and was complaining that the entry-man had not complied with the law. Here the contestant had been in the possession of the land, cultivating and improving it for a series of years prior to the entry of Fitzgerald, and by virtue of her occupancy and under the rulings of the department had an inchoate interest therein which I believe it to be the duty of the government to protect. It unquestionably has a right so to do, for upon the death of a contestant the government is a party to the proceeding and it may, on its own motion, proceed with the case. *Armstrong v. Taylor*, 8 L. D., 598. To sustain the motion would only add additional expense and burden to the parties to the contest and not change their rights, hence I will not go through the form of sustaining the motion where it will only prolong the burden of litigation without resulting beneficially to either party.

Now as to the rights of the parties on the merits of this controversy, there can be no question that Fitzgerald's entry was irregularly allowed.

By the circular of May 31, 1887, approved and re-issued October 27, 1889 (6 L. D., 341), relative to lands occupied by Indian inhabitants, the local officers were instructed as follows:

You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and

you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can ascertain the localities of Indian possession and occupancy in your respective districts, and you will make it your duty to do so, and will avail yourselves of all information furnished you by officers of the Indian service.

It is also ordered in said circular:

When the fact of Indian occupancy is denied or doubtful the proper investigation will be ordered prior to the allowance of adverse claims.

If these instructions had been observed, this entry would not have been allowed. Having been made, under such circumstances it should not operate to the prejudice of Mrs. Poisal, or her heirs.

It was established on the trial that she was at her own request, located on this land by the agent of the Arapahoes, of which tribe she was a member, in 1872; that the government built her house, broke and fenced some ground for her; that she lived there and cultivated her garden until her death; that the claimant knew all these facts, and worked on the place for her son for thirteen months prior to April 22, 1889. It is true the land was shown by the records of the local office to be vacant, but this is accounted for by the fact that the agent, whose duty it was to notify her to appear at his office and have the proper papers made out to secure her land failed to give Mrs. Poisal this notice, and she being in ignorance of the necessity for doing anything further in the premises, the land appeared to be vacant by the books at the local office. But Fitzgerald knew the land was not vacant; knew this Indian woman, ignorant of the English language, seventy-six years old, decrepit and almost blind, lived there with her children, yet he drove her off the land, appropriated her improvements and her growing crop, and even attempted to defy the military authorities when a file of soldiers sought to place her back in her home. His conduct was wrong-
ful from the beginning and the department will not aid him therein.

Your judgment is affirmed.

RELINQUISHMENT—DEFECTIVE RECORD.

ANNA B. KRIDER.

The failure of the local officers to properly note of record their action on a relinquishment will not defeat or impair rights of another under a subsequent entry of the land embraced within said relinquishment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 8, 1892.

On the 5th of July, 1890, Miss Anna B. Krider made timber culture entry for the SE $\frac{1}{4}$ of Sec. 10, T. 11 N., R. 55 W., Denver land district, (now Sterling) Colorado.

On the 5th of February, 1891, you held said entry for cancellation for

conflict with timber culture entry of William Huartson, made at the same office, on the 11th of February, 1887, for the same tract. The case is before the Department upon an appeal from your decision.

The facts seem to be that the year after Huartson made his entry, he relinquished the same. His relinquishment was written upon the back of the receiver's receipt, and properly signed and duly acknowledged by him. It was then delivered to Jacob Silver, who procured it for Anna B. Krider. He delivered it to her brother, for her. He was well acquainted with Huartson, and at the time he procured the relinquishment of his timber culture entry for Miss Krider, he also purchased from him "all of his homestead traps and outfit, and the timber which he had on his pre-emption for a house." Huartson then left the country, and has not been back since, nor done anything whatever with either his pre-emption or timber claim.

The relinquishment was in the possession of Silver for several months before its delivery to Krider, and he frequently examined it as did also his wife, and both swear positively to its existence, and to the fact that it was executed by Huartson in good faith, and freely and voluntarily.

In reference to the matter, Miss Krider makes oath "that I purchased of William Huartson his relinquishment to the United States government of all claims and titles to the SE $\frac{1}{4}$ of Sec. 10, T. 11 N., R. 55 W., Logan Co., Colorado, the same being written on the back of receiver's receipt No. 8257, signed by William Huartson and sworn to before a notary public, and in the presence of witnesses. I presented this relinquishment July 5, 1890 to the U. S. land office at Denver, Colorado, at the same time making application for the same tract. The relinquishment was accepted, and my application granted." In this statement she is corroborated by her brother, who was with her in the land office when she filed the relinquishment, and made her entry.

Under date of March 27, 1891, the then register of the Denver land office, informed the register and receiver at Sterling, that—

The records of our office fail to show that Huartson's entry was ever canceled, although there would seem to be some reason for the allowance of Krider's T. C., and probably if a relinquishment was filed it went with the T. C. papers of Krider to the Department.

From all the facts and circumstances of the case, as presented by the papers before me, I think there can be no doubt that Huartson executed a relinquishment of his timber culture entry. I am also clearly of the opinion that such relinquishment was presented at the land office in Denver on the 5th of July, 1890, by Miss Krider, together with her application to make timber culture entry for the land mentioned in such relinquishment. The allowance of her entry by the local officers, was the result of her presentation of Huartson's relinquishment in connection with her application.

That the local officers did not cancel the entry of Huartson, upon the filing of his relinquishment, is a fact with which Miss Krider has nothing to do. As well might it be said that an entryman must pay his

money a second time, because the local officers, after receiving his money and issuing to him their receipt, had failed to report his first payment to the government. That this cannot be required, was settled in the case of *Andrew J. Preston* (14 L. D., 200).

In the case of *Yates v. Glafcke* (10 L. D., 673), it was held that the failure of the local officers to promptly cancel a desert entry, after due relinquishment thereof had been filed, will not prejudice the rights of a subsequent applicant for the land involved therein.

A still later case is that of *Roberts v. Gaston et al.* (11 L. D., 592) in which a party had secured the relinquishment of a prior entry. This he filed, together with an application to make timber culture entry for the same land. Believing that his application to enter had been allowed, he proceeded to comply with the timber culture law. Subsequently another party instituted a contest against the original entry, and the Department held—

A contest against an entry that appears of record through the failure of the local officers to act upon the previous relinquishment thereof, must fail where the party filing such relinquishment has thereafter proceeded in compliance with the timber-culture law in the honest belief that his application to enter thereunder has been allowed.

The fact that the cancellation of Huartson's entry is not a matter of record, in the local office and in your office, is owing to the neglect of the local officers and Miss Krider should not suffer therefor. She filed the relinquishment with the local officers on the 5th of July, 1890, and they acted upon it, by allowing her entry for the same land. Since then she should not be responsible for its care or custody. Having filed the relinquishment, I do not think she should be obliged to clear the records of the adverse claim "by contest or otherwise," as you required her to do, within sixty days after notice of your decision of June 17, 1891.

The judgment appealed from is reversed, and the entry of Miss Krider will be allowed to remain intact. You will cancel the entry of Huartson, referring to this letter, and to the papers constituting the record in this case, as your authority for so doing.

FINAL PROOF PROCEEDINGS—PROTESTANT—CONTESTANT.

TRAVIS v. PERRY.

One who formally appears as a "protestant" against final proof, and subsequently files with the testimony taken therein an affidavit of contest, is not entitled to plead the status of a "contestant" in the absence of any official action on said affidavit.

Secretary Noble to the Commissioner of the General Land Office, July 8, 1892.

By your letter of April 2, 1892, you transmitted the application of James Travis, jr., asking that the record and proceedings in the case

of James Travis, jr., *v.* Frederick Perry, involving the homestead entry of the latter for the SW. $\frac{1}{4}$ of Sec. 24, T. 18 N., R. 1 E., Helena, Montana, be certified to the Department, under rules 83 and 84 of Rules of Practice.

His application is based upon your decision of March 4, 1892, which was adverse to him, and he was denied the right of appeal therefrom. A copy of your decision is annexed to the application as an exhibit and made a part of it. It is alleged in the application that you erred in your decision as follows:

First. In holding that said Travis was merely a protestant, and is not entitled to the right of appeal;

Second. In holding, in substance, that it is necessary for contestee in all cases to have the thirty days notice allowed by the Rules of Practice;

Third. In substantially deciding that, in the absence of objection by contestee, it is necessary for a formal order for a hearing to be issued from the local office;

Fourth. In deciding that claimant's improvements are such as to fulfil the requirements of the homestead law;

Fifth. In deciding that claimant's residence on this tract was continuous in a legal sense;

Sixth. In not finding from the evidence, and so holding, that this entry was made by Perry in the interest and for the benefit of his son-in-law George Travis.

The protest filed by Travis is not before me, the only means of knowing what it contained is the statement contained in the copy of your decision wherein it is stated that when Perry offered his final proof before the clerk of the court, Travis "appeared and filed with the district clerk a written statement, stating that he appeared to protest against the allowance of Perry's proof and for the purpose of cross-examining Perry and his witnesses."

The fact that Travis is a mere protestant, and not a contestant, is here asserted by him evidently for the purpose of deriving the benefit of such character, and it can not be denied without a breach of good faith; in such cases the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his statements.

Attached to the application, and marked as an exhibit, is what purports to be an affidavit of contest, dated April 14, 1890, charging "that said tract is not settled upon and cultivated by said party as required by law, but he is endeavoring to fraudulently obtain title to it; that he has not lived on it six months before final proof, and this the said contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said case." It appears from the recitals in your decision that there is nothing to show that this affidavit was ever filed in the local office, but it is presumed that it was simply filed with the testimony when taken. There is no claim that it was ever presented to the commissioner taking the testimony or to the register and receiver, or that they acted upon it, or ordered a hearing thereon. Nor is it shown that the entryman had any notice or knowledge of its

existence at the time he concluded his final proof; the taking of which seems to have been informally adjoined from the 9th to the 14th day of April, 1890, on which latter date the entryman appeared with witnesses in support of his entry and Travis with witnesses adverse to the entry. A contest on this affidavit was never allowed or hearing ordered by the local officers, nor by any competent authority. To hold, under all of these circumstances, that the contestant acquired any right, under the affidavit of contest, would be to ignore the rules of practice and evidently result in hardship and injustice to the entryman. At any rate this shows such an irregularity as can not in the interest of justice be tolerated. The case of *Emblen v. Weed* (13 L.D., 722) is cited and relied upon in support of the application. In that case Emblen filed an affidavit of contest against Weed's entry and a hearing was ordered and had thereon in the usual way. In the case at bar Travis simply appeared and protested against the allowance of Perry's proof; in that case the action was against the entry, in this it was merely against the proof; in that case Emblen charged a default upon the part of the entryman, and furnished proof in support of it, and paid the costs of taking his testimony; in this case Travis only protested against the proof of Perry and did not pay the costs of taking any testimony in relation to the final proof.

It is true that on the day his affidavit of contest is dated he appeared with his witnesses in support of the default charged in said affidavit, but under the circumstances said affidavit and testimony taken thereunder had no proper place in the record of the case, and they were properly eliminated therefrom by your decision.

It is claimed by counsel for the applicant that Perry appeared to the contest affidavit and by such appearance he waived the defect in respect to the failure to serve notice of the contest. This might be so if a hearing had been ordered on the affidavit of contest and a time set for hearing and the party had voluntarily appeared and submitted his testimony without objection. But in this case there was no contest pending for him to appear to, for the filing of an affidavit of contest, without action thereon by the proper authority, does not constitute a pending contest.

From a careful examination of the application and showing made it appears that substantial justice has been done in the disposition of the case below. The application for *certiorari* is therefore denied.

REPAYMENT—FRAUDULENT ENTRY.

SAMUEL A. RARIDON.

Repayment will be denied where it appears that the entry was procured by false testimony, and the "conviction of the entryman before a jury on a charge of perjury" is not required to give the Department jurisdiction to determine the character of said testimony on application for repayment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 8, 1892.

I have considered the appeal of Samuel A. Raridon from your decision of August 25, 1891, rejecting his application for repayment of the purchase money on his pre-emption cash entry No. 6681, for the SE. $\frac{1}{4}$ of Sec. 35, T. 115 N., R. 66 W., Huron, South Dakota.

Raridon filed his declaratory statement for said tract May 10, 1883, alleging settlement thereon two days before the filing. He submitted proof January 5, 1884, and on the same day cash certificate No. 6681 was issued.

On February 28, 1884, John W. Heltibridle filed his affidavit of contest, alleging that said entry had been fraudulently made.

Hearing was had, and the register and receiver recommended that the entry be canceled. This action was sustained by your decision, June 17, 1886, and on appeal this Department, on July 7, 1888, concurred therein, summing up the testimony as follows:

From the testimony it appeared that the claimant, about a month after his filing, built a shanty of rough boards, eight by ten feet, in which he put no furniture; that he has five acres broken, but not cultivated; that the claimant did not visit the land as often as once a month; that during the summer of 1883 he lived in Redfield, some twenty miles distant; where he was employed as a telegraph operator, and that the parties named as witnesses for the claimant in the motion and affidavits for continuance were not known in the localities where they were said to reside The allegations of contestant are in my opinion sustained by a fair preponderance of the evidence.

It thus appears that the allegations of fraud, charged by contestant, were after hearing duly sustained by the local office, and on appeal by your office and this Department.

In his final proof, he swore his residence was continuous, and upon this and other statements in his final proof final certificate issued. His statements, at least as to his alleged residence, were shown to be false and upon that showing his entry adjudged fraudulent.

In the appeal the fraudulent character of his proof is not denied, but it is insisted that "there must be a conviction on the charge by a jury before the guilt of the party is established," and error is alleged in rejecting his claim for repayment, because "no charge has been brought against the claimant, nor has he been convicted of such crime."

It is sufficient to say that this Department has no jurisdiction in criminal cases, although its findings on a question of fact may become

the basis for an information involving the crime of perjury and punishable on conviction under section 5392 of the Revised Statutes. But the Department is specially charged with the administration of the public land laws, and each applicant thereunder is required to comply with the provisions of those laws, in good faith, before he gets title to the land applied for.

On a charge of fraud, and competent proof thereunder of false swearing in relation to a material question affecting the good faith of the claimant, the entry must be canceled. In such case, a judgment of cancellation necessarily carries with it a finding of perjury—a finding that the entry was allowed upon false testimony; and “a conviction by a jury” is not necessary to a final departmental determination of that fact.

The tribunal making such a judgment has likewise the jurisdiction to pass upon an application for repayment of the purchase price of the land, and when the entry was obtained through fraud repayment will be refused. C. A. Linstrom, 2 L. D., 685; Jens Stohl, Id., 686; Joseph Walsh, 5 L. D., 319; Gerard B. Allen, 8 L. D., 140.

The judgment appealed from is accordingly affirmed.

HOMESTEAD CONTEST—NOTICE—DECEASED ENTRYMAN.

HANSCOM v. SINES ET AL.

A pending contest precludes action on the subsequent application of another to proceed against the entry in question.

An application to enter can not be legally allowed for land embraced within the existing entry of another.

A contest may be properly allowed against a homestead entry, though the statutory period for submission of proof under said entry may have expired.

The heirs of a deceased entryman are necessary parties to a contest against his entry, and should be duly served with notice.

The expired entry of a deceased homesteader can not be successfully contested for abandonment, or non-compliance with law, if it appears that the entryman in his life earned a patent to the land in question.

Secretary Noble to the Commissioner of the General Land Office, July 9, 1892.

I have considered the case of Viola G. Hanscom v. The Heirs of George W. Sines, entryman, Herman A. Fisher, second contestant, and James T. Lentzy, intervenor, on appeal by said heirs and said Fisher from your decision, dated October 22, 1891, holding intact the homestead entry No. 4233 of lots 5, 6, and the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 29, T. 29 N., R. 5 E., made April 13, 1882, by said Sines, at the Olympia land office in Washington Territory, now the State of Washington and allowing the heirs, in case said decision becomes final, to make final proof in support of their claim to said land.

The record shows that said Sines on November 6, 1879, filed in said local office his pre-emption declaratory statement for said land, alleging settlement thereon September 1, same year.

On April 13, 1882, Sines made his said homestead entry and in his homestead affidavit made before the clerk of the court, declared that his "settlement was commenced April 8, 1882."

On February 10, 1887, without having made final proof, Sines died. On June 1, 1888, said Hanscom initiated a contest against said entry, alleging that the entryman had wholly abandoned said tract, that he died on or about February 10, 1887, without heirs residing in said territory; that the heirs of said Sines had not, since his death, complied with the requirements of law as to improvement and cultivation of said land and that the entryman did not duly cultivate and improve the same in his life-time. A hearing was accordingly had on December 28, 1888, and the local officers, upon the ex parte testimony submitted by the contestant, recommended said entry for cancellation.

On September 18, 1890, you remanded said case for a new hearing because no sufficient showing was made by the contestant upon which service by publication was made, which decision, you re-affirmed on November 15, following.

On December 20, 1890, notice was issued directed to "the heirs and legal representatives of Geo. W. Sines, deceased," alleging abandonment and publication of the same was duly made, fixing the hearing at March 18, 1891, and a copy thereof mailed to George Sines, one of the heirs of said deceased entryman, at Edge Hill, Pennsylvania. On February 14, 1891, Herman A. Fisher presented his affidavit of contest against said entry, which was filed subject to the prior contest of Hanscom. On the day fixed for the hearing, the contestant appeared and moved for a continuance in order to perfect service upon other heirs whose whereabouts she had learned within the last few days.

Upon the same day said Fisher filed a motion to dismiss Hanscom's contest for want of sufficient service and that his contest be substituted therefor. The local office overruled the motion of said Hanscom for a continuance and also said motion of Fisher. Thereupon, the hearing proceeded and the contestant submitted her evidence. On June 18, 1891, one James T. Lentzy filed his homestead application for said tract alleging settlement thereon March 19, 1891, and the same being rejected, an appeal was taken therefrom on July 17, 1891. On July 22, 1891, prior to any decision of the local officers upon the evidence taken in the Hanscom contest, counsel for the heirs of said Sines entered their appearance and filed a motion that the proceedings of said contest be stayed, which was denied by the local officers, who on July 24, same year, rendered their decision that said entry should be canceled and the preference right of entry awarded to the contestant. A motion was made by counsel for said heirs to re-open the case which was refused by the local officers and an appeal from the decision of the

local office was duly taken by counsel for the heirs of Sines. It further appears that said Fisher and Lentzy each appealed from the several rulings of the local office adverse to them but the appeal of Lentzy was not duly forwarded by the local office. On October 22, 1891, you considered the appeals of the said heirs of Sines and said Fisher, and after reciting the history of the case substantially as aforesaid, dismissed the appeal of said Fisher upon the ground that he is a stranger to the record and must wait until there is a final disposition of the Hanscom contest. You also dismissed the appeal of the heirs from the action of the local officers rejecting their offer to make final proof on account of the pending contest of Hanscom. You also found that the notice of publication was duly made on the heirs, who were all non-residents, and notice to Charlie Sines, the only one known to the contestant, was received by him more than thirty days prior to the day set for the hearing; that as to the heirs unknown to the contestant it was not possible for her to give notice by registered letter, and she was guilty of no laches by not attempting to give notice to them; that the objection to the affidavit of contest was not well taken, because it alleged that the entryman did not, in his life time, comply with the law, and the heirs had not done so since his death. But you reversed the decision of the local officers, upon the ground that the non-resident unknown heirs were entitled to a reasonable time within which to come in and be heard as to the charges alleged against them or the deceased entryman; you also held that said entry should not be contested upon any charge as to the failure of the heirs to cultivate and improve said land, since it appears that said entryman filed for said land under the pre-emption law, alleging settlement September 1, 1879, also made said homestead entry on April 13, 1882, and in February 1887, was removed from his cabin on said land to the hospital where he died; that if the entryman had in his life-time complied with the law and was entitled to make final proof, at the date of his death, the heirs should not be charged with laches as to cultivation and improvement of the land subsequently to the entryman's death. You further held that as the only charge that could be considered at said hearing, was the failure of the entryman to comply with the law, as to residence, cultivation and improvement, and the contestant failed to submit any testimony tending to show the truth of that allegation, the contest must be dismissed and if your decision should become final the heirs would be allowed to submit final proof.

From your said decision both Hanscom and Fisher appealed and Lentzy has also asked to be allowed to intervene and be allowed to enter said land under his said homestead application.

In Hanscom's appeal it is urged among other things, that you erred in finding that the heirs of said Sines have exercised due diligence in entering their appearance, and setting up a meritorious defence; that it was wrong to consider the fact that said entryman made a pre-

emption filing for said land, and at the time of his decease, had earned his patent; that it was error to hold that contestant had not proven each and every allegation in her contest affidavit. In his appeal Fisher alleges error in your holding that there was no laches on the part of said Hanscom in perfecting service upon the heirs of said Sines, and in affirming the action of the local officers denying his motion to dismiss Hanscom's said contest, and to substitute his contest in lieu thereof.

Lentzy insists that your decision was erroneous in passing upon the rights of parties in the absence of his appeal from the decision of the local office rejecting his said homestead application for said land; that as said entry of Sines had expired by limitation, the land covered thereby was vacant public land at the date of Lentzy's application and subject thereto.

It is quite evident that neither Lentzy's nor Fisher's appeals can be sustained. Hanscom's contest was first in time and the local officers rightly ruled that Fisher's contest must be postponed until the final disposition of Hanscom's prior contest. Schneider *v.* Bradley (1 L. D., 132) Wheelan *v.* Taylor (2 L. D., 295) Ferrier *v.* Wilcox et al. (4 L. D., 470); Hoode *v.* Sando et al. (5 L. D., 435) Wade *v.* Sweeney (6 L. D., 234) Smith *v.* Brown et al. (7 L. D., 423) Conly *v.* Price (9 L. D., 491) Capelli *v.* Walsh (12 L. D., 334).

Sines' entry, until duly canceled segregated said land, and there was no error in rejecting Lentzy's said application to homestead said tract. Witherspoon *v.* Duncan (4 Wall., 210-219) Hastings and Dakota Railroad Company *v.* Whitney (132 U. S., 357) Sturr *v.* Beck (133 U. S., 541-548) Swims *v.* Ward (13 L. D., 686) James A. Forward (8 L. D., 528) Allen *v.* Curtius (7 L. D., 444). Schrotberger *v.* Arnold (6 L. D., 425) Milton Townsite *v.* Gann, (4 L. D., 584). Whitney *v.* Maxwell (2 L. D., 98) Attorney-General MacVeigh's Opinton (2 L. D., 30).

So long as the homestead entry remains of record, it is subject to contest even though the time for making final proof has expired. Kincaid *v.* Jefferson (3 L. D., 136). Greer *v.* Brown (5 L. D., 229). Rathbun *v.* Warren (10 L. D., 111-113). Mathews *v.* Barbaronie (12 L. D., 285).

It is expressly well settled that the heirs of a deceased entryman are necessary parties and should be duly served with notice of the contest. Dixon *v.* Bell (12 L. D., 510) Driscoll *v.* Johnson (11 L. D., 604).

The record shows that said contestant moved the local officers to grant a continuance in order that some of the heirs whose names were then known to her could be duly served with notice and made parties to the contest. This motion, in my judgment, should have been allowed. If it be true that Sines in his lifetime had earned a patent for said land, then the entry could not be successfully contested. It is true that in his homestead affidavit, Sines states that his settlement commenced April 8, 1882, but that fact would not estop him, upon application to make final proof, from showing that he had, in fact, lived on

said land prior thereto and claimed the same under the settlement laws of the United States.

But the pre-emption declaratory statement is not conclusive as to settlement and residence upon said tract as required by law, and the question of fact should be determined at a hearing between the parties.

The case is accordingly remanded with directions that you order a further hearing between Hanscom and said heirs to determine whether said Sines had failed to comply with the requirements of law as to settlement and residence in good faith prior to his death for a sufficient time to entitle him to a patent, and each party will be allowed to submit any competent evidence tending to show their interest in the premises. Fisher's contest affidavit will remain in the local office to await the result of said hearing, and the homestead application of Lentzy will stand rejected.

DECLARATORY STATEMENT—DEFECTIVE RECORD.

SEBREY v. AUGUSTINE.

The doctrine of *res judicata* is not applicable to a decision rendered upon an incomplete record.

The failure of the local officers to properly endorse and record a declaratory statement will not defeat the rights of the pre-emptor, nor preclude the subsequent correction of the record in accordance with the facts.

Secretary Noble to the Commissioner of the General Land Office, July 9, 1892.

I have considered the appeal of Frank Sebrey from your decision of July 21, 1891, holding his rights subordinate to those of Jose M. Augustine to lots 1 and 2 and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 31, T. 1 S., R. 2 W., M. D. M., situated in the San Francisco land district, California.

On July 27, 1883, Jose M. Augustine presented his pre-emption declaratory statement for the land, and tendered the proper fees for filing the same, alleging settlement in October, 1878. Said statement was refused by the local officers, on the ground that the land was reserved for the Western (now Central) Pacific Railroad Company.

Said tract is within the place limits of the grant to said company under the act of July 1, 1862 (12 Stat., 489), as enlarged by the act of July 2, 1864 (13 Stat., 536).

On August 2, 1883, an appeal from the decision of the local officers rejecting said declaratory statement was filed by the attorney of Augustine. Neither said statement nor said appeal was transmitted by the local officers to your office, at that time, through some oversight on their part, and said attorney afterwards died. Said statement of Augustine was endorsed as filed by the register on January 21, 1884, "nunc pro tunc" as of July 27, 1883.

Augustine was foreignborn, and declared his intention to become a

citizen September 2, 1878, and took out his final papers February 20, 1884. He was but little acquainted with the English language and could neither read nor write, but signed by mark to all papers.

The township plat of survey of the tract was filed in the local office on July 30, 1878.

Augustine bought the improvements on the land and the possessory right thereto of Raimundo Caetano, his brother-in-law, in 1877, and then took possession of the land, but did not receive a deed therefor until July 30, 1883.

Caetano bought the improvements on said land and the possessory right to the same of Josephus M. Shuey, on November 8, 1865, as appears by the deed of Shuey to Manuel Hendricks and said Caetano. Hendricks sold out his interest therein to Caetano after about two years. Said Shuey bought the improvements thereon and the possessory right thereto of John Abbot in October, 1859.

The land had been in the continuous possession and occupancy of these several claimants, each of whom had a family that lived upon said quarter-section.

On July 31, 1878, Caetano offered to file his declaratory statement on said land, alleging settlement in November, 1865, but it was rejected by the local officers.

In July, 1883, the boundary lines of the "Moraga grant" were definitely run out and marked on the ground, and were found to extend into said lot one and to include the dwelling house of Augustine, a short distance within said exterior boundaries. The surveyor of said grant informed Augustine of this fact, and told him where he might locate a house on the public land, outside of said grant, on said lot one. On July 27, 1883, Augustine moved a cabin upon the site indicated by the surveyor, and had the assistance of Frank Sebrey and others in so doing. Augustine then moved with his wife and two children into said cabin and lived there continuously thereafter as his home. On the day he moved, he tendered his statement at the local office, as above recited.

On July 30, 1883, Caetano formally relinquished all claim to said land.

Thereafter, on December 29, 1883, the said Frank Sebrey filed his declaratory statement (No. 17,914) on said land, alleging settlement on June 14, 1878.

On January 12, 1884, Augustine filed a second declaratory statement (No. 17,993) on said land, alleging settlement in October, 1878.

On February 25, 1884, Augustine applied for notice of his intention to make final proof on April 14, 1884, at the local office, in support of his filing.

Notice was issued to Sebrey, Caetano, and said railroad company to appear on April 14, 1884, to contest Augustine's claim. The parties (except Caetano) appeared and testimony was submitted. On December 4, 1884, the local officers awarded the land to the railroad company. Both Sebrey and Augustine appealed.

By letter of May 8, 1885, the register transmitted the motion of Augustine for a new trial, on the ground of newly discovered evidence.

By your letter of December 10, 1885, a new trial was ordered to determine the rights of said railroad company, on the allegations made by Augustine.

The new trial began on March 9, 1886, and on February 14, 1887, the local officers decided that said land did not pass to said railroad company. On appeal, by your letter of May 9, 1889, you sustained the decision of the local officers. On appeal by said company, your decision was affirmed by the departmental decision of December 18, 1890 (unreported). In that decision it was held that:

The evidence seems to show a clear claim to the land in Augustine, but, as Sebrey did not participate at the hearing, which was ordered solely to determine the rights of the railroad under its grant, the rights of the adverse claimants will not be considered herein.

By letter of January 10, 1891, you decided that said case was closed as to said railroad company, and the local officers were advised that the rights of Sebrey and Augustine would then be adjudicated.

By your letter of April 20, 1891, you hold that:

Augustine was the first to make actual settlement, to wit: July 27, 1883, but he made no filing, pursuant to such settlement, till January 12, 1884, nearly six months thereafter. He must, therefore, be charged with slumbering on his rights and allowing Sebrey, a subsequent, actual settler (in September, 1883,) to cut him off by following up that settlement by his filing on December 29, of the same year, and thus giving notice to the world of his intention to purchase that tract under the pre-emption law. Augustine's declaratory statement for said tract is therefore held subject to Sebrey's. Sebrey has the right to make final pre-emption proof within the statutory period from the date of actual settlement, exclusive of the period of litigation, viz: February 25, 1884, to date of notice hereof.

This decision was made upon an incomplete record, inasmuch as Augustine's first declaratory statement and appeal had not then been transmitted to your office.

The receiver, by letter of May 7, 1891, transmitted certified copies of said first declaratory statement and appeal, on file in the local office, with a petition of Augustine's attorney for a reconsideration of the case upon the record as thus completed.

By your letter of July 21, 1891, you held that:

The ruling per letter "H" of April 20, 1891, in favor of Sebrey is hereby modified, so that whatever rights said Sebrey may possess shall be deemed and held subordinate to those of Augustine to the land in controversy. You will allow Mr. Augustine to give new and proper notice of intention to make final proof, and should no valid objection interpose on or before the day fixed in said notice, the proof already submitted will be accepted.

On appeal to this Department, Sebrey alleges:

(1) That you erred in granting a rehearing of your decision of April 20, 1891, because the grounds set forth in the motion for review of said decision are not sufficient in law to authorize the granting of such review. (2) And upon the further ground that the register had no legal power, jurisdiction or authority to file the said paper writing, dated

July 27, 1883, on the 21st day of January, 1884, "*nunc pro tunc*," as of July 27, 1883.

The said motion for review sets forth the facts relative to the offering and filing of said first declaratory statement and the appeal from the rejection thereof, and alleges, *inter alia*, that:

The failure of the register to properly notice in his "Register of Declaratory Statements," in connection with the date January 21, 1884, that it was to date back to July 27, 1883, is no fault of Augustine, and can not militate with his rights as the first settler, when he immediately and diligently followed the rules of the Department in prosecuting his claim. Nor do we understand why the register and receiver should have refused to file the declaratory statement of Augustine, when it was first offered, and accepted Sebrey's declaratory statement on December 29, 1883, when the same objection still existed that was urged against Augustine.

The motion fully sets forth the facts, and shows that your former decision was rendered upon an incomplete record. It follows that said decision of April 20, 1891, was not *res judicata* as the record was incomplete, and not binding upon Augustine, because based upon a partial presentation of the documentary evidence in his favor. Maggie Laird, 13 L. D., 502.

The record as now complete shows that Augustine actually moved upon the land July 27, 1883, and tendered his statement therefor the same day, which shows that he did not slumber upon his rights, while Sebrey did not actually claim settlement upon the land till September following, and filed his statement December 29, 1883. So that Augustine was the first settler and the first to give notice of his intention to pre-empt the land. As Sebrey helped Augustine move his house upon the land on July 27, 1883, he undoubtedly had notice that Augustine did so with the intention of making it his home as a settler.

These are substantial facts, which should not be sacrificed to mere technicalities. When the omission in the record was supplied, the amended record became the only subsisting record for consideration. (Hilliard on New Trials, 641, note). The Commissioner had full power and jurisdiction to consider the amended record. (Gates *v.* Scott, 13 L. D., 383, 385.)

It is contended in the second place that the local officers, having omitted to file Augustine's statement on July 27, 1883, when it was presented, had no power to file it on January 21, 1884, "*nunc pro tunc*," as of the actual date. The endorsement upon the statement of the date when it was filed was a ministerial, not a judicial act. The failure of the local officers to properly endorse the statement when first presented, and to make the proper entry upon the records, could not jeopardize the rights of Augustine. Edward R. Chase (1 L. D., 81). And they had the power to correct their error afterwards in accordance with the truth. When substantial justice has been done by a decision in a case, it will not be reversed on appeal for ministerial acts, though they may have been informal or defective. (Hilliard on New Trials, 720.)

Your judgment is affirmed.

RAILROAD GRANT—DETERMINATION OF LIMITS.

GIBSON v. NORTHERN PACIFIC R. R. CO.

In the construction of a diagram showing the limits of a railroad grant some tracts are necessarily included therein that are more than the designated distance from the line of road, if the measurement is made to a point directly opposite such tract, but are within said distance from some other point on said line.

Secretary Noble to the Commissioner of the General Land Office, July 9, 1892.

Your decision of April 16, 1891, rejecting the application of Homer Gibson to make homestead entry for the NW. $\frac{1}{4}$ of Sec. 27, T. 18 N., R. 9 W., Olympia, Washington, is here on appeal of said Gibson.

His application was made January 5, 1886, and the land (which is within the indemnity limits of the Northern Pacific Railroad) was selected by the company May 12, 1885.

You correctly held that the selection of the company reserved the land from entry or other disposition. See *Darland v. Northern Pacific R. R. Co.*, 12 L. D., 195.

It is averred by counsel that the tract in question is more than fifty miles from the line of the road, and, hence, not within the limits of the grant.

Your decision reports the tract to be within the limits of said grant, which, upon inquiry, I learn is correct, according to the diagram on file and in use in your office in the adjustment of the grant.

The manner of the preparation of diagrams is fully set forth in departmental decision in the case of *Scott v. Kansas Pacific Railway Company*, 5 L. D., 468, being as follows:

The lateral limits of a grant are determined by drawing lines on each side of the route of the road through a series of points, at the precise distance therefrom of the width of the grant, on tangential lines to arcs having a radius equal to the width of the grant on each side of the route. (Syllabus.)

In this way, on the bend in the road, many tracts may be included within the limits, which, measured to the line of the road directly opposite the tract, would be more than the required distance, yet such tracts are within the required distance from some other point on the line of road.

There is nothing in the appeal to lead me to suppose that these limits, established many years ago, are not in accordance with the theory above described, which has long governed your office in the adjustment of the limits of railroad grants, nor does it show that any error was made in properly laying down such limits.

I therefore affirm your decision holding that the land is not subject to Gibson's application, and herewith return the papers in the case.

RAILROAD GRANT—CONFLICTING PRE-EMPTION CLAIM.**NORTHERN PACIFIC R. R. CO. v. SMALLEY.**

Land embraced within a pre-emption claim at the date of the grant to this company is excepted therefrom, though such claim is abandoned at the date of definite location of the road.

The decision of the United States Supreme Court in the case of *Bardon v. The Northern Pacific R. R. Co.*, 145 U. S., 535, cited and followed.

Acting Secretary Chandler to the Commissioner of the General Land Office, July 11, 1892.

I have considered the case of the Northern Pacific Railway Company *v. James A. Smalley*, involving Lots 6, 7, and 8, Sec. 1, T. 9 N., R. 9 W., Vancouver land district, Washington, on appeal by the company from your decision of October 1, 1886, holding the tract to have been excepted from the grant.

The land in question is opposite that portion of the road extending from Portland, Oregon, to Tacoma, Washington, the grant to aid in the construction of which was made by the joint resolution of May 31, 1870 (16 Stat., 378). *Northern Pacific Railroad Company v. McRae*, 6 L. D., 400. It is within the primary, or granted, limits, as shown by the map of general route filed August 13, 1870, and map of definite location filed September 13, 1873.

On September 14, 1869, one Matthew Lamley filed pre-emption declaratory statement No. 395 for this land, alleging settlement thereon September 6, 1869, which is still of record uncancelled.

Upon an application by Smalley to make homestead entry of this land, presented August 20, 1884, alleging settlement in 1876, a hearing was ordered, at which it was shown that Lamley settled, as alleged, viz., September 6, 1869, and that he continued to reside thereon until September 28, 1870, when he abandoned the tract.

In the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), it was held that lands, which, at the date of the grant to the Northern Pacific Railroad Company, were segregated from the public lands within the limits of said grant by reason of a prior pre-emption claim to it, did not, upon the cancellation of such claim, although prior to the definite location of the road, pass to the company, but remained to the United States, subject to disposition as other lands.

At the date of the passage of the resolution of May 31, 1870, making the grant for the road in this vicinity, the tract in question was embraced in the pre-emption claim of Lamley, under which he was occupying and improving the land, and it was therefore excepted from the grant made by said resolution, although such claim had been abandoned at the date of the definite location of the road.

Your decision is therefore affirmed.

HOMESTEAD ENTRY—MINERAL LANDS—RES JUDICATA.**REA ET AL. v. STEPHENSON.**

In the absence of appeal, the finding of the local office as to the character of land is final as between the parties litigant.

The conditions existing at the date of final entry, determine whether land should be excluded from homestead entry on account of its alleged mineral character.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 12, 1892.

On April 12, 1883, Daniel D. Stephenson made homestead entry No. 2308 of the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ Sec. 14, and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ Sec. 11, T. 9 S. R. 39 E., W. M., at La Grande, Oregon.

On April 17, 1889, the register published the usual notice that Stephenson would make final proof in support of his claim before the county clerk of Baker county, Oregon, on June 6, 1889. On the day set for taking the final proof, the contestants or their grantors filed their protest, alleging in substance that the land in dispute is more valuable for mining than for agricultural purposes, and asked for a hearing. Said protest was forwarded with said final proof to the local office.

On July 13, 1889, a hearing was ordered to be held at the local office on September 10, 1889, to determine the character of said land. The parties appeared and testimony was submitted. On September 28, 1889, the local officers rendered their joint decision "that the tract is not mineral land, or that mineral does not exist in paying quantities therein." The parties were duly notified of said decision and of the right of appeal, but no appeal was taken.

On June 11, 1890, you advised the local officers, that upon a careful examination of the testimony their said decision was affirmed and the case closed under Rule 48 of the Rules of Practice. Final certificate and receipt were issued Stephenson for the land on July 7, 1890. On January 18, 1891, James M. Rea and others, as owners of the Bonanza Queen Placer Mining Claim, filed their petition, at the local office, alleging their ownership and possession of said mining claim, embracing lands partly in conflict with those embraced in said entry, and that said mining ground is of great value for placer mining purposes, and contains large and extensive strata of gravel deposit, containing placer gold, and of no value for agricultural purposes. That they and their grantors, at the time said entry was made, were preparing to open the said mine for mining purposes by conducting water upon the same, and that having brought water thereon, in the years 1890, and 1891, they took therefrom large amounts of placer gold. Wherefore they petitioned you to order that a hearing be had, and that they be permitted to contest the right of said Stephenson to a patent to said land under and by virtue of said entry. This petition was duly sworn to, and cor-

roborated by the affidavits of others, and was forwarded to you by the register's letter of July 20, 1891.

By your letter of September 12, 1891, you denied the petition on the following ground.

As it appears that Rea et al. have had ample opportunity to substantiate their charge, and utterly failed at the hearing to establish the mineral character of the land in controversy, I do not think that they should now be permitted to urge the same objection to this entry.

An appeal now brings the case before me.

The first error specified in the assignment of errors is as follows:

In holding that the question of the right of these contestants in and to said lands had been adjudicated.

The mineral character of this same land was directly put in issue between the same parties in the contest before the local officers already recited, and was adjudicated by them, and no appeal was taken. These contestants or their grantors had no right to the land if it was not mineral. The decision that it was not mineral was an adjudication that they had no right to the land. That question then became *res judicata*.

The petition alleges, however, that since said final entry was allowed the contestants have proved by mining operations that the land does produce mineral in paying quantities. But it was held in *Deffeback v. Hawke* (115 U. S. 392, 405) that—

The certificate of purchase which was given to him (the entryman) upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July, following that the probate judge entered the townsite. The land had then ceased to be the subject of sale by the government. It was no longer its property; it held the legal title only in trust for the holder of the certificate. *Witherspoon v. Duncan*, 4 Wall., 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee.

The same doctrine was applied in the case of the Colorado Coal Co., *v. United States* (123 U. S., 307, 328), in which the following language is used:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

These principles are applicable to the present case. The homestead law provides (Sec. 2302, Rev. Stat.) as follows:

Nor shall any mineral lands be liable to entry and settlement under its provisions.

In the case of James K. Jacks et al., (7 L. D., 570) where there was a homestead entry, it was held that "the subsequent discovery of coal, on a small portion of the land, after the final entry, cannot affect the right of the purchaser, who had completed his entry."

See also *Harnish v. Wallace* (13 L. D., 108).

From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions

then existing. Judged by this rule the land in dispute has been formally determined not to be mineral land, and discoveries made since the entry ought not to be allowed to affect that judgment.

This disposes of the case and makes it unnecessary to consider the other questions raised upon the record.

Your judgment is affirmed.

SECOND TIMBER CULTURE ENTRY—REPEALING ACT.

JAMES C. FOSTER.

A second timber culture entry may be made where the first, through defective surveys, includes land not intended to be taken and is, for that reason, relinquished. An application to make a second timber culture entry, pending at the repeal of the timber culture law, is protected by the terms of the repealing act, though such application may require amendment before favorable action can be taken thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 12, 1892.

I have considered the appeal of James C. Foster, from your decision of May 19, 1891, rejecting his application to amend timber culture entry, to cover S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ section 19, T. 22 N., R. 44 W., Alliance, Nebraska land district.

The history of this case is peculiar. As shown by the records of your office, on June 28, 1888, he filed a declaratory statement for lot 1 being N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section No. 1 T. 23, R. 46 W., and for the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and lots 3 and 4 (being N. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of section 6 T. 23 R. 45 W., of said land district, and on January 12, 1889, he amended this filing by relinquishing the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 1 T. 23 R. 46 and filing for the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 6, T. 23 R. 45 W.

Afterward, on February 16, 1889, he made a timber culture entry for lots 1, 2, 3, 4, of section 1 T. 23 N. R. 46 W., (These lots are simply the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ of the section, they are full quarter quarter sections and were not surveyed or numbered as lots).

On January 14, 1891, the claimant made an affidavit, and on March 18, following, he supplemented this by a detailed statement of the case. He avers that he procured a surveyor, Sweeny, to make a survey for him so that he could get the proper description for his declaratory statement filing, and made it according to this survey. He says:

The land affiant selected for said filing was a small fertile valley surrounded by worthless sand hills and "blowouts" and affiant chose his claim to conform as nearly as possible to the said valley.

That shortly after his declaratory statement filing Surveyor Merrill ran the lines of the survey and a mistake was discovered in the Sweeny survey so his filing appeared to be too far west; then he amended by relinquishing the western "forty" of his filing and taking a forty on the east of his main tract. About a month after he had secured this

amended entry, Merrill made another survey starting at another corner, and discovered that not only was Sweeny's survey wrong but his own former survey was also erroneous and that affiant's claim was about a mile west of the land covered by his filing. He was immediately apprised of this fact, and consulted his attorney, who was fearful that another amended entry would not be allowed on his declaratory statement. This last survey showed that the valley he was trying to acquire title to and was improving as a pre-emption claim was very nearly the N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ of section 1 of T. 23 N. R. 46 W., so under the advice of his attorney, and having never exercised his right to make timber culture entry, he filed on the four tracts described as lots 1, 2, 3, 4, of said section No. 1. After he had thus made timber culture entry for the land he was living on, and supposing his pre-emption claim was on the sand hills and that he was not on it, a surveyor by the name of Hoskins was employed to retrace the government surveys and beginning on the east he retraced the surveys all over, to the acceptance of the county surveyor and it was demonstrated by this survey that Foster's pre-emption filing was not as erroneous as supposed, but that it covered a large portion of the valley, and the portion not covered was mostly in sections 36 and not subject to entry. Thereupon finding that his timber culture entry, which he supposed was in the valley was on the sand hills and in section 16, and that his declaratory statement covered the lands he was settled upon he made proof and cash entry No. 1381 upon his pre-emption declaratory statement, and he asked in said affidavit to have the timber culture entry amended and that he be allowed to enter the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ section 19, T. 22 R. 44 W., 6th P. M., Nebraska.

The first affidavit filed by Foster was deemed incomplete and indefinite and was held insufficient, whereupon the supplementary or amended affidavit was filed, and the local officers reconsidered the case and recommended the allowance of the entry. You rejected it because the first application was incomplete, and the act of March 3, 1891, repealing timber culture laws, having been passed before the application to amend was made, that he having no accrued right prior to March 3, 1891, could acquire none.

This application is not in effect an application to amend but an application to make second entry. It is somewhat similar to the case of Clement Spracklen (10 L. D. 9) but in the latter case the land entered was covered by a prior *bona fide* pre-emption claim, which, it appears should have been but was not shown by the records.

On an application to amend the entry, the homestead was canceled, without prejudice, and he was allowed to enter other land in lieu thereof. In the case at bar, the entryman was deceived by erroneous surveys, and while he thought his timber culture entry was for a part of a fertile valley it proves to be upon a worthless sand hill, and the land he thought he was entering, the fertile land, was in fact covered by his pre-emption claim.

Were it not for the repeal of timber culture laws there would be little or no question that the manifest good faith of Foster and his diligence would entitle him to have the timber culture entry canceled without prejudice to his right to make a second entry.

Had he however, initiated such proceedings as would entitle him to complete an entry after March 3, 1891?

First he has a timber culture entry (on worthless land) but it covers one hundred and sixty acres. He applied to amend or rather to surrender this entry and have it canceled without prejudice that he might enter the lands described in his application. Had this application been in due form and considered sufficient in law, it would undoubtedly have been allowed in February 1891, but being considered insufficient it was amended or supplemented and it appears to have made a sufficient showing when so amended to entitle him to the relief asked. It is the usual rule that an amended pleading relates back to the filing of the original one, the case being heard or tried under the law as it stood when the action was commenced, and I see no reason why this amendment does not relate back to the date of filing of the defective application.

There is no adverse claim. The government is alone interested. The entryman used diligence in attempting to locate his pre-emption. The shifting surveys misled him and caused him to enter for timber culture and pay the fees for land that is worthless. The survey he had made at first proved to be nearer correct than the two subsequent ones that caused the trouble. There is in the case strong evidence of good faith, and diligence and if the amendment is not allowed the money paid cannot be refunded and a grave wrong is the inevitable result. Justice and fairness indicate that the application should be allowed. Your ruling is therefore set aside, and the entry will be allowed as prayed for.

PROTEST—ORDER FOR HEARING—PRE-EMPTION.

BAKER ET AL. v. BIGGS.

An order of the Commissioner directing a hearing on an informal protest against final proof is within his discretion, and an appeal will lie therefrom.

A pre-emption settlement made and maintained in good faith for agricultural purposes upon unsurveyed and unoccupied land is not defeated by the subsequent occupancy of the land by others for the purposes of trade, nor by the fact that the pre-emptor himself engages in business on said land.

*Secretary Noble to the Commissioner of the General Land Office, July 13,
1892.*

On the 10th of July, 1890, Francis M. Biggs made pre-emption final proof for the SW $\frac{1}{4}$ of Sec. 5, T. 48 N., R. 6 W., (Ute Series) Gunnison land district, Colorado. His proof was made before the clerk of the district court of Montrose county, Colorado. It was accepted by the

local officers, and final certificate and receipt issued by them on the 22d of that month.

The day prior to the making of said proof by Biggs, A. E. Baker and William Budelier filed with the clerk of said court a protest in which they alleged that Biggs did not settle upon the land and use it for agricultural purposes; that it was used for purposes of trade and business; that the town of Cimarron was situated on said land, and that the inhabitants of said town claim the right to secure the entry of said land by the county judge of said county, in trust for the use and benefit of the inhabitants thereof.

This protest was forwarded to the local office with the final proof of Biggs, and was rejected by the register and receiver "because it does not show that protestants have any title, or that there is any town site on the land, and because protest is not in proper form." The protest was signed by Budelier and Baker, as was also the following:

Wm. Budelier and A. E. Baker being each duly sworn under oath say the allegations contained in the foregoing protest signed by them are substantially true.

Samuel Wells, J. P., certifies that this was sworn to before him on the 9th of July, 1890.

An appeal being taken by the protestants from the action of the local officers, a hearing was ordered by you, which took place in January, 1891, and resulted in a joint decision by the local officers in favor of the entry, and recommending that a patent issue therefor.

From such decision an appeal was taken to your office, where the action of the local officers was reversed by you on the 6th of July, 1891. Hattie M. Biggs, the widow and administratrix of Francis M. Biggs, deceased, appeals from your decision to the Department. The errors complained of in your decision are enumerated as follows:

1st. That the decision rendered herein by said commissioner holding the entry made by Francis M. Biggs for cancellation such entry being pre-emption cash entry No. 1105 is contrary to the evidence adduced upon the trial before the register and receiver of the United States Land Office at Gunnison, Colorado.

2nd. That such decision is contrary to the laws in relation to pre-emption cash entries.

3rd. That said commissioner erred in finding that plaintiffs filed with the clerk of the district court upon July 9th, 1890 an affidavit protesting against the allowance of the entry which was sufficient in law; and said commissioner erred in holding that any affidavit was filed by the plaintiffs on said date stating that this defendant and others settled upon the land for town site purposes and that the tract has been wholly used for purposes of trade and business.

4th. That said commissioner erred in holding that an affidavit sufficient under the law had been filed by plaintiff prior to the execution of defendants final depositions.

5th. That said commissioner erred in holding that there is or was at any time a railroad town or any other town called Cimarron, covering the tract of land in question.

6th. That said commissioner erred in finding that sometime in 1883 this defendant went upon said land and purchased a saloon and from that time to the present has continuously engaged in that business.

7th. That said commissioner erred in finding that this defendant intended to convey a portion of said land after he had obtained title thereto.

8th. That said commissioner erred in finding that long prior to the date when this defendant made final proof the land was used for purposes of trade and business and was so used by defendants permission and is therefore excepted from entry.

9th. That said commissioner erred in finding that the entry made by this defendant upon said land was not made in good faith and with a bona fide intention on his part of complying with the requirements of the pre-emption law.

The Rules of Practice of the Department make no provisions for hearings in the case of protests, but they are very specific in reference to all matters relating to hearings in contest cases. Where a hearing is applied for in case of contest, rule 2 provides that the application must be accompanied by an affidavit fully setting forth the facts which constitute the grounds of contest. If the case is one in which an entry has been allowed and remains of record, rule 3 provides that the affidavit of contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

I do not think that it is absolutely necessary that a protest should be accompanied by an affidavit. In *Blakely v. Kaiser* (12 L. D., 202), it was said that if the local officers received information in regard to the matter, it was their duty to take action thereon, and to inform your office regarding the same, even if no protest were filed, and the information came to them in an informal manner, and in *Tuttle v. Parkin* (9 L. D., 495) a decided distinction is recognized between a protest and a contest. Your order directing a hearing upon the paper filed, was within your discretion, and was not subject to appeal.

From the record in the case it appears that prior to 1883, a person named McMinn, and a certain Captain Cline, had possession of the land in question, and owned certain improvements thereon. About twenty-five acres of the land were level, the balance being hilly, and fit only for grazing. Biggs bought out the interests of McMinn and Cline, paying them \$650 for their improvements and possessory rights. He established his residence upon the land in February, 1883, and continued to reside there until the hearing.

After Biggs established his residence upon the land, the Rio Grande Railroad Company built its road through the valley, taking about twenty acres of his level land for its track, depot, round house and other purposes. This left him only about five acres of level land, but as it brought quite a number of persons there in the employ of the railroad, he established a saloon, using the hilly portion of his land for grazing and stock raising.

The railroad company charged its employes one dollar per month for the privilege of building their shanties upon its land. To avoid the payment of this sum, quite a number obtained permission from Biggs to erect their houses upon his land. This he allowed them to do, free of charge.

At the time he made his settlement the land was not surveyed by

the government. He procured one to be made by the county surveyor, and established his lines accordingly. When the government survey was made, his line was changed so as to take in a strip upon which several persons had erected structures and commenced business. It is this fact which gives rise to the charge in the protest that the land included in his entry was used for purposes of trade and business. None of the persons residing on this strip had taken any proceedings to procure title to the land upon which they were living.

The railroad plat of selection for Cimarron depot, and its rights thereunder, was approved by the Secretary of the Interior September 25, 1883, and was filed in the local land office on the 12th of October of that year. After this selection, the company obtained from Biggs a deed for the land covered thereby, some twenty acres. He also made conveyances or gifts of lands for a school house, and for a cemetery, under the provisions of section 2288 Revised Statutes.

In your decision you state that Biggs admits that *with his permission* parties have built business and residence houses upon the land in question. I find no such admission in his evidence, so far as places of business are concerned. He admits that he allowed parties to build residences upon the land, but the only case in which such permission was given in writing, and to which you refer by name is that of John T. Benge, in which it was said: "It is also a consideration of this lease, that the party of the second part agrees to never sell, give away, or traffic in any manner in intoxicating liquors, or other mercantile business."

As already stated, the only business places upon the tract, except those on the railroad land, and the residence and saloon of Biggs, were upon the strip which he did not claim, and which he did not include in his entry until after the government survey.

Both the protestants are employes of the railroad company, Baker as car inspector, and Budelier as conductor on a freight train. Baker resides on the land of the company, and Budelier lives in a house attached to that of his father-in-law. The house of the latter is on railroad land, but Budelier's part extends over the line, and onto the land of Biggs.

Biggs testifies that he made his settlement in good faith, intending to acquire title to the land under the pre-emption laws of the United States. In this he is not contradicted.

The evidence at the hearing shows the hilly portion of the land to be valuable for grazing, and that it is used for that purpose by Biggs who has five cows, twenty-five horses, some young cattle, and twenty hogs. His final proof shows his improvements to be worth \$1,375.

Section 2258, Revised Statutes, describes the classes of land not subject to pre-emption. The first class is lands included in reservations; the second is those in incorporated towns, or selected as the site of a city or town; the third is lands actually settled and occupied for pur-

poses of trade and business, and not for agriculture, and the fourth is lands on which are situated any known salines or mines. The land in question is not included in the first, second or fourth classes, while as to the third, there was no settler upon the tract at the time Biggs established his residence there. Afterwards the railroad established its station, and took nearly all the land which could be used for business purposes. Had it been the intention of Biggs to settle upon the land as a town site, he had no land which could be used for that purpose after the railroad took twenty acres out of the center of his twenty-five of level ground.

In the case of *Doud et al. v. Slocomb* (9 L. D., 532), the lands were originally settled upon by the claimant and others as a townsite, and actually occupied for the purposes of trade and business. In that case the entry was held illegal and was canceled. In the case of *Fouts v. Thompson* (10 L. D., 649), the land was taken because it contained a mineral spring, and the parties immediately commenced the erection of a hotel, cottages, bath houses, stores, etc., so that at the time of the hearing there were twenty cottages, beside the hotel and other places mentioned, and the land was made use of for the purpose of maintaining a health resort thereon. The entry was canceled.

Those cases, however, differed materially from the one at bar. In one of these the land was used from the first as a town site, and in the other as a health resort. In the case before me, Biggs took the land for grazing purposes, and has ever since used it as a ranch for his cattle and horses. I do not think it is included in the third class enumerated in section 2258, Revised Statutes.

The register and receiver heard all of the evidence upon the trial, and after considering the same, united in a decision in which they carefully enumerated the facts of the case and their conclusions thereon. I have examined the whole record, and concur in the conclusions reached by the register and receiver. The decision appealed from is therefore reversed.

MINING CLAIM—ADVERSE PROCEEDINGS—REGULATIONS.

HAWKEYE PLACER *v.* GRAY EAGLE PLACER.

The Department, in the exercise of its discretion, may suspend its regulations to avoid an act of injustice.

The failure of an adverse claimant, who appears as a transferee, to furnish an abstract of title will not defeat his right to be heard where he has in good faith complied with the regulations so far as possible.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 13, 1892.

On March 26, 1889, T. G. Durning, as agent and superintendent of the Gray Eagle Mining Company (duly incorporated), made application

in behalf of said company, as owner, for a patent for the Gray Eagle Placer Mine, embracing 145.43 acres of gold bearing placer mining ground, situated in the Spring Garden mining district, county of Placer, California, in Sec. 6, T. 13 N., R. 10 E., M. D. M., at Sacramento, California.

Notice of said application was duly published in the "Placer Herald," a weekly newspaper, published in said county, for ten successive weeks, beginning March 30, and ending June 1, 1889, the sixtieth day of publication being May 29, 1889.

On July 24, 1889, said company was allowed to purchase said claim (mineral entry No. 1339) and final certificate and receipt therefor were issued.

On May 28, 1889, Eli Seavey offered to file an adverse claim, alleging ownership of the Hawkeye Placer, which conflicts with the Gray Eagle Placer to the extent of 77.7 acres.

On May 29, 1889, the local officers to refused to receive and file said adverse claim for "non-compliance with the requirements of paragraph 48 of Circular of October 31, 1881."

The said paragraph requires that the adverse notice must set forth:

Whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished.

The adverse claimant sets forth in his affidavit that he is the owner by purchase and in possession of the adverse Hawkeye Placer Mine, that it was located in 1856, consisting of about 117 acres, by six persons whose names are given; that the mining records of the said district wherein was recorded the said notice of location have been for many years lost, and no copy thereof can now be produced; that said mine was properly marked on the ground, and notice of location recorded in the proper district in 1856; that said locators and their grantees remained continuously in possession and expended on said location more than \$12,000; that in 1858 said locators and their grantees conveyed said mine to said Seavey, but that none of the said several transfers and conveyances can be made to appear by reference to an abstract of title, for the reason that all of said records are lost.

A diagram or map was attached to said adverse claim, duly certified by a United States deputy surveyor, which presented a correct description of the relative locations of the said Hawkeye mine, and of the said Gray Eagle mine.

A motion for a rehearing before the local officers was presented to them on June 5, 1889, under Rule 76 of Practice, and on July 23, 1889, the order May 30, 1889, refusing to file the adverse claim was affirmed. Said motion was accompanied by affidavits showing that said conveyances were in writing, and that Seavey paid \$700 for the said mining claim.

An appeal was taken, and by your letter of July 30, 1891, you reversed the decision rejecting said adverse claim, and allowed the adverse claimant thirty days from notice in which to commence suit upon his adverse claim in a court of competent jurisdiction. An appeal now brings the case before this Department.

The ground of your decision is said to be:

The omission to file an abstract should be treated as an irregularity and not as a defect that vitiates the adverse claim. No one is injured by the omission, and it would be extremely technical to treat it as good cause for rejecting the claim.

The non-compliance in this case was with the requirement of a rule and not of a statute, and the rule should not be so strictly followed as to require an impossibility or work injustice. A court may, under circumstances, avoid an act of injustice by the suspension of its rules, where its discretion may be fairly exercised. *Yturbid's Executors v. United States* (22 How. 290). This Department has the same power and can take up a case and dispose of it in accordance with law and justice. *Knight v. United States Land Association* (142 U. S., 161-181).

The adverse claimant appears to have done in good faith all that was in his power to comply with the rule, and in such a case the rule will not be held to operate as a bar. *Jenny Lind v. Eureka (Copp's Mineral Lands, 124-129)*. An omission to file an abstract was in that case treated "as an irregularity only, and not as a defect that vitiates the adverse claim."

Sec. 2326 of the Revised Statutes requires that the adverse claim "shall show the nature, boundaries and extent of such adverse claim," and there was a sufficient compliance with this requirement by the adverse claimant.

Your judgment is affirmed.

PRACTICE—NOTICE—JURISDICTION.

FUNK *v.* MEYER.

That a notice to take testimony before a commissioner does not designate the day of hearing before the local office will not defeat the jurisdiction of said office, where due notice of the contest is given in the first instance and the case is continued to a day certain.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 13, 1892.

On May 27, 1886, Sophia Meyer made timber-culture entry No. 11,131, for the NE. $\frac{1}{4}$ of Sec. 31, T. 130 N., R. 63 W., Fargo, North Dakota.

On January 29, 1890, Edward J. Funk filed his affidavit of contest against the entry, alleging that—

the said Sophia Meyer is dead and has been for two years last past; that the heirs of said deceased have failed to plant or cultivate any part of said tract the third

year after filing of deceased, and have failed to plant the trees, seeds, or cuttings, any part of said tract since the same was entered by the deceased as a timber-culture claim.

Notice was issued February 11, 1890, citing the parties to appear at the local office, March 26, 1890.

February 27, 1890, contestant made affidavit before the register, stating:

That from the time said notices were received he has made diligent search and inquiry for the heirs of deceased claimant and has failed to find any of such heirs in the State, with the exception of Mrs. Charles Funk, who is the daughter of the deceased, and who resides on and who informed this affiant that she is the only heir living in North Dakota, and that there is only one other heir, and that such heir resides some where in the State of New York; that affiant was acquainted with deceased claimant and with her daughter, Mrs. Charles Funk, while they were residing in the village of River Falls, in the State of Wisconsin.

He asked that service upon the other and only remaining heir be made by publication.

It was so ordered, and the same was published for six consecutive weeks in the "Ellendale Commercial," a weekly newspaper, published in Ellendale, Dickey county, North Dakota, fixing the hearing for April 29, 1890, at the local office.

Copy of the notice, addressed to Mathias Meyer, at Buffalo, New York, was sent by registered letter, March 28, 1890, and by him received, as evidenced by the registry return receipt.

Personal service was made upon the other heir, Mrs. Charles Funk.

The local office was practically closed, by reason of the illness of the receiver, during part of the summer of 1890, and for this and other reasons the case was continued from time to time, until August 25, 1890, when the register commissioned H. S. Nichols, clerk of the district court, at Ellendale, North Dakota, to take the testimony of contestant's witnesses. He fixed October 28, 1890, for taking the testimony, and again continued the case until November 5, 1890, directing that the testimony be transmitted to the local office "and filed on or before the said 5th day of November, 1890," and that personal notice be served upon Mrs. Funk and notice by registered letter upon the other heirs of the deceased claimant, for at least thirty days prior to said 28th day of October, 1890.

Notice was served accordingly, and the testimony of contestant and two other witnesses was duly taken, defendants making default.

This testimony was received and filed in the local office, October 30, 1890, two days after the same was taken, and on November 13, following, the register and receiver found that the land "had not been cultivated by the heirs of Sophia Meyer, deceased, as required by the timber-culture law, the present condition of the tract being devoid of trees or of any indication of planting or cultivation," and recommended the cancellation of the entry.

November 15, thereafter, both parties were notified of the decision and of defendants' right of appeal.

On March 21, 1891, you remanded the case, with directions to allow contestant "thirty days in which to apply for notice and proceed anew, in strict compliance with the rules of practice." You further said:

If the claimant does not respond after due notice, the testimony already taken will be resubmitted. Should the contestant, however, fail to take any further action, you will dismiss the contest—subject to the usual right of appeal.

Your reasons for thus remanding the case are as follows:

The notice of contest submitted is imperfect, inasmuch as only the day designated by the local officers for the testimony to be taken before the clerk of court is given, and not the date of final hearing at your office.

Contestant's attorney was duly notified of your order remanding the case, and no application for an alias notice having been filed within the time designated therefor, the register and receiver, on May 25, 1891, dismissed the contest "for failure to prosecute."

Contestant brings this appeal, insisting that "due and sufficient service was made on defendants, and due and complete returns made thereon."

It is seen that defendants were properly notified in the first instance of the hearing before the local officers and that they made default.

The only irregularity insisted upon by your office is, that the notice for taking the testimony before the district clerk did not designate the day of hearing before the local office.

It will be noticed that on August 25, 1890, the register continued the case "until November 5, 1890, at ten o'clock A. M.;" on the same day and in the same order he commissioned the district clerk to take the testimony, the same to be filed in the local office, "on or before the said 5th day of November 1890."

Although defendants had made default at the time this order was issued, the register directed that they be notified of the time and place and before whom the testimony was to be taken, and they were accordingly notified, and again made default.

Defendants have made no appearance, either before the local officers, or the clerk of the district court, to sustain the entry. They have made no objection to the contest, either before your office, or this Department.

While a "final hearing" before the local office was not specifically named as such in the notice to take the testimony, yet a particular date—namely: "November 5, 1890,"—was designated in that notice, to which the case was continued, and defendants being notified might have appeared on that day, if they had seen fit so to do.

It does not appear that this appeal has been served on the appellee, but, inasmuch as you failed to pass upon the merits of the case, I return the papers, with direction that you consider it in view of the ruling herein made, and give notice to all parties in interest.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

HEWES v. KAMMAN.

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of a "bona fide purchaser for a valuable consideration" extend to a transfer of title from the husband to the wife where good faith is shown, and the local laws provide for such a conveyance.

It is necessary that the record should disclose the actual consideration paid by the purchaser, as it is only a purchase for a "valuable consideration" that is protected by said section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 14, 1892.

On December 1, 1883, Charles H. Kamman filed declaratory statement (No. 1372) for the SE. $\frac{1}{4}$, Sec. 12, T. 50 N., R. 64 W., at Cheyenne (now Buffalo) Wyoming, alleging settlement November 26, 1883. On August 21, 1885, he made pre-emption cash entry (No. 611) for said land, and received final certificate and receipt therefor.

On May 3, 1888, Arthur P. Hewes filed contest affidavit against said entry, alleging that said Kamman never resided upon said land, as required by the pre-emption law. A hearing was ordered before the judge of the probate court of Cook county, Wyoming, on April 15, 1889, when the contestant appeared, and Kamman, being sick, appeared by attorney, and testimony was submitted.

On May 3, 1889, the local officers recommended the entry for cancellation and that Hewes should be allowed no preference right of entry.

Kamman appealed, and by your letter of June 25, 1891, you affirmed the decision of the local officers as to the cancellation of said entry, but did not sustain their recommendation relative to the contestant's preference right of entry.

An appeal now brings the case before this Department.

By your letter of January 13, 1892, you transmit the motion, affidavit and abstract of title of Ellen M. Kamman, intervenor in said contest, showing that she bought said land for a valuable consideration from said Charles H. Kamman on January 17, 1888, that at the time said final certificate was issued there were no adverse claims, contests, or protests existing against said entry, and asking that said entry be confirmed and patented under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

The certified abstract of title filed with the motion shows that Charles H. Kamman conveyed the land January 17, 1888, to Ellen M. Kamman, and that Charles H. Kamman and Ellen M. Kamman, his wife, afterwards made two conveyances of said land—one a mortgage, and the other a quit claim deed. From the facts so disclosed it may be assumed that Ellen M. Kamman, the transferee, was the wife of Charles H. Kamman, the entryman, when the land was conveyed to her, and the ques-

tion, therefore, arises whether, under the circumstances, she is such a purchaser as is contemplated by the provisions contained in the body of said section seven.

Sec. 1558 of the Revised Statutes of Wyoming (Ed. of 1887) provides that all property, both real and personal, "which any married woman during coverture acquires in good faith from any person other than her husband" shall be her sole and separate estate. The implication from this language seems to be that a married woman in Wyoming may acquire real estate from her husband, but that it might not be her sole and separate estate.

Sec. 1559 of said statutes provides that—

Any married woman may bargain, grant, sell and convey her property of any kind, whether real, personal or mixed, and enter into any contract in reference to the same in the same manner and to the same extent as if she were unmarried.

Taking these provisions together it would appear that a married woman in Wyoming might become a "*bona fide* purchaser for a valuable consideration" of real estate from her husband, but might not acquire a sole and separate estate therein.

In the instructions of this Department of May 8, 1891, (12 L. D., 450-452) relating to said section seven, it is said:

Under this clause where it is satisfactorily shown that a sale or encumbrance was made prior to March 1, 1888, such sale or incumbrance will be presumed to have been made in good faith, and unless such presumption be overcome by facts presented by the record or in connection with the sale, such entry should pass to patent.

Inasmuch as this sale was made prior to March 1, 1888, and as the transferee makes affidavit that she purchased the land for a valuable consideration on January 17, 1888, while the contest affidavit was not filed till May 3, 1888, she would seem to be entitled to the presumption that her purchase was made in good faith, unless such presumption be overcome by the facts presented by the record.

The final proof of Kamman was submitted August 10, 1885, and shows that he was then a single man; that his improvements were valued at \$400, consisting of a log house twelve by sixteen feet, with shed kitchen, a corral, and thirty-five acres cultivated, and that he had resided upon the land from November 26, 1883.

At the hearing before the judge of probate two witnesses, one being the contestant, testified that Kamman did not actually live on the land, as the law requires, before his final proof was taken. Depositions were also offered that he worked in a mill in Central City from January to August, 1885. Kamman, under the advice of his attorney, put in no evidence before the judge of probate, but moved to dismiss the case on the ground that the contestant had failed to establish any of the material allegations set forth in the affidavit of contest, and also for the reason that the Land Department had no jurisdiction over the subject matter after the issuance of the final certificate and receipt. He filed, however, a copy of the final proof papers at the hearing before the local officers, who overruled said motion.

Under these circumstances, if the evidence introduced at the hearing was sufficient to overcome the *prima facie* case established by the final proof, I do not think it was sufficient to overcome the presumption of good faith in the purchase made by the woman who became the wife of the entryman after his final proof was submitted.

Absence of the entryman from the land in order to work is often excusable, and does not break the continuity of residence, and, therefore, is not to be construed as indicative of bad faith. Special Agent Bartlett Minot seems to have made some investigation of the entry upon the petition of numerous citizens, and forwards affidavits of Kamman and others in the support thereof, but makes no special report. It may be inferred, therefore, that he found no fraud or bad faith to report, but, on the contrary, favored the sustaining of the entry. But, however the fact may be as to Kamman himself, there is no evidence that the woman who afterwards became his wife had any knowledge of any bad faith on his part in making his entry when she made the purchase January 17, 1888.

By section 2221, of the Revised Statutes of Wyoming, it is provided that "Dower and tenancy by the courtesy are abolished and neither the husband nor wife shall have any share in the estate of the other, save as herein provided." The provision therein referred to is that if the wife die intestate leaving a husband and children surviving, one half of her estate shall descend to the surviving husband, and the other half to the surviving children. It would seem to follow that the wife in this case acquired a full title to the land conveyed by her husband's warranty deed, and that he had no interest therein during her life. Indeed the rights of a married woman in that state are very nearly those of an unmarried woman both as to her real and personal estate. She can convey her real estate by deed or mortgage "as if she were unmarried." She can sue and be sued "as if she were sole," and also make a will (Sections 1560 and 1561, Rev. Stat.).

In Michigan under a similar statute it was held that a married woman could receive a conveyance of land directly from her husband. *Burdeno v. A'mperse* (14 Mich., 90), *Jenne v. Marble* (37 Mich., 319).

The only remaining question is whether the conveyance in this case was for "a valuable consideration" as required by said seventh section of the act of March 3, 1891.

The said abstract of title shows that the consideration named in said deed to her was only one dollar. This is but a nominal consideration. It is possible that the real consideration was not named in the deed. In her affidavit she swears that she paid a valuable consideration, but she does not state what it was. She is not the proper judge of that question. What was the actual consideration should be made to appear, that the officers of the Land Department may judge whether it was valuable or not, within the meaning of the statute. The distinction

between a good and a valuable consideration has been thus defined by Blackstone:

A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded in motives of justice. (2 Bl. Com. 297.)

The consideration must have some real value, though it need not be adequate. (1 Parson's on Contracts, 436.)

If the consideration was valuable a different question would be presented from that now disclosed by the record.

In order that the facts may be ascertained, you are hereby instructed to order a further hearing upon this point, after due notice to the parties in interest. Upon receipt of the evidence you will re-adjudicate the case in the light of this decision.

Your judgment is modified accordingly.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. v. STARK.

The possession and occupancy of land by one who has exhausted his rights under the settlement laws will not except the land covered thereby from the operation of a railroad grant.

Secretary Noble to the Commissioner of the General Land Office, July 14, 1892.

The E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 24, T. 10 N., R. 12 W., and lot No. 1 of Sec. 19, T. 10, N., R. 11 W., Helena, Montana, are within the limits of the grant to the Northern Pacific Railroad Company.

The withdrawal for the benefit of the company became effective upon general route February 21, 1872.

The line of said road opposite this land was definitely located on July 6, 1882.

The tract in question was excepted from the operation of this withdrawal by reason of the existing pre-emption declaratory statement of Martin J. Richardson filed for said land on December 2, 1871, in which he alleged settlement the same day.

In 1874, Charles T. Stark purchased the improvements of Richardson on said tract took possession thereof, and made valuable improvements thereon, his house and buildings being erected on lot 1, in Sec. 19. In 1881, he applied to enter the tract first above described but was told by the register and receiver that lot 1 Sec. 19, could not be entered because being an odd numbered section it belonged to the railroad company, he thereupon entered under the homestead law, the N. $\frac{1}{2}$ of N. E.

$\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and "N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ " of Sec. 24, T. 10 N., R. 12 W., the tract above quoted being taken in lieu of lot 1.

By authority of letter "C" of your office, dated January 10, 1888, he amended his entry so as to include lot 1 instead of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, which was relinquished by him the same day.

On May 31, 1883, he made timber culture entry for lot 1 but when he applied for amendment of his homestead entry in 1889, he relinquished said entry.

On March 10, 1887, the Northern Pacific Railroad Company listed lot 1, claiming it under its grant, but its claim was rejected by the register and receiver; thereupon it appealed to you from said rejection and on June 2, 1890, you ordered a hearing to determine the respective rights of the parties. After considering the evidence submitted at the trial the local land officers found in favor of Stark and the company appealed to you from said finding.

On May 5, 1891, after considering the case you also rejected the claim of the company and directed that Stark's entry remain intact.

The company has appealed from your judgment to this Department.

The facts shown in the record prove conclusively that the tract was exempted from the operation of the withdrawal on general route made February 21, 1872, and if the railroad company's claim is to be maintained it must be because the tract was not legally claimed by Stark on July 6, 1882, when the map of definite location was filed.

It is shown by the evidence that Stark was at that date in possession of the tract and that he had placed thereon a house worth about \$4000; that he was residing in said house and had the greater part of the tract under cultivation. It also shows that he had exhausted his rights under the pre-emption and homestead laws, at that time having a homestead entry of one hundred and sixty acres adjoining the tract in question.

It has been held by this Department in a number of cases that where possession and occupancy alone are relied upon at the time rights under a railroad grant attach to except the land from said grant, it must affirmatively appear that the party in such possession had the right, at that time, to assert a claim to the land in question under the settlement laws. *Northern Pacific Railroad Company v. Potter et al.* (11 L. D., 531). See same in review. (12 L. D., 212). *Irvine v. Northern Pacific Railroad Company* (14 L. D., 362). In the case at bar it does not appear that Stark was qualified on July 6, 1882, to enter the tract under the settlement laws, but on the contrary it does appear that on that date he had exhausted all his rights under said laws it follows that the tract passed to the company on that date and was not subject to his application to amend.

Your judgment is accordingly reversed, the listing of the tract by the company should be allowed and the homestead entry of Stark should be canceled as to lot 1 in Sec. 19, T. 10 N., R. 11 W.

INDEMNITY SCHOOL SELECTION—DEFECTIVE BASIS.

JAMES D. SCRIMSHER.

A school indemnity-selection based in part upon a deficiency that does not in fact exist is defective, and must be canceled.

Secretary Noble to the Commissioner of the General Land Office, July 14, 1892.

On March 31, 1890, James D. Scrimsher made homestead entry No. 4225 for lots 3 and 6 of Sec. 8, and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 17, T. 10 N., R. 3 W., Marysville, California, "subject to the right of the State under school indemnity land application No. 2793, filed August 28, 1888."

On June 8, 1891, you held the entry for cancellation "as to lot 6 of Sec. 8," by reason of conflict with the State's application, the acceptance of which was authorized by your letter "K" of June 30, 1890.

Scrimsher has appealed from your decision, alleging that the selection is invalid, for the reason that the basis used did not exist at the time the application was made or at any time since November 23, 1861.

Application No. 2793, filed August 28, 1888 (the acceptance of which was authorized by your letter "K" of June 30, 1890), was made for lot 6 of Sec. 8, T. 10 N., R. 3 W. It was based upon the following alleged deficits in school sections:

	Acres.
SE. $\frac{1}{4}$ Sec. 36, T. 18 N., R. 2 W	12.77
Sec. 36, T. 21 N., R. 1 E	13.91
Sec. 36, T. 24 N., R. 2 E	18.66
	<hr/>
	45.34

It appears that Sec. 36, T. 24 N., R. 2 E., was taken by a donation claim. The State thus had the right to select in lieu of that section six hundred and forty acres, and, on November 22, 1861, list No. 24 was filed, using the deficit in that section for the selection of 627.40 acres, leaving 12.60 acres as a basis for future selections.

As seen above, the State's application No. 2793, filed August 28, 1888, used as a basis 18.66 acres in Sec. 36, T. 24 N., R. 2 E., with other deficiencies therein alleged, as authority for its selection of said lot 6.

The alleged basis in said section 36, being 6.06 acres in excess of the real deficiency, the question at issue relates to the validity of the entire selection.

This excess, under the circular of July 23, 1885 (4 L. D., 79), would probably not prove fatal to the selection. But a subsequent circular from your office, dated July 29, 1887, cited with approval in *Melvin et al. v. the State of California*, 6 L. D., 702, reads as follows:

Hereafter on presentation of applications to select school indemnity it will be insisted on that the areas of the selected tracts and their bases must be equal, and the selections must be separate and distinct, so that action thereon may be taken sepa-

rately. For instance, the total deficiency in a school section, or in the township may be 131.00 acres. In lieu of this, one hundred and twenty acres may be selected, and there will remain eleven acres to be satisfied in another selection. These fractions may be used in selections of larger tracts by adding a sufficient number of them together, so that the area of the selected tract is nearly reached, and then a portion of a deficiency should be added to make up the exact quantities selected. Care should be taken not to divide deficiencies of aliquot parts of technical sections, such as quantities of forty acres, eighty acres, etc., so long as fractions of less than forty acres may be so used.

A careful and complete record of deficiencies satisfied by selections should be made on your tract books in the places set apart for the sixteenth and thirty-sixth sections, giving the exact areas of the losses or deficits used, and referring to the tracts selected in lieu thereof by section, township and range.

The State's application No. 2793, having been filed more than one year after the issuance of said circular, should be governed thereby. This selection being based in part upon a deficiency, which in fact did not exist, and being thus contrary to the regulations then in force, as shown by the circular above quoted, is defective.

You will therefore cancel the same, giving the State the right to make a new selection upon a proper basis.

The homestead entry will remain intact. The decision appealed from is accordingly reversed.

RAILROAD GRANT—MAP OF DEFINITE LOCATION.

OREGON AND CALIFORNIA R. R. Co. v. BARRON.

The provision in section 2, act of July 25, 1866, requiring the survey of sixty miles of the road prior to any withdrawal, is not intended as a requirement that subsequent maps of definite location should be in sections of sixty miles.

Secretary Noble to the Commissioner of the General Land Office, July 14, 1892.

I have considered the case of the Oregon and California Railroad Company *v.* H. F. Barron, involving the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 5, T. 40 S., R. 2 E., Roseburg land district, Oregon, on appeal by the company from your decision of July 23, 1891, holding said tract to have been excepted from the grant made by the act of July 25, 1866 (14 Stat., 239), under which said company claims the land.

It appears that on September 1, 1883, H. F. Barron made private cash entry No. 5496, embracing said tract.

By your office decision of July 24, 1884, said entry was held for cancellation for conflict with the rights of the company under said grant, which it was stated attached in the vicinity of this land upon the definite location of the road, August 1, 1883.

May 20, 1885, the register reported that Barron had been notified of said decision and had failed to appeal.

No further action appears to have been taken by your office until in the decision of July 23, 1891, appealed from, the former action was revoked, and it was held "that the accepted map of definite location covering the land in question was not filed with the Secretary of the Interior until September 6, 1883."

The cash entry made September 1, 1883, was therefore permitted to stand and the claim of the company, under its grant, rejected.

The company, in its appeal, states:

That the map of location of the company's road past this land was filed in the Secretary's office, August 1, 1883, is shown by the records in the General Land Office. I understand this is not disputed, but unofficially I am informed that, as this map did not show a length of road sixty miles long, it was proper to couple it with the map filed September 6, 1883, and take the latter as the date of location of both pieces of road.

No such reason is assigned for the change of the date of the definite location of the road in your opinion, it appearing to be an attempt to correct the statement of facts to agree with the records of your office.

Upon inquiry at your office, I learned that this land is opposite to and coterminous with the location shown upon the map filed August 1, 1883, as ruled in your opinion of July 24, 1884. This map was duly accepted by this Department, and thereby became the basis of the adjustment of the grant.

It is true, that the line of the road shown upon said map is less than sixty miles, but I can find nothing in the act making the grant requiring that the maps of definite location should be in sections of sixty miles.

It is stated in section 2 of the act of July 25, 1866 (*supra*):

and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified.

This merely required that before any withdrawal should be made that at least sixty miles should be surveyed, but thereafter the locations were left to the convenience of the company.

The entire line has been located, and rights of parties and the company adjudicated, recognizing rights in the company under the locations as made, without regard to the length of the same, and, from a review of the matter, I can find nothing to warrant the change of the date of location made in your decision of July 23, 1891.

The case was properly ruled in the first decision of your office, and the decision appealed from is reversed, and you are directed to cancel Barron's entry.

PRIVATE LAND CLAIM—CONFIRMATION—SURVEY.

LAS VEGAS (ON REVIEW).

Received, 6/3
21
The action of Congress in designating the confirmee under a private land claim must control the Department in the issuance of patent.

In the re-survey of this grant there should only be included the lands allotted to settlers, under the original concession, at the time the territory became subject to the laws of the United States.

Secretary Noble to the Commissioner of the General Land Office, July 16,
1892.

The attorneys for Moses Milhiser et al., claimants under the Las Vegas grant have filed a motion for review of departmental decision of December 5, 1891 (13 L. D., 646) in favor of the town of Las Vegas. The motion as framed is made up of many items, but in fact presents no question either of law or fact that was not presented, considered and discussed at length when the case was originally presented to the Department, so that it is unnecessary to quote said motion in full. It is said that some of the statements found in the decision complained of are incorrect and misleading, yet it is not shown or asserted that the history of the grant and the facts in the case are not substantially as set forth in that decision. I have not found it necessary at this time to set out that history or to state the facts in full, reference being made to the former decision therefor. The case naturally divides into two branches, the first being as to the party or parties to whose name a patent should issue, and the second as to the land which such patent should describe.

It is strongly insisted that it was error to conclude that the patent should be issued to the town of Las Vegas because there was no such town in existence at the date the grant was made. If, however, the grant was confirmed to the town that action of Congress must control this Department. Whether such confirmation was proper or effective is a question that will not be determined here. That the intention of Congress was to confirm the grant to the town of Las Vegas is, in my opinion, clearly disclosed not only by the reference made to exhibit "A," by which Congress adopted the designation there given of said claim, but also by the whole tenor of the record made, while the consideration of the confirmatory act was progressing, special reference being had, in this connection, to the report of the Senate committee referred to and quoted from the former decision. The conclusion reached in that decision and the course to be followed to carry it into execution is one, if not the only, practicable way in which the interest of all parties may be fully protected. It is virtually conceded by the attorneys for the parties now seeking the revocation of the decision of December 5, 1891 that equitable rights in some portions of the property have been acquired "by possession or otherwise," and that such rights should be

fully protected. They even profess a readiness and willingness to release their claim to the land within the town of Las Vegas and also of East Las Vegas, and to a large tract surrounding said towns, and to convey the same by quitclaim deed "to the proper legal authorities thereof in the interest and for the benefit of the inhabitants thereof." This proposition can not be seriously entertained even had these parties, which they have not, tendered a formal instrument in furtherance thereof. Indeed, submission of such a proposition is inconsistent with the various allegations made by them, as to the effect of conveying the legal title to the town by the government. It is said in one place "There was no such town in legal existence at the time of the grant, when the title vested, and there is none now." Again "But we earnestly oppose the issue of the patent to the 'Town of Las Vegas,' because no one can know what is meant thereby." And again: "Our chief objection to the last named patentee (Town of Las Vegas) is simply that, in such case, no one could find the proper party on whom to serve process to begin a suit for the determination of the ultimate rights of property in the lands patented." If all these uncertainties and inconveniences would, in their opinion, follow the issuing of a patent in the name of the town, they must believe the same would attach to any title vested in the town by the conveyance proposed. Again it is said that under a patent issued as they ask, in the names of those asserted by them to have been the original grantees, "any right legal or equitable arising under the original grant, or subsequent conveyances, can be directly asserted, with justice to all and injury to none. It enures to the benefit of the smallest land owner on the grant, and the alleged 'Town of Las Vegas' as well." Why all parties would be fully protected if patent shall issue as they request and not if it shall issue as directed in the decision complained of is not readily seen, nor am I convinced by the arguments put forward that such is a fact. On the contrary, I am convinced that individual rights and equitable claims may be more readily and surely protected with the legal title so placed that the holder thereof would have no interest in defeating just claims than with it in the hands of individuals whose personal interest would be enhanced by defeating all claims other than their own. The decision complained of affords to all rightful occupants of the land granted equal and full protection, those who now claim to be or to represent the original grantees as well as those who claim, through the large number of people who were recognized by the Mexican government as equally entitled to share in the benefits of said grant. That the grant was not made for the exclusive benefit of those whose names are mentioned as the petitioners therefor is conclusively shown by the history of the governmental action in relation thereto. The grant, as ordered made by the territorial deputation was "not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate." In carrying into execution the

orders of the territorial deputation, the officer intrusted with that duty recognized not only those who were present on the day the first allotment was made, but also others who afterwards presented themselves. This course was pursued at least so long as the land and the occupants thereof were under the jurisdiction of the Mexican government, and until the number of beneficiaries had increased to nearly two hundred. This course negatives the idea that it was supposed that a grant in fee was being made for the exclusive benefit of the small number of persons referred to in the original petition. The fact that those original petitioners acquiesced in these later distributions and that one of them, Juan de Dios Maese, officiated at one of these subsequent distributions, shows that these petitioners themselves did not consider that they had been invested with the fee simple title of all said lands, or that those lands not distributed had passed beyond the control of the government. The facts are wholly inconsistent with the claims now made in behalf of those presenting themselves before this Department as the assigns and legal representatives of the original petitioners. The political chief in his instructions to the constitutional justice speaks of these allotments as *grants*, using the word in the plural and directs that they "be made according to the means of each one of the petitioners" so that none of the land given them should remain without cultivation. The history of this grant shows conclusively that it was made for the benefit of all who should see fit to settle thereon to the end that a town might be established and built up, each individual to have exclusive right to such tract or tracts as might be awarded to him by the government in the various distributions to be made. Congress evidently considered that this intention in making the original grant would be best carried out, and individual interest most surely and effectually protected by making the confirmation in the name of the town. However, whatever may have induced the action taken by Congress, it but remains for this Department to carry into execution the legislation enacted, and this can, in my opinion, be done only by issuing the patent in the name of the town, as concluded when the decision complained of was rendered.

Upon the question of the resurvey directed in the former decision, these parties presenting the motion for review, which brings the case again before the Department, and who are opposing the town in its application attack the position taken in that decision, but the town has not filed any motion for review of said decision. Under these circumstances, it seems unnecessary to enter upon a lengthy discussion of that part of the case. Upon a further consideration thereof, I have seen no good reason for a conclusion different from that heretofore announced. So long as the land remained under the control of the Mexican government the rights of those settling thereon were fixed and determined by the laws of that country; but when the land passed under the control of this government the rights of those attaching thereafter are to be

determined under the laws of this country. The act of Congress confirmed all rights acquired under the Mexican law, and this effect is given that law by the decision in question. Rights asserted after Mexican control ceased must be by virtue of the laws of the United States, and such claims can be properly determined only by making the public land laws applicable to all lands remaining undisposed of at that date. This is what the former decision directs to be done.

There has recently been filed another brief in support of this motion in which is incorporated what is claimed to be a copy of a decree recently rendered in the Court of Private Land Claims in the case of *Carlos W. Lewis v. United States*, involving the construction of a grant said to be in all respects like the one here under consideration. This copy is not certified to or in any manner authenticated; but I have thought proper to examine the grant involved in that case. The copy of the decree as incorporated in said brief does not set forth the grant or give any particulars in regard thereto that would enable one to determine as to the similarity of that and the Las Vegas grant, and hence it is necessary to examine the history of that private land claim No. 49, which is given in House Executive Document No. 106, 3d Sess. 41st Congress. (Vol. 2, Private Land Claims). This grant was made by the Spanish government in 1753 to the six persons petitioning therefor, and to six other persons whose names were directed to be inserted by the chief alcalde at the time of giving possession, and possession was given to twelve persons named in the report of the alcalde. The proceedings of possession and distribution were confirmed by the governor and captain general under date of March 28, 1854, with an express declaration cutting off all others from any claim to said lands in the following words:

I did declare and do declare, that no other petition or claim hereafter appearing and being presented by any person shall be entertained inasmuch as none such appeared when called for at the time or in the act of possession, or during the time that has passed since the possession was made and up to the date of this decree.

It seems these parties failed to settle upon the lands granted as they should have done but afterwards again petitioned for said grant and a decree was rendered in 1759 granting their petition upon their appearing and assuming anew the obligations to make settlement. Confirmation was made on January 19, 1759. Afterwards in 1762 the names of four other persons were inserted in the place of the same number who had forfeited their rights by failure to make settlement as required. The surveyor-general approved the grant to the legal representatives of the original grantees.

From this recital it will be seen that said grant differed very materially from the Las Vegas grant. There the beneficiaries were definitely and explicitly designated and limited both in the grant and in the confirmation and also in the act of possession, while in the Las Vegas case the beneficiaries were not limited in any stage of the proceedings. In

the latter case the Mexican government retained and exercised control of the unallotted lands at least to the extent of making further allotments and grants, so long as the territory remained under its control, while in the former the Spanish government had no further control after the beneficiaries had complied with their obligations. The same line of reasoning would not apply in the two cases and the claim that the said decision of the Court of Private Land Claims should be followed in passing upon this motion need not be further considered.

In this late brief the case of the Los Trigos grant decided by this Department on April 6, 1892 (14 L. D., 355), is referred to as one precisely like the one now under consideration. In that instance the surveyor-general found the grant to be an absolute one, recommended its confirmation as such and Congress confirmed it as recommended. As is said in the departmental decision, the executive has no power to limit such a confirmation to lands actually under cultivation and the occupancy of the grantees. The difference between such a grant and the Las Vegas claim is pointed out in the decision now under consideration and it is unnecessary to repeat what was then said.

After a careful reconsideration of the questions involved in this case in the light of the arguments both oral and written, submitted while the case has been pending here upon motion for review, I have found no good reason for disturbing the decision complained of, and said motion for review is therefore hereby denied.

RAILROAD GRANT—ACT OF JUNE 22, 1874

GRAND RAPIDS AND INDIANA R. R. CO.

The act of June 22, 1874, authorizing selections in lieu of relinquished tracts is for the protection of settlers, and in no manner operates to extend or enlarge a railroad grant.

Lands within the indemnity limits of a railroad grant can not be used as a basis for selections under said act, and proceedings for the recovery of title should be instituted where selections have been certified on such basis.

*Secretary Noble to the Commissioner of the General Land Office, July 14,
1892.*

I have considered the matter, as presented in your letters of July 12, 1890, and May 27, 1892, relative to the rule issued March 11, 1890, upon the Grand Rapids and Indiana Railroad Company, to show cause why certain lands certified to said company under the provisions of the act of June 22, 1874 (18 Stat., 194), should not be reconveyed to the United States, as contemplated by the act of March 3, 1887 (24 Stat., 556).

Said rule states "an examination shows that the bases stated for the selections made and approved under the act of June 22, 1874, were lands within the indemnity limits, which it is held, in the case of the

St. Paul and Sioux City Railroad Company (10 L. D., 50), does not afford a basis for relinquishment and selection under said act."

In the answer to the rule, the company claimed that the tracts were relinquished upon request, and that they had been duly selected, and therein was the difference between the two cases.

Upon a resubmission of the case, it having been returned to you for report upon the facts alleged in the answer, you state:

The original grant for the Grand Rapids and Indiana Railroad Company was by act of June 3, 1856 (11 Stat., 21), and was for a railroad from Grand Rapids to some point on, or near, Traverse Bay, in the State of Michigan. Said act granted to aid in the construction of the road every alternate section (those designated by odd numbers) within six miles of the road, and provided for *indemnity* from the odd sections within fifteen miles, on each side of the road.

By act of June 7, 1864 (13 Stat., 119), the act of 1856 was amended, so that the road should extend from Fort Wayne, Indiana, to some point on, or near, Traverse Bay, as aforesaid, and provision was made whereby the company would be permitted to take *indemnity* from the odd-numbered sections within twenty miles of the road, instead of within fifteen miles, as under the act of 1856.

The withdrawal of the additional indemnity belt, provided for by the act of 1864, was ordered October 23, 1866.

An examination shows that the lands relinquished by the company, and for which it obtained indemnity under the act of June 22, 1874, were all outside the fifteen mile limits, and within the twenty mile limits, of the grant for said company.

It does not appear from the records that any of the relinquished tracts were ever selected by the company, or approved on account of its grant. On the other hand, the records show that at the date of the additional withdrawal, under act of June 7, 1864, the lands relinquished were covered by filings and entries under the pre-emption and homestead laws.

From the foregoing, it appears that the lands relinquished were in the *indemnity* limits (twenty miles), and had never been selected or approved for the company. Since the papers were returned to this office, the company has filed a letter withdrawing the statement, that "the lands under discussion were formally selected by this company in lieu of lands in place within the primary limits," and adds, "It must now be understood that both the lands relinquished, and the lands in lieu, were within the indemnity limits." This letter is herewith enclosed.

In reply to your question asking whether the reconveyance and relinquishment of the lands, for which the company received indemnity, was made by request of the government, and the manner in which said request was communicated, I have to say, that, after diligent search, I have been unable to find that the company was ever requested by the government to relinquish its claim to any of the lands for which it received indemnity under the act of June 22, 1874. All that I can find bearing upon this matter is a letter from the company's attorney, Mr. Horace J. Frost, asking how the company should be indemnified for certain lands covered by entries at the date of withdrawal under act of 1864, and a reply thereto, by this office, that a method of adjustment for such losses was provided by the act of June 22, 1874. Said letters—Mr. Frost's being dated October 28, 1874—and copy of the reply of this office—bearing date November, 1874, are herewith enclosed.

The counsel for the company states in his argument that "the lands were reconveyed to the government, by request, from time to time." If this is so, I have been unable to find any record of such requests, and this fact leads me to the conclusion that the counsel for the company has been misled into making the statement referred to.

It will be seen that the tracts in lieu of which these selections were

made were embraced in entries prior to the withdrawal of the lands, and the company was not requested to relinquish in their favor, but, on the other hand, sought to increase its diminished grant through the operation of the act of June 22, 1874 (*supra*), by urging invalidity in the entries, the same having been allowed after the passage of the act of June 7, 1864 (*supra*). This act contemplated a release by the company where it had such a right under its grant as would bar the settler from completing his claim.

While it was not mandatory upon the company, yet its object was plainly for the relief of settlers, and that the company might not take lands in lieu of which it was not justly entitled, provision was made in the act "that nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad."

It is clear that this company had no such right in any of these lands, entered before the withdrawal of the same, as could prejudice the rights of such entrymen, and as the tracts in lieu of which the selections are made lie within the indemnity limits, the approval of such selections was a clear enlargement of the grant.

Under the terms of the grant the company was restricted in the selection of indemnity to alternate sections, which by election embraced the odd-numbered sections, and by the waiver of claim in certain odd-sections, in which they had no right by reason of prior disposals, it was sought to make available, through the operation of the act of 1874, also the even-numbered sections.

The decision in the case of the St. Paul and Sioux City Railroad Company (*supra*) fully disposes of the argument made in support of the answer to the rule under consideration, and adhering to the views therein expressed, I direct that demand be made for the reconveyance of these lands under the provisions of the act of March 3, 1887, and at the expiration of the time allowed, that report be made to this Department for such further action as the facts may warrant.

PAYMENT—REINSTATEMENT OF CANCELED ENTRY.

BLEDSOE *v.* HARRIS.

The payment of the purchase price of a commuted homestead entry to the clerk of a court to be forwarded with the final proof is not authorized by statute, and is at the risk of the claimant.

An application for the re-instatement of a canceled entry will be denied where no error is alleged as against the judgment of cancellation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 16, 1892.

I have considered the case of James M. Bledsoe *v.* Thomas Harris, on appeal from your decision of June 1, 1891, involving the validity of

the latter's homestead entry for the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 4, T. 14 S., R. 23 W., Camden land district, Arkansas.

It appears that the plaintiff made a homestead entry for said land January 30, 1882; that on August 11, 1888, a hearing was held before the local officers on the charge of abandonment, brought by T. W. Turnell, wherein Bledsoe made default and the entry was canceled by your letter of July 23, 1889. No appeal having been taken your judgment was final.

From some cause, the contestant, J. W. Turnell, failed to take advantage of his preference right and on September 11, 1889, Bledsoe filed in your office a petition and affidavits asking for a re-instatement of his homestead entry.

October 16, 1889, before any action was taken on the petition by you, the local officers allowed Thomas Harris, the defendant in this case, to make entry of the land.

March 21, 1890, you directed that a hearing be ordered to investigate the allegations made in said petition, with notice to all parties in interest, and on September 27, 1890, both parties in this case appeared before the clerk of the court of Hempstead Co., Arkansas, and introduced their testimony.

On October 8, 1890, the local officers, rendered a decision in favor of the plaintiff and on June 1, 1891, you reversed the judgment below and sustained the entry of Harris; whereupon the plaintiff appealed.

The petition filed, upon which the hearing was ordered, recites that on December 20, 1884, S. W. Mallory, receiver at Camden, issued and published notice that on February 9, 1885, Bledsoe would appear and make commutation proof on his homestead entry, before the judge of the court of said Hempstead county; that on the day prescribed, Bledsoe, in the absence of the judge, made said proof before H. J. Trimble, clerk of the court, and that said proof and \$100, in money, were left with said clerk to be forwarded to the local officers and were forwarded February 16, 1885.

Furthermore, it appears that said proof and money never reached the local office, at least, there is no record of its receipt, and the register of the local office at the time said commutation was made, has since deceased.

The plaintiff in this case, seeks the re-instatement of his entry, on the ground, substantially, that he had complied with the law and commuted his entry; that the cancellation of his entry on the ground of abandonment was in error as he had perfected his right to the land and therefore that the entry of Harris should give way to his superior right and his entry be re-instated.

It appears from the evidence submitted in this contest, that several months before the alleged commutation, plaintiff gave out word that he would sell his claim and it was so generally understood in the neighborhood; that he entered into an oral agreement about October, 1884, to sell and convey all his interest in and to said land in controversy to

A. Anderson, for the sum of \$450, but from some cause this was not carried out, and subsequently he sold or attempted to sell his claim to the land to James F. Hartin, who received what purported to be a conveyance of the same about the time the alleged commutation was made and thereafter plaintiff moved his family away from the land and abandoned the same.

The testimony as to the exact time this transfer was made is not clear, Bledsoe testifies that he made the same after the alleged commutation, but it is alleged on the other hand, that Bledsoe owed Hartin a sum of money; that Hartin also furnished the money to commute and that the sale was actually effected before the alleged commutation. However, as there is no record of such commutation and the papers, if there ever were any, have been lost, it is a difficult question to determine. The plaintiff, however, had not at the time this alleged conveyance was made, received final receipt for this land, hence he had no interest in the same to sell or convey, and therefore at the date plaintiff filed petition for re-instatement of his entry, he had forfeited all interest whatever in the land, by his attempted transfer and abandonment of the same.

If he had fully complied with the requirements of the homestead law and received his final receipt he would have had the right under the decisions of the courts and of this Department to sell or dispose of the land. Meyers *v.* Crof (13 Wall., 291); Falconer *v.* Hunt *et al.* (6 L. D., 512); Fritz Schenrock (7 L. D., 368).

The law provides that when proof is made on commuted homestead entries, the purchase money shall be paid to the receiver of the district land office.

In this case, however, neither the money nor the proof required by law, ever reached the local office and therefore no payment was made, or right acquired that would have entitled the plaintiff to a final receipt.

It is true that the law allows commutation proof to be made under some circumstances, before a clerk of the court, but there is no authority for paying the purchase money in any case to said clerk and if the plaintiff did so, he did it at his own risk.

In 1888, six years after the entry was made and four after abandonment, as there was no record of the alleged proof and purchase, the local officers allowed a contest against plaintiff's entry for abandonment; personal notice was given Bledsoe but from some cause it was not served in time to give him the requisite thirty days before trial, therefore the local officers fixed another date for trial, giving Bledsoe notice by registered letter in sufficient time so that he had sixty days before trial. Both these notices plaintiff acknowledges he received, yet at the date of trial, he failed to appear and answer the charge. The evidence submitted by the contestant Turnell, showed abandonment; the local officers so decided and when the case was reported to your office you affirmed the decision below, which became final.

Transferees have the right to file notice in the local office showing

their interest in a pending entry. Manitoba Mortgage and Investment Co. (10 L. D., 566). But in the case at bar, for five years or more neither the entryman nor the alleged transferee, paid any attention to the case, although in the meantime a contest had taken place and been decided finally against them. It is unreasonable to suppose that any entryman or his transferee who was entitled to a final receipt, would rest quietly for five years and in no way protect his claim, even when contested, or even make an inquiry at the local office relative to the alleged commutation.

If Bledsoe is so anxious now to protect the rights of his alleged transferee, why did he not appear at the contest and defend the claim or notify his transferee and give him an opportunity to do so? He did neither, but allowed a final judgment of cancellation to be made.

This entry was regularly contested, the entryman legally notified, the judgment of cancellation has become final. In the present appeal there are no errors assigned against said judgment and on that ground alone the petition for reinstatement should be rejected. Wiley v. Patterson (13 L. D., 452).

In view of all the circumstances in this case, the suspicion of bad faith, the indifference shown as to alleged commutation, the abandonment of the land, the failure to appear at the trial and defend their claim, the final decision against the entry, and the fact that the land is now embraced in the entry of Harris, I am satisfied that the decision that appellant's claim should be rejected, is correct.

Some testimony was brought out in the trial, going to show that the defendant had not complied with the homestead law, but this question does not enter into the issues of this case and can not therefore be considered now.

Your decision is affirmed.

MINING CLAIM—SURVEY—CIRCULAR OF DECEMBER 4, 1884.

CORRECTION LODGE.

In the survey of a mining claim the end line must terminate at the point where the lode, in its onward course or strike, intersects a senior location; and the regulations of December 4, 1884 to this effect are not in conflict with statutory provisions.

Secretary Noble to the Commissioner of the General Land Office, July 18, 1892.

I have considered the appeal taken by Rolla Wells from your decision of February 5, 1891, ordering an amended survey of the Correction Lode claim in conformity with the provisions of the circular of December 4, 1884, (3 L. D., 540).

Said Wells made mineral entry (No. 298) on October 11, 1887, for the Correction Lode and Millsite claim (survey No. 576 A) at Las Cruces, New Mexico.

Said claim was located June 28, 1886, and overlaps on its westerly

end the Evalena lode claim (survey No. 578 A), located on January 1, 1886.

In your letter of February 5, 1891, addressed to the United States surveyor general at Santa Fe, New Mexico, you stated that the said circular had been disregarded in the making and approving of said survey, and required the same to be amended so as to conform thereto.

There is also transmitted with the papers an application by the claimant for an order vacating and annulling paragraphs 1, 2, 3, 4, 5, 6 and 8 of said circular.

The survey in question conflicts with four other lode claims, at its westerly end, by the boundaries as given, but the area in conflict in each case is afterwards excluded from the area of the Correction lode, in the following words:

Saving and excepting from this the Correction lode claim, all that portion thereof in conflict with the Pacific lode claim, Sur. No. 577 A, with the Evalena lode claim, Sur. No. 578 A, with the Tangle lode claim, Sur. No. 580 A, and with the Smuggler lode claim, Sur. 583 A, which said excepted portion is bounded and described as follows, etc.

The object of extending the Correction lode survey into these other surveys was to secure within its area a triangular piece of ground not included in these surveys, and, at the same time, to theoretically make the west end line of the Correction lode parallel to its east end line.

This mode of making said survey plainly disregarded the instructions of said circular, which provides, *inter alia*, as follows:

1. The rights granted to the locator under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges, as may be "situated on the public domain." . . . His (the locator's) right to the lode claimed terminates where the lode in its onward course or strike intersects the exterior boundary of such excluded ground and passes within it.

2. The end-line of his survey should not, therefore, be established beyond such intersection, etc.

In the present survey the end-line was established beyond such intersection and was partly within four other surveys. But it is contended that said circular was improperly issued and is not a valid regulation, except as to paragraphs 7 and 9, because it ignores the rights of "cross lode" locator under section 2336 of the Revised Statutes.

Said section 2322 provides that the locator of all mineral lodes:—

Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations. . . . And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

In the present case the location of the Evalena lode was the senior location, and, therefore, Mr. Wells as the junior locator is excluded by the express terms of the above statute from "entering upon the surface" of the Evalena claim for any purpose, even for marking out the boundary of his westerly end-line as he contends. Yet by section 2325 the boundaries of the claim "shall be distinctly marked by monuments on the ground."

The circular of December 4, 1884, appears therefore to be fully warranted by said section 2322, and to be a proper and valid regulation of proceedings thereunder, taking said section alone into consideration.

But it is contended that the survey in question was authorized by said section 2336, which provides that:

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine, etc.

This section evidently applies only to cross lodes, and provides a right of way through the space of intersection which divides the two sections of the intersected vein or lode, "for the purposes of the convenient working of the mine." In the case of *Branagan v. Dulaney* (8 Colo., 408) the supreme court of Colorado held that this right of way was a way of necessity "for the purpose of excavating and taking away the mineral contained in the cross-vein."

But in the present case no such reason exists, or is pretended, for extending the survey in question into the domain of a senior survey, and said section 2336 has no application to a case where the end of a lode simply is made to project into the surface of another prior claim. *Engineer Mining and Developing Company* (8 L. D., 361).

In the case of *Belk v. Meagher* (104 U. S. 279-284) it is said:

The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior location, but all the world, because the law allows no such thing to be done.

In the present case the attempt of the locator is to obtain a piece of mining ground by a device which the law does not allow.

Said application is therefore denied.

Your judgment is affirmed.

RAILROAD GRANT—SETTLEMENT RIGHT.

LEONARD *v.* NORTHERN PACIFIC R. R. Co.

The purchase of the possessory claim and improvements of another confers no right under the settlement laws that will defeat the operation of a railroad grant; nor can such right be acquired through the possession of a tenant.

Secretary Noble to the Commissioner of the General Land Office, July 18, 1892.

I have considered the case of *Simon Leonard v. the Northern Pacific Railroad Company*, involving the NE. $\frac{1}{4}$ of Sec. 15, T. 10 N., R. 12 W., Helena land district, Montana, on appeal by Leonard from your decision

of June 12, 1891, holding for cancellation his pre-emption entry covering said tract.

This land is within the primary limits of the grant for said company, as shown by the map of definite location, filed July 6, 1882, and was also embraced within the limits of the withdrawal upon the map of general route, filed February 21, 1872.

The records show that one Joseph Scrutchfield filed declaratory statement No. 2166, for the land, January 4, 1872, alleging settlement December 4, 1869. Said filing served to except the tract from the operation of the withdrawal on general route.

On May 21, 1883, Leonard filed declaratory statement No. 5285 for this land, alleging settlement April 10, 1883, and, after due notice by publication, he made proof, on November 10, 1883, and cash certificate No. 2023 issued June 22, 1885.

On December 22, 1886, the company listed this land on account of its grant.

Upon the examination of Leonard's entry, you ordered a hearing to determine the status of the land on July 6, 1882, the date of the filing of the map showing the line of definite location of the road opposite this land.

The testimony offered at the hearing shows that in 1881 Leonard purchased the possessory claim of one William W. Royal to this land. At that time the tract in question was inclosed with an adjoining tract in an even-numbered section in one enclosure, the south boundary of this land being a river.

The tract in the even numbered section was patented land, owned by Royal, who seems to have used the tract in question, in connection therewith, and the sale by Royal to Leonard is alleged to have embraced both tracts—that is, so far as Royal had an interest therein.

Upon the tract in question, in addition to the fencing, was a house, presumably that built by Scrutchfield under his filing made in 1872.

At the time of this sale, Leonard was residing in the town of Phillipsburg, distant some thirty miles from the land in dispute. He alleges that he rented the land to one Howard, during the year 1882.

Howard lived upon the tract in the even section, and at most cut hay from the land in dispute.

In the spring of 1882, Leonard made application to purchase this land of the company, and, in January, 1883, he moved his family from town, to the tract in the even section, and in the following April moved them upon the land in question, where they continued to live until his offer of proof, six months later, when they returned to the tract in the even section.

Your decision holds that Leonard did not have such a claim to this land, on July 6, 1882, as would serve to defeat the grant, and, further, that his entry is illegal, having moved from land of his own in the even section to make settlement upon the tract in question.

The first question for consideration is, whether this land was excepted from the grant, for, if it was not, it passed under the grant, and any question of Leonard's disqualification in the matter of the entry of this land need not be considered.

In determining this question we must look to the condition of the land at the date of the definite location of the road. Was there such a claim at that date as would serve to defeat the grant?

It appears that after the abandonment of this land by Scrutchfield, when not shown, it was used by Royal in connection with adjoining land for which he held a government patent.

As to whether Royal laid any claim to this land, or, if he did, the nature of the same, is not shown. Whatever his claim, however, he abandoned the same by his sale to Leonard in 1881, prior to the date of the definite location of the road.

Leonard did not take possession under his purchase until April, 1883, nearly a year after the date of definite location, and had, prior to this time, applied to the company for the purchase of the same.

It has been repeatedly ruled that no rights are acquired under the settlement laws by the purchase of the possessory rights and improvements of another (*Willis v. Parker*, 8 L. D., 623, *Bunger v. Dawes*, 9 L. D., 329), and that no rights are acquired through acts performed by an agent. *McLean v. Foster*, 2 L. D., 175.

Leonard not having made a personal settlement upon this land prior to the date of the definite location of the road, I must hold that he acquired no such right through the purchase from Royal as would defeat the grant, nor could such right be acquired through the possession of a tenant.

I must therefore hold that the land passed under the grant, and for this reason sustain your decision and direct the cancellation of Leonard's entry.

CONTEST—PREFERENCE RIGHT.

JEFFERS *v.* MILLER.

A preference right can not be secured through a contest against an entry covering land reserved from such appropriation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 18, 1892.

On December 5, 1889, Robert H. Miller made soldier's additional entry No 1900 (final certificate No. 289), for lot 1, Sec. 23, T. 48 N., R. 4 W., Ashland, Wisconsin.

On December 2, 1890, Edward B. Jeffers filed his affidavit of contest against the entry, alleging:

From the best information I can get, said entry was fraudulent at its inception, as is shown by affidavit of A. R. Osborn, now on file in the General Land Of-

fice and I further swear from information and belief that the said land at the date of said entry were (was) withdrawn lands for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, under act of Congress of June 3, 1856, and as such was not of the class of lands which are open to entry that said soldier's additional scrip was made by power of attorney, and was therefore illegal.

He accompanied his contest with an application to make homestead entry of the land, and the receiver recommended a hearing.

On February 27, 1891, Messrs. Britton and Gray, of this city, as attorneys for Miller, moved the dismissal of the contest, and, on April 16, 1891, you sustained that motion and at the same time held Miller's entry for cancellation, saying:

There can be no question but that this land was not subject to Miller's application when presented, having been withdrawn under the grant to aid in the construction of railroads, made by the act of June 3, 1856. It is not needed in the satisfaction of the grant, and would be restored on the 17th instant, but for the entry of record. . . . Where applications had been made for any of these lands while in a state of reservation, it was held that such applications conferred no right upon the applicants, and that the lands would be restored without regard to the same,— citing Chicago, St. Paul, Minneapolis and Omaha Railway Company, 11 L. D., 612.

From that judgment both Miller and the contestant have appealed; the former alleges error in your holding that the land in question was not subject to his entry, and the latter (Jeffers) that it was error to hold the entry for cancellation, "without regard to the application of appellant," and further insisting that "if the entry is to be canceled, without a hearing, then appellant is entitled to an entry *nunc pro tunc*."

Since your action, dismissing the contest and holding the entry for cancellation, the following named persons made homestead applications for the land: Louis Oettel, April 18, 1891; Abel H. Dufur, November 11, 1891.

These applications were rejected, because of Miller' entry. The applicants duly appealed, and you have forwarded their appeals to this Department.

Attorneys for Miller strenuously insist that Jeffers's contest is "irregular and insufficient," and that your action dismissing the same was proper; but no grounds are presented in support of their allegation that his entry is valid. They promise, however, "in due time, to show that the land was properly entered, was subject thereto, and should be patented to Miller, but before any discussion can be had upon that question we submit and move that the contest, so-called, of Jeffers be disposed of."

This case being here upon Miller's appeal, as well as that of Jeffers, the merits of both appeals must be considered and finally disposed of.

It is manifest, from the recitals in your decision, that the land being in a state of reservation was not subject to entry, and that no rights were conferred upon Miller by reason of his entry. Your decision holding the same for cancellation is therefore affirmed.

It appears that all the lands withdrawn for the benefit of said company, and not needed in satisfaction of the grant, were ordered to be restored on April 17, 1891. The land in controversy would likewise have been restored to entry but for the entry of Miller thereon. His appeal from the action of your office suspended the final determination of the legality of his entry, until passed upon by this Department.

If, as above shown, the entry was illegal, because made of lands not subject thereto, it is unnecessary to consider or discuss the fraudulent character of the same, upon the basis of the Osborn affidavit, referred to by contestant. The land not being subject to entry, all other questions as to the manner in which it was made are eliminated.

If Miller's entry was invalid, because made of lands withdrawn for the benefit of a railway company, it follows that contestant's homestead application, made for the same lands, in the same condition, would have been properly rejected.

Had Miller filed a relinquishment of his entry immediately after the contest was filed, and had done so confessedly because of the contest, still contestant could not thereby have secured any rights to the land, the same not then being subject to entry. To have given him a preference right the contest must have been brought against an entry made for lands subject to entry. At most, the contestant only called attention, "from information and belief," to that which your office would necessarily have discovered and acted upon.

I think the application to contest was properly dismissed, and your action therefore is accordingly affirmed.

SWAMP LANDS—FIELD NOTES OF SURVEY.

STATE OF MICHIGAN.

To support a claim of the State to swamp land on the field notes of survey it should appear therefrom, where the survey is made prior to the grant, that the land is unfit for cultivation by reason of its swampy character.

Secretary Noble to the Commissioner of the General Land Office, July 18, 1892.

By letter of July 6, 1891, you refused to certify and patent to the State of Michigan, under the swamp land grant, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 1, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21, all in T. 51 N., R. 34 W., upon the ground that the field notes of survey do not show that the lands are of the character contemplated by the grant.

The State alleged in its application that these lands were shown by the field notes of survey to be of the character of lands contemplated by the grant, and that the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21 was certified by the

surveyor-general as swamp land, in list 13, Lake Superior district, May 11, 1852, which furnishes an additional reason why said land should be certified and patented.

You state that your office has received no list whatever dated 1852, but that the surveyor-general reported list 13, dated February 12, 1853, which did not embrace this tract.

From the rejection of their application the State appealed, assigning the following grounds of error:

First. In holding that the land in section 21 was not certified by the surveyor-general as swamp and overflowed land.

Second. In holding that the field notes of survey of all the land in question do not show them to be of the character contemplated by the granting act.

Third. Error in refusing to certify the patent to lands in the State as they clearly fall within the meaning of the act of September 25, 1850, granting swamp and overflowed lands to the State of Michigan.

I find nothing in the record in support of the allegation of the State, that the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21 was certified by the surveyor-general as swamp and overflowed land, or in conflict with your statement that the records of your office do not show that said trust was so certified.

The field notes in this case show that the greater part of each smallest legal subdivision is swamp and overflowed; but as they do not show that the lands were thereby rendered unfit for cultivation, and the survey having been made prior to the date of the grant, I see no error in refusing to certify and approve the lands without further evidence of the character of the land. If there is no adverse claimant, I see no reason why the State may not prove it by *ex parte* testimony, but, if there is an adverse claimant, a hearing should be ordered.

Your decision is affirmed.

*OVERRULED so far as
in conflict, 18 L. D. 283*
INIAN LANDS—ALLOTMENT—PATENT.

LIZZIE STRICKER.

A patent for Indian lands, issued under the general allotment act, and in accordance with the record, passes title to such land, and the Department is thereafter without authority to cancel said patent and issue another to correct an alleged error as to the name of the patentee.

Secretary Noble to the Commissioner of Indian Affairs, July 18, 1892.

I return herewith the communication from George Stricker of the Yankton Sioux tribe of Indians and accompanying land patent No. 822 issued in the name of his daughter Lucy Stricker which accompanied your letter of 7th ultimo.

As the correct name of the allottee is Lizzie Stricker you recommend that the patent be canceled and a new patent issued to Lizzie Stricker who is the allottee intended by the patent.

In response thereto, I transmit herewith an opinion of the Hon. Assistant Attorney General for the Department of the Interior, dated 15th instant, in which I concur, wherein it is held that it is beyond the power of this Department to cancel the said patent and issue a new one on the showing made.

The Assistant Attorney General suggests that Congress should be asked to enact such further legislation as would authorize the Department to rectify this and similar errors.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, July 15, 1892.

I beg to acknowledge receipt of a communication and accompanying papers, from the Commissioner of Indian Affairs, relative to the issue of patent to Lucy Stricker, which papers were referred to me June 8, 1892, by Acting Secretary Chandler, for an expression of opinion upon the matters presented.

It appears that on May 8, 1891, patent No. 822 was issued to Lucy Stricker, a Yankton Sioux Indian, as allottee, for the S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, of Sec. 33, T. 97. N., R. 65 W., 5 P. M., South Dakota.

George Stricker now returns said patent, asserting that it should have been issued to "Lizzie" Stricker, his child; and prays the error may be corrected. E. W. Foster, U. S. Indian Agent, certifies that the correct name of the allottee is "Lizzie" Stricker, "as shown in the census." J. G. Hatchett, the special allotting agent of the United States, certifies that by mistake the name was given as "Lucy" when he made the allotment; and the Commissioner of Indian Affairs recommends that said patent be canceled and a new one be issued to Lizzie Stricker.

The patent in this case was issued under the general allotment act of February 8, 1887, 24 Stat., 388, section 3 of which requires the allotments to be made under rules prescribed by the Secretary of the Interior, by special agents appointed for that purpose, and the United States Indian agent in charge of the reservation about to be allotted. The allotments when made are to be certified in duplicate to the Commissioner of Indian Affairs, one copy to be retained by him, and the other transmitted to the Secretary of the Interior, for his action, and to be deposited in the General Land Office. This certified list constitutes the record in the case and in accordance with that record the patents are prepared and issued in the General Land Office.

I understand, from the papers forwarded by the Commissioner of Indian Affairs, that the patent is in accordance with the duplicate list in his office. Indeed, Hatchett, the special allotting agent, states that by mistake the name of Lucy was placed upon said list, presumably, by himself. An inspection of the duplicate list in the General Land

Office, which I have caused to be made, shows that the patent was issued strictly in accordance therewith.

It is therefore to be assumed that said patent is in accordance with the record duly made by the proper officer. If this assumption is correct, it is beyond the power of this Department and I so advise you, to cancel said patent and issue a new one, on the showing made. The law on this point seems to be well settled, and I need cite no other authority to sustain it than your recent decision in the case of Thaddeus McNulty, 14 L. D., 534.

The Department being powerless of itself to correct this mistake, though committed by its own officers, the proper party is left without land because her name is not on the list of allottees, whilst a patent is outstanding for land to which the patentee, if in existence, is not entitled. In contemplation of law, the patent, so improvidently issued, has passed the legal title to the land covered by it, out of the United States and beyond the reach or control of the officers of the Executive, whilst there is no one who can properly surrender and relinquish the same. Relief might possibly be obtained by invoking the aid of a court of equity. But this course would be attended with difficulties, delays and expense which neither the government or allottee ought to be compelled to encounter.

In view of the circumstances of the case, and I am informed unofficially there are many like it, I beg to suggest that Congress should be asked to enact such further legislation as would authorize the Department to rectify this and similar errors.

SURRENDER OF PATENT—INDIAN ALLOTMENT.

PRETTY CRAZY EYES.

The sole heir of an allottee may surrender, under the act of November 19, 1888, for purposes connected with the administration of Indian affairs, the patent theretofore issued and take other land in lieu thereof.

When a patent is thus surrendered under said act a formal relinquishment must be endorsed on said patent, and due proof of heirship furnished. The new patent should be issued to the heir of said allottee, as such, and contain a recital of the facts with respect to the issue and surrender of the original patent.

Secretary Noble to the Commissioner of Indian Affairs, July 18, 1892.

I acknowledge the receipt of your communication of 7th instant, and its enclosures relative to the cancellation of a patent No. 873 issued to Pretty Crazy Eyes a Yankton Sioux Indian.

In response thereto, I transmit herewith an opinion of the Hon. Assistant Attorney General for this Department dated 15th instant, in which I concur, wherein he holds that as the relinquishment is not properly endorsed upon the patent and because it incorrectly gives the

number of the patent surrendered, it should not be accepted, attention is also called to the fact that the statement of the father in the relinquishment is the only evidence in the papers to show that the deceased allottee was unmarried and without issue and that he was her father and only heir.

I agree with the Hon. Assistant Attorney General that this uncorroborated statement should not be accepted and you will direct the Indian Agent to report on the subject accompanied by the testimony of parties cognizant of the facts.

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, July 15, 1892.

On June 8, 1892, Acting Secretary Chandler referred to me, for an expression of opinion on the matter therein presented, a communication, and accompanying papers, from the Commissioner of Indian Affairs, respecting the allotment heretofore made to Pretty Crazy Eyes, a Yankton Sioux Indian, and I beg leave herewith to submit my views.

It appears that on May 8, 1891, patent No. 873, was issued to said Indian for, and as an allotment in severalty to her of, the N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ and Lot No. 1 of Sec. 10 T. 96 N., R. 65 W., of 5 P. M., South Dakota, and that thereafter said allottee died, without having married, leaving her father, Crazy Eyes, or Istakmaskinyan, as her sole heir and legal representative.

The land so allotted is now wanted by the Indian Office for the establishment of a substation, the residence of an additional farmer, and the erection thereon of a warehouse for the storage of government property.

The father and heir of the allottee is willing to relinquish the land for these purposes, if other lands be allotted in lieu thereof. To this end said patent has been surrendered for cancellation, and what purports to be a relinquishment and quit-claim to the United States all of his interest, right or title to said land, has been executed by him before a notary public and attached to this patent. And I presume an expression of opinion is desired from me as to whether said patent may be so surrendered and a new allotment made to the father; and, if these inquiries be answered in the affirmative, whether the papers submitted are in due form.

Section 2 of the act of November 19, 1888, 25 Stat., 611, I think covers the case. Its provisions are as follows:

The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such

surrendered patent: *Provided*, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven.

The patent recommended was issued under the allotment act of 1887, and, therefore, under "existing law;" it is for land on the reservation to which the Indians belonged, and it is now proposed to select in lieu thereof other lands under the provisions of said act of 1887. There seems to be a good and sufficient reason why in this case you should exercise the discretion with which you are clothed by the act, as the purpose for which the exchange is sought to be made is "for the best interest of the Indians," being for the promotion of the administration of their affairs only.

I conclude, therefore, that such an exchange of lands, as is proposed, may be consummated between the government and an allottee; and if with an allottee no reason suggests itself why the heir who becomes entitled to allotted land may not do the same thing.

Section 5 of the allotment act of February 8, 1887, *supra* provides that the allotted lands are to be held in trust for the benefit of the allottee, "or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located."

The lands in question are stated to be situate in South Dakota. By the civil code of the Territory of Dakota, Section 778, it is provided that "If the decedent leaves no issue nor husband, nor wife, the estate must go to the father." And, by section 24 of the act of February 22, 1889—24 Stat., 676—enabling the people of that Territory to form two states out of the same, this law was continued in force in the new states "except as modified or changed by" said act "or the constitution of the states, respectively." It has not been so modified or changed and therefore is yet in force. So that, if the deceased allottee was unmarried and without issue as stated the father is the sole heir, and as such can do all, in the premises, which she could do, if alive.

The act of October 19, 1888, *supra* contains a provision that when the patents for allotments are surrendered, a formal relinquishment by the Indian to the United States, of all his right, title and interest in the allotted land shall be "properly indorsed thereon." In the present case there is no formal relinquishment properly "indorsed" on the patent, but it is on a separate paper which is attached to the patent. This requirement seems to be a wise one, inasmuch as upon compliance with it, the patent and the relinquishment become thereafter inseparable as would not necessarily be the case with a paper merely attached to it. The rule is a good one and I think it should be followed here.

It is my judgment that the relinquishment transmitted should not be accepted, because not "properly indorsed" on the patent, and because it incorrectly gives the number of the patent surrendered. But when so indorsed it may be accepted, the patent canceled, a new allotment made in lieu of the surrendered land and patent issued therefor.

The patent for the new allotment cannot be issued in the name of the original allottee, because she is now known to be dead. But as it is to be issued on account and in lieu of the allotment originally made to her, it should be issued to her father as her heir, and the issue and surrender of the original patent, giving the date, number and record page thereof, and the death of the allottee and the heirship of the father should be recited in the new patent.

Attention is called to the fact that the statement of the father in the relinquishment is the only evidence in the papers to show that the deceased allottee was unmarried and without issue, and that he was her father and only heir. I think this uncorroborated statement should not be accepted as sufficient evidence upon which to base action so important. And the Indian Agent should be ordered to make a report on the subject, accompanied by the testimony of parties cognizant of the facts.

TIMBER CULTURE ENTRY—ACT OF MARCH 13, 1874.

ANDERSON *v.* POTTER.

A timber culture entry embracing land in different sections may be allowed to stand, where made prior to the act of June 14, 1878.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 20, 1892.

On the 10th of August, 1876, James W. Potter made timber culture entry for the S $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec. 8, and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 17, T. 23 S., R. 56 W., Pueblo land district, Colorado.

On the 26th of December, 1888, Charles Anderson filed an affidavit of contest, alleging that the said entry was illegal, because it embraced land in two different sections, and that the defendant had not in any manner complied with the timber culture law as to the portion in section 8.

A hearing followed, resulting in a decision by the local officers, on the 1st of May, 1889, in which they recommended the cancellation of the entry so far as it related to land in section 8. That decision was affirmed by you on the 6th of June, 1891, and an appeal from your decision brings the case to the Department.

In your decision you say: "The right to make entry of land under the timber culture law, in more than one section, has never been recognized, but on the other hand, has always been denied." In support of your statement you cite the case of William A. Cox (3 L. D., 361), which was a decision by Commissioner McFarland, in December, 1884. I do not find that the question has ever been passed upon by the Department, under the act of 1874, neither do I find any provision in the statute under which the entry in question was made, which deals directly with the subject.

The act of March 3, 1873 (17 Stat., 605) provided that "only one quarter in any section shall be thus granted." The act of March 13, 1874 (18 Stat., 21), which amended the act of March 3, 1873, provided that "not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act, unless fractional subdivisions of less than forty acres are entered which, in the aggregate, shall not exceed one quarter section."

The act of March 13, 1874, was amended by the act of June 14, 1878 (20 Stat., 113) which provided that "not more than one quarter of any *one* section shall be thus granted, and that no person shall make more than one entry under the provisions of this act."

It was not until the passage of this last named act, that the entry was limited to "any *one* section." Prior to that time the words of limitation had applied to the quantity of land to be entered, and not to the location thereof. It is true that the change in the statute in this respect is very slight, and consists only in inserting the word "one" between the words "any" and "section" in the former statutes.

Slight as is this change, the Department has recognized it as being sufficient to change the rule in reference to entries in more than one section, as it was held in the recent case of *Ingalls v. Lewton* (13 L. D., 509), that under the provisions of the act of March 13, 1874, (which was the act in force prior to the passage of the act of 1878), a second entry of land might be made, not only in a different section but in a different township, where the two entries taken together did not exceed one hundred and sixty acres, and the first entry was for less than forty acres.

Under this ruling it is clear that if Potter had made his entry for a fractional part of a quarter section in section 8, of less than forty acres, he could have subsequently made an additional entry in section 17, provided the land embraced in the two entries did not exceed one hundred and sixty acres. I can see no reason why this result may not as well be attained by a single entry, and find no departmental decision adverse to such ruling, rendered while the act under which Potter's entry was made was in force, or in reference to an entry made under said act.

The application of William A. Cox (3 L. D., 361), the case cited by you, was made under the law of 1878. Commissioner McFarland, in rendering his decision in that case, does not say that the application is contrary to law, but rejects it "because it embraces portions of different sections, which is not admissible under the rules of this office." This decision of Commissioner McFarland was rendered on the 3d of December, 1884, and was evidently based upon that of Acting Secretary Joslyn, rendered on the 4th of April of that year, in the case of James C. McLafferty et al. (11 C. L. O., 54). In that case, as in the

case of Cox, the applications were made under the law of 1878, and they were rejected because "such have been the uniform rulings," where the application embraced lands in two sections. No rulings, however, are cited in support of the decision, nor do I find any made by your office or by the Department prior to the passage of the act of June 14, 1878, wherein similar views are expressed. The entry of Potter having been made prior to the passage of that act, is not controlled by its provisions, nor by the decisions made thereunder.

The evidence submitted at the hearing in the case at bar, established the fact that Potter sought to make entry for three forties of land in section 8, but as it did not lay in a square form, the local officers advised him to change his application to cover the land constituting his entry. This he did at their suggestion, and had since occupied the whole of said land. He had fenced it all, and had cultivated the requisite amount of the land to trees, the forty acres upon which the trees were growing being enclosed by a separate fence. The trees were upon section 17, but he had a driving track which was partly upon both eighties, and ditches which conveyed water to his timber tract, and upon each of the forties in his timber culture entry, and also to his house, which was situated north of and adjoining the land in section 8, and to a fish pond near his house. To reach the main road from his house he was obliged to cross the land in section 8, his improvements upon which he valued at \$150. He used the land in section 8, included in his timber culture entry, principally for pasture.

There is no contradiction in the evidence in the case, and the contestant does not claim that the entry should be canceled, so far as it relates to the land in section 17, upon which Potter's trees are growing.

I have given the case careful consideration, and my conclusion is, that under the law in force at the time Potter's entry was made, it was properly allowed by the local officers, notwithstanding it embraced land in more than one section. The decision appealed from is therefore reversed, and the contest is dismissed.

RAILROAD GRANT—ACT OF JUNE 15, 1880.

NORTHERN PACIFIC R. R. CO. v. MATTHEWS.

The right of purchase under section 2, act of June 15, 1880, can not be set up, by one who claims no interest through the original entryman, for the sole purpose of defeating the operation of a railroad grant.

*Secretary Noble to the Commissioner of the General Land Office, July 20,
1892.*

I have considered the case of the Northern Pacific Railroad Company *v.* Thaddeus L. Matthews, involving the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, sec. 23, T. 10 N., R. 3 W., Helena land district, Montana, on appeal by the company from your decision of July 2, 1891, holding said tract to be excepted

from the grant made by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of said road.

This tract is within the limits of the withdrawal made upon the filing of the map of general route, July 21, 1872, but was excepted therefrom by the pre-emption filing by one Charles Tache, filed March 24, 1870, alleging settlement same date, which was of record, *prima facie* valid and unexpired at the date of said withdrawal.

Upon the definite location of the road, shown upon the map filed July 6, 1882, this tract falls within the primary, or granted, limits.

On March 22, 1871, Tache transmuted his filing to homestead entry No. 481, which entry was canceled February 8, 1879, for failure to make proof within the statutory period.

Matthews's claim to this land is based upon his pre-emption filing No. 9514, made on October 10, 1888, alleging settlement same date. This filing was held for cancellation by your office letter of December 4, 1890, the land appearing to be free from claim at the date of the definite location of the road, but, upon claimant's motion, your decision of July 2, 1891, reconsidering the action of December 4, 1890, and held the land to have been excepted from the grant, by reason of the act of June 15, 1880 (21 Stat., 236), the second section of which provides:

That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

The theory of your decision being that Tache might have availed himself of the provisions of said act, and this right in him, although not asserted, was sufficient to defeat the grant, so that another might make entry thereof.

In the present case, the entry had been canceled in 1879, and, in effect, your decision reinstates the same for the purpose of defeating the grant, but for no other purpose.

It is clear that Tache, or his transferee, such as mentioned in the act, was, upon the passage of the act of June 15, 1880, authorized to entitle himself to the land entered, by making payment as required, provided this right should not interfere with the rights of others who may have entered such lands prior to the offer of payment, but, as held in the case of Nathaniel Banks (8 L. D., 532), this purchase is not a consummation of the original homestead entry, operating by relation from the date of such entry, but a private cash entry, operative from the date of such cash entry.

In the present case neither Tache, nor any one claiming through him, has sought to make purchase of this land.

From the lapse of time it is reasonable to presume that no such right exists, or, if it does, it will not be asserted.

For the present case, however, it is unnecessary to pass upon such right; suffice it to say, no such right has been claimed, and I am of the opinion that it can not be pleaded by another, who claims no interest in the land through the original entryman, as in the present case, merely in order to defeat the grant, and thereby open the land to entry by such person.

It is safe to say that no right of purchase now exists, for the filing by Matthews would bar the right of purchase, and as no such right has heretofore been asserted by Tache, or others claiming through him, upon the record as made, I must reverse your decision, and hold that the land was not subject to Matthews's filing when allowed. The same will accordingly be canceled.

This is no wise in conflict with the rulings in the case of said company against Burt (3 L. D., 490); same against Holmes (5 L. D., 333); same against McLean (5 L. D., 529), and same against Quinlan (12 L. D., 310), for in all these cases the land was claimed either by the original entryman or others claiming through such person.

PRACTICE—APPEAL—NOTICE.

BRADFORD *v.* ALESHIRE.

An appeal will lie from a decision of the General Land Office holding a notice of contest insufficient, and directing further proceedings, or in default thereof a dismissal of the contest.

*Secretary Noble to the Commissioner of the General Land Office, July 20,
1892.*

On the 21st of April, 1892, you transmitted to the Department an application for a writ of certiorari, filed by the attorneys for Mrs. A. D. Bradford, founded upon your decision of March 23, 1892, in the case of A. D. Bradford *v.* David Aleshire, in which you denied the right of appeal to the Department from your decision rendered in the case on the 13th of February of that year.

The land involved is the NE. $\frac{1}{4}$ of Sec. 9, T. 10 S., R. 1 E. New Orleans land district, Louisiana, for which David Aleshire made timber culture entry on the 1st of April, 1887.

It appears that this entry was contested by Bradford, the notice of hearing being served upon Aleshire by publication. At the hearing he made default, and proof of the charges contained in the contest affidavit was duly made. Before decision thereon by the local officers, the entryman moved that the contest be dismissed, on the ground that the affidavit upon which the order of publication was granted was

made by the attorney for the contestant and not by the contestant herself. In deciding this motion the local officers said:

Inasmuch as the affidavit asking for publication of the notice hearing is not sworn to by contestant, but by her attorney, we are of the opinion that contestee's objections are well taken, and should stand and the motion to dismiss is hereby sustained. The case is therefore dismissed without prejudice to the rights of contestant of applying for a new hearing within thirty days from receipt hereof.

From that decision an appeal was taken to your office, where the same was affirmed by you on the 13th of February, 1892. In rendering judgment in the case you said:

In all cases as the basis of an order for publication, an affidavit is required by the contestant, and such affidavit can be made by the contestant only. The rules in regard to obtaining notice by publication are construed strictly, and without passing upon the other points raised by the record, I find the notice defective for the want of an affidavit made by the proper party, it having been made by contestant's attorney. Your action is therefore affirmed, and the case is remanded for a continuance of the proceedings after due notice hereof, or in default thereof on the part of the contestant, a dismissal of the contest for want of prosecution.

An appeal from such decision by you was taken to the Department, and on the 23d of March, 1892, you dismissed the same, and directed the local officers to proceed as instructed by your letter of February 13, 1892. As already stated, the application before me is based upon your action of February 13, and is made under rule 83 of the Rules of Practice.

The question before me is not whether the affidavit upon which the order for publication of the notice of hearing was made, was or was not sufficient, under the rules of practice of the Department. The only question for determination by me is, was the order contained in your decision of February 13, 1892, one which is excepted from appeal by rule 81 of the rules of practice, which provides that—

An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims except in cases of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner.

In the case of the State of Oregon (13 L. D., 259), it was held that "a question that involves the jurisdiction of the Commissioner in the disposition of public land is properly the subject of appeal." That same case also held that "the authority of the Commissioner of the General Land Office to order a hearing may be properly reviewed on application for certiorari."

I am of the opinion that when you say in your decision of February 13, that—

The case is remanded for a continuance of the proceedings after due notice hereof or in default thereof, on the part of the contestant, a dismissal of the contest for want of prosecution,

that a question is presented "that involves the jurisdiction of the Com-

missioner in the disposition of public land." The decision cited holds that such a case "is properly the subject of appeal." You not only order a hearing, but you dispose of the land, in a certain contingency. It was a decision which amounted to the determination of a substantial right, and in *Rathbun v. Warren* (10 L. D., 111), it was held that such a decision is not interlocutory, although made between the commencement and end of an action.

You make no provision for the service of notice of contest, other than that already made in the case, but only provide for a continuance of the proceedings after due notice of your decision, or a dismissal of the contest for want of prosecution. If, as was said in the case cited from 13 L. D., your authority to order a hearing may be properly reviewed on application for certiorari, most certainly your authority to order a dismissal of a contest may properly be the subject of appeal, or your refusal to allow the same, may be reviewed on an application such as is now before me.

My conclusion is, that your decision of February 13, 1892, was one from which an appeal could properly be taken, and you are therefore directed to certify to the Department the record in the case for its consideration.

PRE-EMPTION ENTRY—SECTION 2260, R. S.

GEORGE BOHL.

To disqualify a settler under the second clause of section 2260 R. S., it must appear that he abandoned land of his own with the purpose of residing on public land in the same State.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 21, 1892.

I have considered the appeal of George Bohl from your decision of July 20, 1891, holding for cancellation his pre-emption entry of the SE. $\frac{1}{4}$ of Sec. 13, T. 30 S., R. 43 W., Garden City, Kansas, on the ground that he was not a qualified pre-emptor, because, in answer to question forty-five he said—"I moved off an 80 acre farm of my own in Allen Co., Kansas."

In his appeal claimant alleges that it was error to hold said entry for cancellation without a hearing, after the final proof had been made to the satisfaction of the register and receiver, and final certificate had been issued thereon; that the final proof does not show on its face that he removed from land of his own in said State "with intention of settling on the particular tract of land proved up under the pre-emption laws."

In support of his appeal claimant has filed his affidavit, in which he swears—

That prior to making said entry he lived on an eighty acre tract of land in Allen county, Kansas, which last named tract was then mortgaged for \$800, which was about the actual value of said tract of land. That when he left Allen county he left for the purpose of abandoning his home and residence on said eighty acres of land, and that he did abandon said residence thereon at the time of leaving there, and removed to western Kansas, and that affiant was about three weeks on the road. That affiant had no residence during said three weeks, but was going west to find him a home. That after he reached western Kansas he went to see the tract of land afterwards entered by him under the pre-emption laws, and decided to locate on it. That he did so in good faith. That before doing so he fully stated all the facts concerning the eighty acres of land in Allen county, Kansas, to one O. S. Murphy, who was deputy clerk of the district court of Stanton county, Kansas, and who was making out papers for persons who desired to enter government land, and representing that he knew fully what their rights were. That affiant was told that he was a qualified pre-emptor, and acted upon said advice and in good faith entered said lands. That he has improved said tract to the value of \$600 actual cost. That he is the owner of said land. That at the time of making said final proof, affiant was simply asked to state where he lived before coming west, and told of the eighty acre tract, that he was not asked to state, as he would have done, that he had abandoned his residence three weeks before locating on said tract in Stanton county, Kansas. That affiant asks that in case said patent may not be issued by the Hon. Secretary that this case be referred to the board of equitable adjudication.

It is quite evident that the claimant made no effort to conceal the truth in his said final proof. It is true that if he comes within the statutory inhibition against allowing a pre-emption entry by a "person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory" he cannot acquire title to said land under any circumstances.

In the case at bar, it does not affirmatively appear that claimant abandoned his own land to reside on *public land* in the same State. True, he abandoned his residence on his own land, as he admits, for the purpose of finding a home in the West, and was on the road some three weeks, but it does not conclusively appear that he did this for the purpose of residing on the *public land* in the same State. The fact that he did so settle under the proof in this case imposes upon the claimant the duty of showing that it was not his intention when he abandoned said residence on his own land to settle upon the public lands in the same State, or that after such abandonment he acquired another residence on land not his own in good faith prior to his settlement on the tract covered by his said entry. For this purpose the case is remanded for further proceedings, and you will direct the local officers to notify the claimant that he will be required to furnish supplemental proof before them within thirty days from due notice hereof, showing all the facts relative to his abandonment of residence on his own land, and his subsequent conduct up to the time of settlement upon his pre-emption entry. Upon receipt of said proof you will re-adjudicate the case.

INDIAN LANDS—KIOWA AND COMANCHE RESERVATION.

J. M. JOHNSON.

The tract of land in townships seven and eight, ranges fourteen and fifteen, Oklahoma, lying north of the Washita river and south of the recognized boundary of the Kiowa and Comanche reservation, between two points where said river crosses said boundary line, is not open to settlement or entry but reserved for the benefit of the Kiowa and Comanche Indians, until such time as Congress shall take action in the premises.

Secretary Noble to the Commissioner of the General Land Office, July 21, 1892.

I am in receipt of your letter of June 24, 1892, transmitting a letter from J. M. Johnson of Little Rock, Arkansas, with reference to the status of certain lands in townships 7 and 8, north, of ranges 14 and 15 west, Oklahoma.

The land in question is a tract, stated by you, to contain about two thousand seven hundred acres, located north of the Washita River and south of what is recognized as the north boundary of the Kiowa and Comanche Indian reservation, between two points where said river crosses said boundary line, the distance between said points being about six miles on said boundary lines. I do not deem it necessary to repeat the statements made in your letter, but accepting the same as in the main correct, we are confronted with the fact, that this tract of land which is, according to the terms of the treaty between the United States and the Kiowa and Comanche tribes of Indians, concluded October 21, 1867 (15 Stat., 581) ratified July 25, 1868, and proclaimed August 25, 1868, clearly within the limits of the body of land set apart for the absolute and undisturbed use and occupation of said Indians, was also included within the limits of the tract of land set aside by executive order dated August 10, 1869 (executive orders relating to Indian reservations issued prior to April 1, 1890, page 31), for the use and occupation of the Cheyenne and Arapahoe Indians, and consequently, was ceded by them (so far as it was in their power to act in the premises) to the United States, by treaty of October, 1890.

It is clear to my mind, that this tract of land having been reserved and set aside by treaty with the Kiowa and Comanche Indians in 1867, could not be legally included in a tract set aside and reserved for another purpose by an executive order in 1869. Another question, however, may arise as to the legal status of the tract in view of the act of Congress of March 3, 1891, ratifying the agreement of October, 1890, with the Cheyenne and Arapahoe Indians, which agreement specified that said tract was ceded to the United States. I do not deem it necessary, at this time, to discuss this phase of the question.

The 16th section of the act of March 3, 1891 (26 Stat., 989), provides that when the lands obtained from the Cheyenne and Arapahoe Indians "shall by operation of law or proclamation of the President of the

United States be open to settlement they shall be disposed of to actual settlers only &c. &c."

While it is true that the Proclamation of the President, issued April 12, 1892, recited the boundaries of the Cheyenne and Arapahoe Indian reservation which included the tract in question, it was expressly stated in said proclamation that—

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Cheyenne and Arapahoe Indian Reservation, Oklahoma Territory," opened to settlement by proclamation of the President.

The tract in question was not included in said schedule; hence it is clear that it is not open to settlement by proclamation of the President. Is it open to settlement by operation of law?

I think no lengthy argument is necessary to sustain the proposition that the act of March 3, 1891, above cited, is a special act, that it had reference only to particular bodies of land, which land was to be disposed of in a particular manner, hence it provided that the same might be opened to settlement by proclamation or they might be opened to settlement by operation of law, but the words "operation of law," used in this connection and under these circumstances, clearly had reference to some law which might be enacted, or put in operation, at some future time, by Congress, or in other words, Congress might open these lands to settlement by operation of some law, instead of by proclamation of the President, but as yet Congress has not seen fit to put any such law in operation.

Therefore, in reply to your request to be advised as to the status of these lands, I would say, that waiving the question as to whether, or not, they actually remain a portion of the reservation set aside by treaty with the Kiowa and Comanche Indians, it must be held, that none of the lands in question, which are situate south of the line of the north boundary of said reservation, as indicated on the official plats of survey, and as recognized by the land department, are subject to settlement or entry, but said lands will be considered, by this Department as reserved for the use of the Kiowa and Comanche Indians, until such time as Congress shall take action in the premises.

RAILROAD RIGHT OF WAY—UNSURVEYED LAND.

TINTIC RANGE RY. Co.

Maps of definite location submitted under the right of way act of March 3, 1875, will not be approved, where the line of road, either wholly or in part, traverses unsurveyed land.

Secretary Noble to the Commissioner of the General Land Office, July 22, 1892.

I have at hand your office letter of the 19th instant enclosing two maps of definite location of sections of the line of road in Utah of the Tintic Range Railway Company, covering 84.42 miles and 66.17 miles,

respectively and filed for approval under the right of way act of March 3, 1875. Your letter states that a small section of the line of road on map No. 1 passes over unsurveyed lands and that a large portion of that on map No. 2 passes over such lands. The recommendation is that the maps be approved as to that portion only, of the line, on surveyed lands.

On March 21, last, in departmental letter to you, and for reasons set forth, it was directed, that, in future, maps covering lines of road over unsurveyed lands be not submitted to the Department.

The maps before me come within the spirit and intent of that letter although the line of road delineated thereon passes over both surveyed and unsurveyed lands. Map No. 1 shows that the road it embraces passes over alternate tracts of surveyed and unsurveyed lands; extending over the latter class for thirty-one of the 84.42 miles submitted. Map No. 2 embraces more than fifty consecutive miles of road over unsurveyed lands, leaving but about fifteen miles over surveyed lands.

I do not consider it to be good practice to accept these maps in face of the determination expressed in the above letter of March last, even if the approval, in terms, is made to attach to surveyed lands alone.

The affidavits and certificates attached thereto treat these maps in their entirety, from terminus to terminus, without regard to the classes of lands involved. They are filed for the purpose of securing approval for their entire length.

The act under which approval is requested, on the other hand, expressly deals with maps over but one class of lands, viz.: surveyed lands. It is this class of lands alone that maps submitted for approval should embrace. Maps showing lines of road traversing the other class, wholly or in part, are not recognized by the right of way railroad act, nor can they be by the Department in its execution.

The maps are herewith returned without approval.

—
SURVEY-ISLAND-RIPARIAN OWNER.

*Overruled
26 L.D. X5-3*

CHILDRESS ET AL. v. SMITH.

The extension of the public surveys over an island, previously omitted therefrom, is a departmental determination that such land belongs to the government, and on the subsequent entry thereof the adverse rights of riparian owners, claiming under the first survey, must be determined in the courts.

Secretary Noble to the Commissioner of the General Land Office, July 7, 1892.

By your decision of July 29, 1891, you dismissed the separate contests of Robert Childress and William W. Glenn against the commuted homestead entry of John W. Smith, for the southeast fractional section 32 and the northwest fractional section 33, in T. 14 N., R. 8 W., 5th P. M., Harrison, Arkansas.

This tract consists of an island in White river, containing about eighty acres of land. By the first survey, made in 1821, White river was meandered, and this island, if it then existed, was omitted from the survey. In 1854 the government survey was extended over it, and it was described as above.

So it remained, uncultivated and practically unclaimed, until June 24, 1886, when the defendant herein made homestead entry therefor. April 28, 1888, he commuted it to cash entry, No. 3393, and received final certificate May 4th of the same year.

The plaintiffs herein, Childress and Glenn owned separately the land on the east side of White river, opposite this island, for which they derived title from the donation entry of one Alvis Reed, made in 1830.

On the 1st of May, 1888, Childress subscribed to a verified and corroborated petition, alleging:

1st. That said land is not subject to occupation as a homestead by reason of overflows.

2d. That said homestead entry was not made in good faith, but for speculative purposes.

3d. That the same was obtained by the fraud of the entryman; and,

4th. That these two contestants, who owned the land on the east bank of White river, are the lawful owners of the island upon which this entry is located, and asked that it be "canceled, set aside, and held for naught."

On May 16, 1888, Glenn also subscribed to a similar petition.

These two petitions were forwarded to your office, and on October 1, 1888, your predecessor ordered a hearing before the local officers to determine the rights of the parties.

This hearing was had, commencing December 12, 1888, and on April 10, 1889, the local officers jointly found in favor of the entryman. Contestants appealed, and by your said decision, now before me, their action was affirmed, and contestants have now appealed to this Department.

The evidence has been examined, and I think entirely fails to sustain either of the first three allegations of contest, and is very conflicting and unsatisfactory as to the last—namely, the ownership of the land involved, which necessarily depends upon the nature of the stream, location, condition, and existence of the island *as such* at the date of the survey of 1821.

I do not feel called upon to pass upon this question, nor should I feel justified in doing so with the meagre evidence before me.

The land was surveyed by government authority in 1854, and since that time has been subject to settlement and entry as other government land.

If this question had been presented to me upon an application to survey this land and open it to entry, the question raised by the record would properly and necessarily have to be determined. But that ques-

tion was passed upon in 1854, when the survey was made. Now, it is contended by the contestants, that the land then surveyed was not government land, but belonged to the riparian owners.

This is a question essentially for the courts to determine. If it is true that the plaintiff's own this land, their title was derived through the patent issued to Reed. If it has so been patented to Reed, then this Department has no longer any jurisdiction of the matter, it having parted therewith when patent was issued to him. If the land was not included in that patent, then it belongs to the government and is subject to the entry of Smith.

The ordering of the survey of 1854 was a determination by your office (the proper tribunal) that the land belonged to the government.

It has been so held and considered for nearly forty years, and as such it was entered by Smith. I shall therefore not disturb this entry, but leave the contestants to their remedy in court. If, upon a judicial investigation, it should be determined that the government has issued a patent to land not owned by it, the court will set it aside and decree title in the proper owners.

Your decision dismissing the contests is sustained.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

WILLIAM RAY DURFEE.

The relief provided by section 3, act of March 3, 1887, extends to the re-instatement of an application to enter erroneously rejected on account of a railroad grant; but the provisions of said section are not applicable if the application to enter is properly rejected.

No rights under the pre-emption law are acquired by settlement on lands withdrawn for railroad purposes, nor by application to enter the same while so reserved.

Secretary Noble to the Commissioner of the General Land Office, July 22, 1892.

On April 13, 1863, William Ray Durfee settled upon lots 1 and 2 of section 6, lots 1, 2, and 3, of section 7 and N.W. $\frac{1}{4}$ of section 8 T. 48 N., R. 15 W., Bayfield now Ashland, Wisconsin, as shown by his corroborated affidavit.

On April 23, 1863, following, he presented his pre-emption declaratory statement therefor but was informed by the local land officers that he could not take the lands in sections seven and eight for the reasons—

First. That the lands in section seven which he applied for were railroad lands and therefore not subject to entry.

Second. That the lands in section eight applied for could not be taken for the reason that they would not be contiguous to those in section 6, if the lands in section 7 were omitted from the application as he was informed they must be.

His improvements were all on section 6, and in view of the advice above

given he amended his application No. 545, and made final proof on May 24, 1864, and received final receipt and patent for lots 1 and 2 of Sec. 6, T. 48 N. R. 15 W. He has now filed his corroborated affidavit showing the above facts and has applied to be re-instated in his rights as provided in the third section of the act of Congress, approved March 3, 1887 (24 Stat., 556). On April 22, 1891, you considered the application and held that Durfee has no claim to the land under the section referred to, as he was not permitted to make entry therefor. You accordingly rejected his application.

He has appealed from your judgment as to the lands in section 7 only.

The record shows that the tracts in question are within the indemnity limits of the grant made by act of Congress on June 3, 1856 (11 Stat., 20), for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and were selected by said company in 1883, but not being needed in the satisfaction of the grant they have been ordered restored.

Your rejection is based solely on the ground that applicant never had an entry for the tracts and hence not entitled under the section in question to the relief given by said section, to those whose homestead or pre-emption entries have been erroneously canceled "on account of any railroad grant" etc.

The third section of the act in question is as follows:

That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: And provided also, That he did not voluntarily abandon said original entry: And provided further, That if any of said settlers do not renew their application to be re-instated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

After considering this case I am constrained to hold that your conclusion is correct, but not for the reason assigned by you.

The act in question provides only for the re-instatement of certain rights erroneously rejected by the government on account of the supposed right of railroad companies under their grants and under the third section of said act the Department has held that a settler on the public lands whose application to enter was erroneously rejected on account of a railroad grant is entitled to be re-instated in his rights no less than one whose entry was erroneously canceled on account of any such grant. Michael Donovan (8 L. D. 382).

Under this decision if Durfee's application to enter the tracts now sought was erroneously rejected, then he is entitled to the relief for which he asks.

In his case however, I think it is clear that the application to enter was properly rejected and his settlement on the tract was in violation of law.

The tracts in question are within the indemnity limits of the grant to the state of Wisconsin of June 3, 1856, (11 Stat. 20) for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company. All the lands within the odd numbered sections of said limit were ordered withdrawn from entry by you on October 22, 1856, and on March 1, 1859, after the routes of the roads had been definitely fixed a further order was made by you directing the local officers to "continue to reserve" as theretofore the "vacant tracts in the odd numbered sections outside of the six miles and within the fifteen miles limits of the roads."

The application of Durfee was filed on April 23, 1863, at that time the tract in section 7 was not subject to entry because reserved by the above withdrawal the tract in section 8 could not be entered with that in section 6, because non-contiguous, it follows that the application of Durfee was properly rejected and his settlement which preceded it was made on land not subject to settlement or appropriation.

A settlement upon land withdrawn for the benefit of a railroad company, confers no rights under the pre-emption law as against the government. *Hobson v. Holloway et al.* (13 L. D., 432). *Smith v. Place*, (13 L. D., 214) *Shire et al. v. Chicago, St. Paul, M. & O. R. R. Co.*, (10 L. D. 85).

Durfee secured no rights by his settlement on and application for the tract in section 7, hence the third section of the act in question can have no application for he has no rights in which to be re-instated. He acquired no rights by his settlement and application and hence lost none by the action of the register and receiver in rejecting his application to enter in 1863.

Your conclusions are affirmed for the reasons herein given.

PRACTICE—ADDITIONAL TESTIMONY—NOTICE—ACT OF JULY 10, 1890.

PIPER v. STATE OF WYOMING.

Prior to final action in a case pending before the local office, it is within the discretion of the register and receiver to re-open said case for the submission of additional testimony.

Ten days notice of the time and place of taking such additional testimony held sufficient to give the local office jurisdiction to proceed in said matter.

The omission of the title of the case from such notice is not a fatal defect where no prejudice therefrom is shown.

The right to be heard on the allegation that a settlement claim is not asserted within the statutory period can only be accorded the "nextsettler," and will not be recognized when set up by a State, claiming under a selection in conflict with said settlement.

An actual occupant of land, within the abandoned military reservation of Fort Sanders, on January 1, 1890, has a preferred right, under the act of July 10, 1890, to enter a quarter section of such land, including his improvements.

*Secretary Noble to the Commissioner of the General Land Office, July 25,
1892.*

The land in controversy in this case is the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 26, T. 15 N., R. 73 W., Cheyenne land district, Wyoming, situated within the bounds of what was formerly the Fort Sanders military reservation.

On the 3d of November, 1890, Carl Piper applied to make homestead entry for this tract, and on the 4th of said month the governor of Wyoming, on behalf of the State, applied to select the whole of said section 26, under the act of May 28, 1888 (25 Stat., 158).

The application of Piper was not acted upon the day it was presented but the next day it was endorsed by the local officers: "Rejected November 4, 1890, for conflict with State selection for location of fish hatchery, and no proof of citizenship is furnished."

On the 6th of November, Piper presented another homestead application, in which he alleged settlement on the tract in February, 1889, and that his residence thereon had been actual and continuous ever since such settlement, and that his improvements were worth at least five hundred dollars. To this application was attached a declaration of intention to become a citizen, dated September 6, 1890, and an affidavit of contest against the selection by the State of Wyoming of the land in question.

A hearing was appointed which took place on the 9th of December, 1890, both parties being represented by counsel, and Piper being present in person. After the evidence had been submitted, the case closed, and the arguments filed, the contestant applied to have it opened to enable him to present proof of the fact that he first declared his intention to become a citizen of the United States on the 31st of October, 1888, and that he was consequently a qualified homesteader on the 1st of January, 1890.

The State, by its counsel, protested against such re-opening of the case, but the local officers granted the motion on the 13th of February, 1891, appointing the 23d of that month for the making of such proof, and gave the State ten days notice thereof. At the taking of the additional evidence on the 23d of February, no appearance was made by the State.

On the 26th of February, 1891, the local officers united in a decision in favor of Piper, and recommended the cancellation of the selection by the State so far as it conflicted with his entry. Upon appeal that decision was affirmed by you on the 9th of May, 1891, and a further appeal brings the case to the Department.

I deem it unnecessary to recite the provisions of the act of Congress of May 28, 1888 (25 Stat., 158) which authorized the governor of Wyoming to select certain lands within the boundaries of Fort Sanders military reservation for a fish hatchery and other public institutions,

or the act of July 10, 1890 (26 Stat., 227) which made the lands in certain military reservations subject to disposal under the homestead law only, and gave actual occupants thereon upon the first day of January, 1890, if otherwise qualified, a preference right to make such entries. The provisions of these acts are quoted in your decision and in the briefs of counsel filed upon this appeal.

In order to establish his right to the land it was necessary for Piper to show that he was not only an actual occupant of the land on the first of January, 1890, but that he was a qualified homesteader at that date. This he had failed to do when the case was closed on the 9th of December, 1890. He had introduced no evidence at all on the question of his citizenship, and all there was in the record on that subject was the copy of his declaration of intention bearing date September 6, 1890. It was to cure this fatal defect in his proof, that a re-opening of the case was asked for by him, objected to by the State, and granted by the register and receiver.

The right of the local officers to open the case after it had been formally closed as to the evidence, is earnestly denied by the counsel for the State, and in several forms is made grounds of error in the appeal before me. At the time the application to re-open was made and granted, the case was before the local officers for consideration and adjudication. They had rendered no decision therein, and the case of *Horn v. Burnett* (9 L. D., 252) expressly held that "prior to final action in a case pending before the local office, it is within the discretion of the register and receiver to re-open said case for the submission of additional testimony." That is all that was done in the case at bar, and while such additional testimony very probably changed the judgment in the case, it did not change the truth of the matter, nor deprive the State of any actual rights. In the case of *Smith v. Washburn* (12 L. D., 14), the question was not upon the right of the local officers to re-open a case after it had been closed, but it was held to be within their discretionary authority to allow the introduction of additional testimony by the contestant, after the evidence of the claimant had been submitted.

In my opinion the local officers were clearly justified in receiving the additional evidence when offered. Had the application not been made until after they had taken final action in the case, the rule would have been different, but even then, I think it would have presented a case where you would have had a right to exercise your discretion by ordering a further investigation under the last clause of rule 72 of the Rules of Practice.

Original proceedings are instituted by a notice to the parties of at least thirty days, and in the case of rehearing the same rule applies. This provision is contained in rule 19 of the Rules of Practice. The taking of the additional testimony in the case at bar, was in no sense of the word a rehearing, and the position of the counsel for the State,

that it should have had thirty days' notice of the time and place of taking the same, is not sustained by the practice of the Department, nor by the authorities cited.

The fact that the State had notice of the proceeding is admitted, but it is contended that because it was a ten day instead of a thirty day notice, it was not such a notice as gave the local officers jurisdiction to take action in the matter. Objection is also made to the form of the notice, and it is claimed that it was defective, in that it did not contain the title of the case in which it was made. No attempt is made to show that the State was misled or suffered any damage by this omission. The record also shows that the attorney for the State was in the local land office on the morning of the 23d of February, 1891, and was informed that the additional evidence in the case was to be then taken, and asked if he was going to introduce any evidence on the part of the contestee, and he stated that he should make no appearance. From all the facts and circumstances of the case my opinion is that the local officers had jurisdiction of the cause of action and the parties to the proceeding until they rendered their final decision therein, that they had authority to open the case for the purpose of taking the additional testimony, and that the State had proper notice of the time and place of taking the same.

The fact that Piper first declared his intention to become a citizen of the United States on the 31st of October, 1888, and again on the 6th of September, 1890, is explained as follows: His first declaration was made before the clerk of the district court, but being advised that the courts of Wyoming had decided that in order to be a legal voter at the first State election then about to be held, his declaration of intention to become a citizen must be made in open court, he made his second declaration in open court as directed, and thus became a legal voter.

It is urged by counsel for the State, in their argument upon this appeal, that Piper forfeited all his rights to the land by not applying to make entry therefor within three months after July 10, 1890, the date of the passage of the act which gave the preference right of entry to persons who were actual occupants of the land on the first of January, 1890. This objection seems to be met by that part of your decision which states that the local officers were not authorized to receive entries for the lands mentioned in said act, until they received your letter of instructions to that effect, forwarded by you on the 22d of October, 1890, and received by them on the 28th of that month. This part of your decision is not objected to as erroneous, in the specifications of errors in the notice of appeal before me, which was prepared by the attorney who tried the case for the State, and who was no doubt aware of the fact that applications to make entries for the land would not have been accepted by the local officers if presented prior to your instructions to them upon that subject. Under the provisions of the act

which opened these lands to settlement under the homestead laws, and the instructions issued in connection therewith, as stated in your decision, I think Piper's application to make entry for the land in question was in time.

Section 2265, Revised Statutes, provides that within three months from the time of settlement upon public land, the party must make known his claim, in writing, to the register of the proper office, otherwise his claim shall be forfeited and the tract awarded to the "next settler." It must be a "settler," however, who can raise the objection, and take advantage of the default. The Department has uniformly held that a railroad company was not a "settler" or a "purchaser" within the meaning of the statute, and therefore could not raise the question that the settler did not file for the land within three months after his settlement. In the case of *Fountain v. State of California* (14 L. D., 417), the same rule was recognized where a State was the party making the objection. In the course of that decision it was remarked:

It is true that the claimant did not make his entry within three months from the filing of the township plat, but the failure to comply with the law in this particular could only forfeit his right in favor of the next settler in the order of time, who had complied with the law.

In that case your decision canceling the homestead entry of the claimant, in favor of a school indemnity selection made by the State more than three months after the filing of the township plat, but prior to the settler's entry, was reversed.

Applying the doctrine of that case to the one at bar, it follows that even if Piper ought to have made his entry within three months after the 10th of July, 1890, and failed to do so, the State of Wyoming is not such a "next settler" as to be allowed to raise that question against him.

Admitting that the witness, Miller, who was not present at the trial, would have sworn on behalf of the State, "that the contestant resided on the land simply as the employé of another party, and not as a resident or settler on said land on his own behalf, also that the improvements on said land are not the property of said contestant, but that they are the property of the person for whom he was employed," still the preponderance of the evidence is to the contrary, and establishes the facts that Piper was an actual occupant of the land in controversy on the first of January, 1890, and that he was a qualified homesteader at that date. The establishment of these facts gave him the preference right to make entry for not exceeding one quarter section, which should include his improvements. This is what he did. By several witnesses the improvements upon the land are shown to be worth from five to seven hundred dollars. He testifies that they belong to him, and no other person claims or is shown to have any interest in them. He also testifies that he established his residence upon the land in good faith for the purpose of making a permanent home for himself and

family, consisting of a wife and five children. No one testifies to the contrary.

The register and receiver concluded their decision by recommending "the cancellation of so much of the selection made by the State of Wyoming, of section 26, as conflicts with the rights of the contestant herein." You reached the same conclusion, and after examining the case and the arguments, answers and replies of counsel, I affirm the decision appealed from.

* * * * *

HOMESTEAD ENTRY—MEANDED STREAM.

CHARLES C. HILL.

A homestead entry of a tract that embraces land on both sides of a meandered stream will not be allowed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 22, 1892.

I have examined the appeal of Charles C. Hill from your decision of March 27, 1891 suspending his homestead entry for lot 5, Sec. 6, lots 5 and 9, Sec. 7, and the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Sec. 8, T. 22 S., R. 30 E., now Burns (formerly Lakeview) Oregon land district.

The record shows that on March 9, 1887 said Hill made homestead entry for the land above described, and on the 12th of June, 1889 he offered his commutation proof which was approved by the register and receiver and forwarded to your office.

On the 27th day of March, 1891, you suspended the entry "for the reason that the tract is on both sides of a meandered stream and therefore not contiguous." You also directed the register and receiver to notify the entryman "that he will be allowed thirty days" in which to elect which sub-division he will surrender so as to confine his entry to one side of said stream.

From your action he appeals.

It appears that lot 5 of Sec. 7 embracing fifteen acres lies west of the Silvies River which is a meandered stream; the remainder of the tract lying on the east side of said river embracing a fraction over 155 acres.

It is alleged in the appeal that "the stream on which said claim is situate was formerly the boundary of what was at one time" an Indian reservation and as such boundary said stream was meandered.

The reason why the stream was meandered, is not a material question, nor subject of consideration, upon appeal, when the fact of the actual existence of the meandered stream is conceded, as in this case. Under existing regulations, Hill cannot, therefore, be allowed to make entry for land on both sides of said river. Your decision is accordingly affirmed.

MANTLE v. MCQUEENY.

Motion for review of departmental decision rendered March 29, 1892,
14 L. D., 313, denied by Secretary Noble, July 23, 1892.

STATE SELECTION—SETTLEMENT RIGHT.**CHARLES CULVERWELL.**

The settlement right of a qualified homesteader excludes the land covered thereby from selection under the grant of June 16, 1880, to the State of Nevada; and the failure of such settler to assert his claim within the statutory period will not operate to the advantage of the State.

Secretary Noble to the Commissioner of the General Land Office, July 25, 1892.

On December 18, 1890, Charles Culverwell applied to make homestead entry of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 8, T. 4 S., R. 67 E., M. D. M., Eureka, Nevada. His application was rejected, for the reason that the land described therein is included in list No. 127 of lands selected for the State of Nevada, under act of Congress approved June 16, 1880 (21 Stat., 287). Said list was filed in the local office April 28, 1889, by the selecting agent for the State. On appeal, you affirmed that judgment, and he further prosecutes his appeal to this Department.

By said act there were granted to the State of Nevada, two million acres of land in said State,

in lieu of the sixteenth and thirty-sixth sections of land heretofore granted to the State of Nevada by the United States: *Provided*, That the title of the State and its grantees to such sixteenth and thirty-sixth sections, as have been sold or disposed of by said State prior to the passage of this act, shall not be changed or vitiated in consequence of or by virtue of this act.

The second section of said act provides that:

The lands herein granted shall be selected by the State authorities of said State from any *unappropriated non-mineral* public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act, the same shall be duly certified to said State by the Commissioner of the General Land Office and approved by the Secretary of the Interior.

It is alleged (in the appeal) that appellant has been an actual *bona fide* settler on the land since June 1, 1876; that he and his family have been in the actual possession of said land and the whole thereof since that date; that he has made valuable improvements thereon; that said settlement was made long prior to any selection of said land by the State of Nevada, and at date of selection he was in open, notorious and exclusive possession of said land; that his settlement upon the land was made before the survey had been made, and for the purpose and

with the intention of acquiring title to the same as soon as it should be open to entry and sale.

Section 2265 of the Revised Statutes requires every claimant under the pre-emption law to make known his claim in writing within three months from the time of the settlement, "otherwise his claim shall be forfeited, and the tract awarded to the next settler in order of time on the same tract of land, who has given such notice and otherwise complied with the conditions of the law."

Section 2266 requires the settler upon unsurveyed lands "to file his declaratory statement within three months from the date of the receipt in the district land office of the approved plat of the township embracing such pre-emption settlement." But a failure to file such written statement does not necessarily defeat the claim of the settler. If such statement is not filed within the limits therein prescribed, the land will be awarded "to the next settler in order of time who has given such notice."

Although the settler may not give such notice within the prescribed time, still he may subsequently do so and ultimately obtain patent, provided there be no other settler upon the land who takes advantage of the laches of the first settler and gives the required notice.

It will be seen that the lieu lands granted to the State are to be selected from the "unappropriated non-mineral public lands in said States." If at the date the State selected the land in List No. 127, the applicant was then a settler on the land in question, having the qualifications of a homesteader, it can not be said that the tract so settled upon was "unappropriated" public land, and, if not, the State was not authorized to select it as a part of its two million acre grant.

Although the applicant at that time had not given notice of his claim by filing his declaratory statement, or making entry of the land, still his land was only subject to be taken by the next legal settler (not "applicant") "who has given such notice and otherwise complied with the law."

From the statements in appellant's brief, I do not think the State was authorized to make selection of the land in question. Inasmuch, however, as these statements were not made under oath, I hereby direct that claimant be notified to furnish a corroborated affidavit within ninety days from notice of this decision, showing the date of his alleged settlement upon the land, the character of his improvements and residence, and whether he is qualified to make homestead entry. Should he furnish such proof, showing he was a *bona fide* settler on the land at the date of the State's selection thereof, and that he is otherwise qualified to make homestead entry, the State should then be given an opportunity to apply for a hearing. Should no hearing be applied for you will adjudicate the case upon the showing then made by the applicant.

The judgment appealed from is accordingly modified.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT.**HOEFT ET AL. v. ST. PAUL AND DULUTH R. R. CO.**

An indemnity selection, in the absence of a specified basis therefor, is no bar to the acquisition of a settlement right; and, after such right has intervened the company will not be permitted to designate a loss and thus perfect the selection.

Secretary Noble to the Commissioner of the General Land Office, July 25, 1892.

The N $\frac{1}{2}$ of the NE $\frac{1}{4}$, SE $\frac{1}{4}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$, and the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 3, T. 36 N., R. 26 W., Taylor's Falls, Minnesota, are within the thirty miles (second indemnity) limit of the grant to aid in the construction of what is now known as the St. Paul and Duluth Railroad, a withdrawal for the benefit of which became effective on November 15, 1866. These lands were not subject to the withdrawal, however, for they were included in homestead entries made by Edward D. Hatcher and Alexander Cunningham. Said entries were canceled in 1873 and 1874, respectively. The land was thereafter subject to selection by the railroad company, or to entry under the public land laws by the first legal applicant.

The railroad selected the lands on December 28, 1881, and on April 10, 1882, Robert H. Steeves was allowed to file pre-emption declaratory statement for the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said section. He alleged settlement on the land April 8, 1882.

On January 1, 1885, Gottlieb Hoeft made homestead entry for the N $\frac{1}{2}$ of the NE $\frac{1}{4}$, and on April 28th he amended said entry so as to include the tract claimed by Steeves, to wit.: SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said section.

On December 11, 1886, Theodore Rosin made homestead entry for the SW $\frac{1}{4}$ of NW $\frac{1}{4}$, and the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said section.

On January 25, 1887, Steeves offered proof upon his filing, and was met by Hoeft who protested against the allowance of his entry.

The register and receiver, after considering the evidence submitted, decided in favor of Steeves and issued cash certificate and receipt in his name. Hoeft appealed from said finding to you and on October 26, 1888, after considering the case, you found "that the records indicated that the right of the St. Paul and Duluth Railroad Company was superior to that of either of the alleged settlers," and a hearing was ordered to ascertain the status of the land at the date of the company's selection.

The trial was had before the local land officers, at which Hoeft and the railroad company appeared, but Steeves, though served with notice, did not appear.

The register and receiver found, after considering the evidence submitted, that the land was vacant and unoccupied at the date of selection; that Steeves never actually resided upon the tract embraced in

his entry, and that Hoeft had continuously resided upon the land since the date of his entry.

They held, however, that the selection made by the railroad company in 1881 was illegal, because the company had failed to designate what land had been lost from its grant, and in lieu of which said selection was made. They recommended that final certificate be issued to Hoeft.

The railroad company appealed from this finding to you, and on August 20, 1890, after considering said case, you reversed the finding of the register and receiver, and canceled the entries of Steeves, Hoeft and Rosin. The last-named entryman was allowed either the right of appeal, or to apply for a hearing within sixty days, to afford him an opportunity to show that the land was not subject to selection on December 28, 1881. As a reason for reversing the decision of the register and receiver, you state that,—

The thirty-mile limit of the grant in question is on the west side of the line of road only. It was established solely for the purpose of enabling the grantee to make up losses from the grant occasioned by the nearness of the line of road to the eastern boundary of the State. No rule was ever laid upon the company, requiring it to specify losses when selecting lands in this limit, the fact that such loss had ensued being manifest by the official records. If a specification of losses be necessary in this case, the selection referred to is merely rendered defective by failure to make such specification, not illegal, and the defect may and will be cured by the company, no doubt, upon official notice of its existence. In view of the fact, however, that the figures made in the adjustment of this grant show that, after giving to the grantee every available tract within the limits prescribed by law, there will still be a deficiency of more than one hundred thousand acres, it would seem an idle thing to require the company to specify, tract by tract, lost lands when selecting indemnity.

Both Hoeft and Rosin have appealed from your decision to this Department, and have assigned a number of alleged errors numbered from 1 to 8, inclusive.

The second error alleged is,—“The Commissioner erred in holding that it was not necessary for the company to specify the losses it had sustained when it selected the lands situated within said indemnity belt.”

It will be unnecessary to notice the other errors assigned, since your judgment must be reversed on the one above quoted.

The selection in question was made in December, 1881. The circular of instructions to registers and receivers relating to the adjustment of railroad grants, dated November 7, 1879, was in force when this selection was made. It provides, under the head of “Indemnity selections for railroads,” that,

In accordance with the recent decision of the supreme court in the case of the Leavenworth, Lawrence and Galveston Railroad Company v. United States (2 Otto, 753), it is held by the Department that indemnity can only be allowed for lands sold, reserved, or disposed of in the granted limits by the general government after the granting act and prior to the time when the railroad right attached, unless the grant be one of quantity specifically set forth in the act. In the adjustment of all grants

it consequently becomes necessary to know for what lands lost *in place* the indemnity selections are made, and with the view to that end you will require the companies to designate the specific tracts for which the lands selected are claimed.

In the case of John O. Miller, on review, decided on November 13, 1890 (11 L. D., 428), one of the errors assigned in the original decision (11 L. D., 1), was as follows:

That the company not having been originally in default, but being clearly within the instructions of the Secretary, its selection or application to select is not *illegal*, and should not be canceled, but that the company should be permitted to designate a loss therefor.

In deciding the case the Department said:

Conceding, for the sake of argument, that this selection was made in accordance with the instructions of May 28, 1883, I do not see why it should affect the rights of Miller, which must be determined by the act making the grant. Indemnity can only be selected in lieu of some section or part of section lost in place, and the basis for such selection must be specifically designated and shown to be exempted from the grant before the right to indemnity can be exercised. While, as between the government and the company, the practical effect would be the same, where indemnity was allowed in bulk for an equivalent quantity of land lost in place, as where indemnity was allowed tract for tract, yet the individual rights of the settler can only be ascertained and protected by the latter mode.

Where lands are settled upon which have been selected by the company in lieu of an equivalent quantity of lands, without designating the particular basis for each tract, and part of the basis should from any cause be disallowed, it would be impossible to determine which of the selections should be rejected and which retained. The rights of the settler in cases where the lands were subject to settlement at date of the company's selection would be materially affected by any rule that did not require the selection to be made tract for tract and the basis specifically designated, so that his rights as against the company might be definitely determined.

And in the case of the Southern Minnesota Railway Extension Company (12 L. D., 518), the selections were made prior to the requirement of specification of losses as a basis for indemnity selections, still they were not approved by the Department.

In the case at bar the selection was made by the railroad company in December, 1881. At that time before valid selections could be made losses were required to be designated. No losses were designated; said selection was therefore no bar to the rights of settlement, and Hoeft and Rosin have acquired such rights. If the tracts here involved were not claimed by others, of course the railroad could be allowed to designate the losses and thus perfect its selection. It would be inequitable, however, to allow it this privilege in the face of an adverse claim. The railroad company should be allowed no greater privilege in amending its selection than will be accorded to a homestead claimant to amend his entry, and he has never been allowed to amend his entry when to do so would injure a third person.

I am of the opinion that the selection of the tracts in question by the St. Paul and Duluth Railroad Company should be canceled.

Your judgment is accordingly reversed.

INDIAN LANDS—PATENT—ALLOTMENT.

MARY ANN BURDETTE.

The Department is without authority to accept the surrender of a patent and issue another to an Indian allottee for a greater amount to correct an error in the first, where the title thereunder is in fee simple, and the lands set apart for allotment have been restored to the public domain.

Secretary Noble to the Commissioner of Indian Affairs, July 28, 1892.

I acknowledge the receipt of your communication of 5th instant, and its enclosures relative to the cancellation of a patent issued on August 19, 1875, to Mary Ann Burdette, a member of the Ottawa and Chippewa tribe of Indians in Michigan, and the issuance of another patent for the lands desired by her.

In response thereto, I transmit herewith an opinion of the Hon. Assistant Attorney General for this Department, in which I concur, wherein it is held that the Department is without authority to direct the issue of a new patent as requested.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, July 25, 1892.

Under the provisions of a treaty of July 31, 1855, (11 Stat., 621) between the Ottawa and Chippewa Indians, of Michigan and the United States, each head of a family was to be allotted eighty acres of land; for which certificates were to be issued, guaranteeing possession and the ultimate fee simple title thereof, but containing a clause expressly prohibiting the sale or transfer, by the holder, of the land described therein. After the expiration of ten years a patent for the land was to be issued in the usual form, whereupon the restriction would cease, and the patentee would have a full title to the described lands.

Under this treaty, and the confirmatory act of Congress, of March 3, 1875, (18 Stat., 516) a patent was issued August 19, 1875, to Mary Ann Burdette, one of said Indians, conveying to her the title to the NE. $\frac{1}{4}$, SE. $\frac{1}{4}$, and lot 3, of Sec. 6, T. 42 N., R. 1 W., in the State of Michigan, containing 75.80 acres. She now surrenders said patent, with a relinquishment thereon, and asks that the same be canceled and another patent issued to her in lieu thereof.

It is alleged that the land patented to her ought to have been described as being in township 41 N. instead of 42 N. as written in the patent. The matter of her application has been referred to and reported upon by both the Commissioner of the General Land Office and the

Commissioner of Indian Affairs, and is now referred to me by Acting Secretary Chandler "with request to be advised how to proceed to give the patentee a new patent for the lands desired by her, if the same can be legally done."

It appears from the report of the Commissioner of the General Land Office that, at the time of making the allotment and issue of the patent thereon, there was no lot 3 in Sec. 6, Tp. "42" N., R. 1 W., but that in Sec. 6, Tp. "41" N., R. 1 W., the NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ was fractional, being designated as lot 3, containing 35.80 acres, which, together with the forty acres in NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ aggregate 75.80 acres, the amount for which patent was issued. From this statement it would seem that the allegations of Mrs. Burdette are sustained; that in consequence of this error in the patent she has obtained title to only forty acres, instead of 75.80 which was intended thereby to be secured to her.

The period during which the lands allotted to Mrs. Burdette were non-alienable, and were to be held in trust for her by the government, has long since elapsed, and she holds, under the patent, an absolute fee simple title to the same. She therefore stands before this Department as an ordinary patentee, asking that a mistake heretofore made in the conveyance of lands to her be corrected.

It appears also from the report of the Commissioner of the General Land Office that lot 3, being a portion of the lands, which ought to have been originally conveyed to Mrs. Burdette, has been disposed of and can not therefore be now patented to her. In lieu thereof it is proposed to give her forty acres, in another and non-contiguous section of the same township.

The lands out of which the allotments were to be made did not belong to the Indians, as shown by the treaty of 1855, *supra*, which provides that certain designated tracts of the public lands shall be withdrawn from sale for their use and benefit, out of which the allotments were to be made, as before stated, and the reserved lands not appropriated or selected by the Indians within five years were to remain the property of the United States and be subject to entry, by the Indians only, in the usual manner, for the further term of five years. All lands unappropriated at the end of the last period to be subject to disposal as other public lands.

By act of June 10, 1872, (17 Stat., 381) the right was given to the Indians only to make homestead entries of the unoccupied lands on the reservation for the period of six months thereafter, at the expiration of which period the Secretary of the Interior was directed to restore the remaining lands to market, to be disposed of under the general land laws.

By act of March 3, 1875, (18 Stat., 516) the act of 1872, *supra*, was amended so as to authorize the Secretary to issue patents to three hundred and twenty of said Indians, of whom Mrs. Burdette seems to

have been one, for selections made but not reported, and it was provided that—

the remainder of said lands, not disposed of, and not valuable mainly for pine timber, shall be subject to entry under the homestead laws, for one year from the passage of this act; and the lands remaining thereafter undisposed of shall be offered for sale at a price not less than two dollars and fifty cents per acre.

It appears from this history that, of the lands formerly reserved for these Indians, all that were not appropriated by them, under the provisions of the treaty and of the different laws, were long since restored to the public domain, subject to disposition in the regular way as other public lands are to be disposed of.

I know of no law which will authorize the officers of the Land Department to dispose of forty acres, or any other quantity of public land, in the manner proposed, to one who has neither initiated any right nor acquired title to the same in the mode pointed out by the law.

The treaty agreed to give Mrs. Burdette eighty acres of land out of certain specified tracts then set aside for that purpose, and five years were allowed for the selection thereof. Twenty years after the date of the treaty, the unsettled lands were restored to the public domain and the right to select any portion of them under the treaty, lapsed. The effort now made to have a new patent issued including forty acres of the, formerly reserved but now, public lands, is in effect making a new allotment to that extent to Mrs. Burdette, which in my opinion cannot be done directly or indirectly.

The case is very different from those wherein I have advised you that new patents might be issued to Indian allottees to correct errors or promote the interests of the Indians. In those cases your action was either authorized by act of Congress, or the lands to be allotted were yet within the control of the Indian Office for that purpose, and the necessary changes or corrections were made in the trust patents during the trust period.

The case of Mrs. Burdette does not come within the purview of any act of Congress that I am aware of, and the land is no longer in reservation for Indian purposes. Mrs. Burdette does not now appear before this Department in the character of an Indian, but that of an ordinary citizen seeking to have a fee simple patent reformed. In fact, by the fifth article of the treaty, the tribal organization of the Ottawa and Chippewa Indians was dissolved, and when patents were issued to them for the lands, their control over, and right to dispose of, the latter were as full and complete as those of any other citizen.

I therefore think you are without authority to direct the issue of the new patent as requested.

Having come to this conclusion, it is not necessary I should pass upon the relinquishment indorsed on said patent, which is defective in several respects.

TIMBER CULTURE ENTRY—FINAL PROOF—COMMUTATION.**HEIRS OF RICHARD K. LEE.**

The heirs of a timber culture entryman, whose final proof discloses a partial compliance with the law in the matter of securing the requisite growth of trees, may be permitted, where good faith is manifest, to relinquish part of the claim and receive final certificate for the amount of land the planting and cultivation entitle them to under the law, or commute the entire entry under section 1, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 25, 1892.

On the 25th of September, 1882, Richard K. Lee made timber-culture entry for the SE. $\frac{1}{4}$ of Sec. 17, T. 123 N., R. 64 W., Watertown (now Aberdeen) land district, South Dakota. He died on the 12th of February, 1890.

On the 3d of July, 1891, Charlotte Elizabeth Lee, who describes herself as "the widow and one of the heirs of Richard K. Lee, deceased," made final timber-culture proof before the local officers at Aberdeen, which was rejected by them, "for the reason that the testimony shows that at the date when final proof was offered the required number of trees were not growing upon the tract."

This decision was affirmed by you on the 28th of July, 1891, and an appeal from your decision brings the case to the Department for consideration.

In her proof Mrs. Lee shows that the first year after entry forty-four acres were broken. The second this forty-four acres were cultivated, and thirteen additional acres were broken. The third year five and a quarter acres were planted to cottonwood, ash, box-elder and elm trees, and the remainder of the ground broken was cultivated. The fourth year five and a half acres were planted to cottonwood, box-elder, and ash trees. The trees planted in the fourth year were killed by frost, and in the fall of 1886, the ground was properly prepared and other trees planted. This was repeated each year, the trees being killed by frost or drought, until the spring of 1891, when the said five and a half acres were plowed, harrowed, and planted to box-elder and ash tree seed. The trees planted the third year, on the five and a quarter acres, grew and were carefully cultivated each year, so that at the time of making final proof, there were growing on said five and a quarter acres "not less than six thousand box-elder, cottonwood, and ash trees," and not less than 2,700 trees or tree seeds were planted to the acre on the other five and a half acres. In all this she is corroborated by two witnesses.

This proof does not meet the requirements of the timber-culture law, and in her appeal to the Department Mrs. Lee asks that the earnest efforts of her husband and herself to secure the requisite growth of trees shall be taken into consideration, and that she shall at least be

allowed to make proof for eighty acres, in view of the five acres and over of thrifty, growing trees upon the tract.

Under the provisions of the act of March 3, 1891 (26 Stat., 1095), Mrs. Lee would be entitled to make final proof, and acquire title to the land, by the payment of one dollar and twenty-five cents per acre, but she explains that she is poor, out of health, and that it would be difficult for her to borrow the money to make such commutation.

In view of the evident good faith exercised by the entryman during his lifetime, and by his heirs since his death, and there being no parties in interest in the case except the government and such heirs, I can see no good reason why the sound discretion of the Department should not be exercised in the interest of justice, and an amendment of the original entry allowed, by an omission of one-half of the quarter section, and an entry for the forty acres containing the trees and of an adjoining forty embraced in said original entry.

This principle was recognized in the case of *Griffin v. Forsyth* (6 L. D., 791), where it is said, "It would seem that the claimant should be allowed to amend his entry by relinquishing a part of the land, and retaining the amount of land that his cultivation and planting would have entitled him to under the timber-culture law."

This doctrine is alluded to in the case of *Vargason v. McClellan* (6 L. D., 329), and it is there said that such amendments should be allowed only when the interest of justice requires, and adds:

As applied to timber-culture cases, it ought to be allowed only where very considerable and substantial results have been accomplished by the entryman, in good faith, in securing a considerable growth of trees, and where the failure to make that growth extend to the full number of trees required to support the entry is excusable and unaccompanied by bad faith or gross neglect.

I think the case at bar is correctly described in the language just quoted, and that it is one in which relief should be granted. My conclusion therefore is, that upon executing and filing a relinquishment of one half of the quarter section embraced in the original entry, said entry may be completed as to the other half of said quarter section, upon the proof already submitted, or the heirs of said entryman may commute for the whole quarter section under the provisions of the act of March 3, 1891, before mentioned.

Should neither such relinquishment nor such commutation be made by said heirs, within a reasonable time after notice hereof, the entry will be canceled. The decision appealed from is modified accordingly.

PRE-EMPTION ENTRY—TRADE AND BUSINESS.

JAMES W. M. MURPHY.

Land settled upon by a pre-emptor in good faith for agricultural purposes, and so used and improved, is not excluded from entry, under the third clause of section 2258 R. S., by the fact that the pre-emptor erects and operates a sawmill thereon, where the use of the lumber is restricted to the land in question.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 27, 1892.

I have considered the appeal of James W. M. Murphy from your decision of July 15, 1891, holding his pre-emption cash entry for cancellation.

He made said entry for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 15, T. 7 S., R. 10 W., at Little Rock, Arkansas, on April 12, 1888, his final proof having been submitted March 27, 1888.

The papers in the case were transmitted to you, and by said decision you held the entry for cancellation for illegality, as within the third inhibition of section 2258 of the Revised Statutes. Said section reads as follows:

Sec. 2258. The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit:

* * * * *

Third. Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

The only evidence in the case is contained in the final proof made by Murphy and two witnesses. He testified that he went upon the land in person in August, 1883; that he built a house and saw-mill upon the land that fall, and in May, 1884, he moved his family upon the land and lived there continuously thereafter and had no other home. That he had raised crops for four seasons, of corn, oats, sorghum and vegetables, putting twelve acres in crops in 1884, and thirty acres every year thereafter, and at the date of making final proof he had thirty acres plowed and fifteen acres sowed to oats. That up to February, 1887, his business on the land had been that of saw-miller and farmer, and after that date it had been farming only. That he made the entry in good faith, for the exclusive purpose of a home and farm for himself and family. He further testified that there was timber upon the land, principally yellow pine, merchantable, which had all been cut of any value by him and sawed into lumber and used on the land in building houses and making fences. The improvements he had made were a store, church, school-house, planing-mill, six tenement houses, tramway, stable, three wells, orchard, and over thirty acres fenced and cultivated. At the time he made final proof Murphy had rented the mill and the tenement houses were occupied by workmen. It does not appear that he had ever sold any lumber to go off from the land.

The question arises whether the combined use of the land for both farming and milling purposes as above set forth exclude it from entry on the ground that it was "actually settled and occupied for purposes of trade and business, and *not* for agriculture." The land *was* settled and occupied "for agriculture," and, if Murphy is to be believed, that was his main purpose in settling and occupying the land. Does the fact that he erected a saw-mill thereon and used the lumber in erecting buildings and fences upon the tract, and thus improving it, and not

in the lumber trade or business properly so called, bring his case within the inhibition of the statute?

It would seem that a fair construction of this statute is that those lands only are exempted from entry which are actually settled and occupied for the sole and main purposes of trade and business, and not for agriculture. In *Bennett v. Cravens* (12 L. D., 647-650), it is said:

The evidence clearly shows that the contestant, Bennett, entered upon the land on October 2, 1884, and erected his saw-mill thereon for the sole purpose of doing business, that of sawing lumber and selling the same. According to his own statement, at the time he went upon the land, he had no intention of claiming the same under the pre-emption law for agricultural purposes. . . . Bennett cannot be regarded as a qualified pre-emptor, as he entered upon the land for business purposes only, and has used the limited tract in his possession for that purpose.

In that case Bennett brought himself within both clauses of the statutory inhibition; he had the affirmative purpose of settling the land for "trade and business" and the negative purpose of settling "not for agriculture."

In the case of *Fouts v. Thompson* (6 L. D., 332) and (10 L. D., 649), the chief value of the land consisted of certain mineral springs thereon. Fouts made use of the land for the purpose of maintaining a health resort thereon, and built a hotel, cottages, bath house, store, etc., costing some \$10,000, all for that one end and purpose, which was so unequivocal and dominant that it excluded the existence of any other purpose on his part in settling the land. His agricultural acts were insignificant. But these cases do not govern the present one.

I am satisfied that Murphy settled the land in good faith for a home. He swears that he wants to live and die there. That he has built a comfortable house with five rooms worth \$500, and a stable worth \$300; that he has cleared, fenced and put into cultivation over thirty acres of land worth \$600, and planted an orchard worth \$100. These are agricultural improvements and better than the average, and testify to his good faith. He has lived on the land continuously with his family, having furnished his house in a comfortable manner, indicating an intention to make it a permanent residence. He has also provided himself with "plows of all kinds, harrows, hoes, axes, and, in fact, every kind of implement used on a farm," and his live stock consisted of "one mule, one mare and colt, fifteen head of cattle, forty hogs, and chickens." These are substantial proofs which reinforce his oath that he settled on the land for an agricultural purpose.

The fact that he also erected a saw-mill, six tenement houses, a store, etc., only shows that he had another purpose in view besides the agricultural one, but this added purpose of milling does not appear to have been the dominating one, and as he did not sell the lumber to outside parties, but used it on the land, his case is not brought within the inhibition of said statute. His entry should, therefore, be allowed to remain intact.

Your judgment is reversed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1887.

ELEY v. PETCOVICH.

The allowance of a pre-emption filing for a tract of land included within a canceled homestead entry will not defeat the confirmation of said entry under section 7, act of March 3, 1891, for the benefit of a transferee, where said entry is subsequently reinstated and is intact upon the record at the date of the passage of said act.

Secretary Noble to the Commissioner of the General Land Office, July 29, 1892.

This case is now under consideration upon a motion filed in behalf of the transferee, Nicholas Petcovich, for a disposition of the matter under the rule regarding cases confirmed by the act of March 3, 1891 (26 Stat., 1095), which provides that such cases "will be disposed of on written motion, without regard to their places on the docket." (12 L. D., 308.)

The motion was served upon opposing counsel, May 20, 1892, and there has been no objection filed to its consideration.

The case was transmitted with your letter of November 30, 1891, on appeal by Diana T. Eley from your decision of September 23, 1891, holding that the commuted cash entry No. 9104, by Rush Thomas, embracing the NE. $\frac{1}{4}$, Sec. 12, T. 12 S., R. 19 E., Stockton land district, California, was confirmed by section 7 of the act of March 3, 1891 (*supra*).

The facts in the case are as follows:

June 4, 1886, Thomas made homestead entry No. 4644, for the above described tract, which he commuted to cash entry No. 9104, August 19, 1887.

Said entry was held for cancellation by your office April 10, 1888, upon the report of a special agent, and upon the failure of the entryman to appeal, said entry was canceled, August 4, 1888.

On August 14, 1888, Diana Eley filed pre-emption declaratory statement No. 14,438, for this land.

By letter of September 15, 1888, the local officers transmitted an application by Nicholas Petcovich, transferee, to have the case reopened, and that he be permitted to intervene.

This application was rejected by your office, October 4, 1888, but upon appeal this Department, in its decision of November 23, 1889 (9 L. D., 576), reversed your decision and directed that the entry be reinstated, and a hearing ordered, after due notice to all parties in interest.

The hearing was duly held, the decision of the local officers being in favor of the entry, but upon the passage of the act of March 3, 1891 (*supra*), a showing was filed by the transferee, in compliance with the circular of May 8, 1891 (12 L. D., 450), and upon such showing you held

the filing by Eley for cancellation, and the entry by Thomas for confirmation, from which Eley appeals, urging error:

In holding, in view of the fact that the land had been appropriated by the settlement and filing of Diana Eley in August, 1888, while vacant and unappropriated upon the records of your office, that the entry of Rush Thomas, subsequently reinstated, is confirmed by the 7th section of the act of March 3, 1891.

The seventh section of the act of March 3, 1891, provides:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

It is shown that Petcovich purchased the tract in question of the entryman September 27, 1887, the consideration being \$1,400.

There is no question raised as to the *bona fide* character of the purchase, and as the entry was, at the date of the passage of the act of March 3, 1891, intact upon the records, and as there is no adverse claim originating prior to the date of the final receipt, I must affirm your decision holding that the entry by Thomas was confirmed, and I therefore direct the cancellation of Eley's filing.

RAILROAD GRANT—SETTLEMENT RIGHT.

HUDSON v. CENTRAL PACIFIC R. R. CO.

The possession and occupancy of a qualified settler, existing at the date of definite location, except the land covered thereby from the operation of a railroad grant, even though the settler at such time is not asserting any claim under the public land laws.

Secretary Noble to the Commissioner of the General Land Office, July 29, 1892.

Lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 3, T. 2 S., R. 2 W., San Francisco, California, is within the primary limits of the grant to the Central Pacific Railroad Company.

The line of said road opposite the land in controversy was definitely located January 21, 1870.

August 5, 1878, James W. Hudson filed his pre-emption declaratory statement for said tract, alleging settlement May 23, 1861. January 6, 1887, he relinquished his pre-emption claim, and applied to make homestead entry for the same tract. With his said application he filed affidavits, to the effect that the land had been continuously occupied and resided upon by bona fide settlers since the year 1859.

Your office, on March 2, 1887, directed a hearing as to these alleged

facts of residence and occupancy, which was duly had in July of that year.

The local officers rendered conflicting opinions, the register finding in favor of Hudson and the receiver in favor of the railroad company.

Both parties appealed, and by your decision of October 16, 1890, you affirm the judgment of the receiver and hold that the land in question passed to the railroad company under its grant.

Hudson now appeals to this Department.

The substance of the evidence taken at the hearing is correctly stated in your decision, and shows that Hudson's first settlement and occupancy of the land was in 1876. The land had prior to that time (as early as 1860 or '61) been enclosed with other lands, in all amounting to four or six hundred acres, and used chiefly for grazing purposes. Some improvements had been made on it, including a house, which had been occupied by many different people, but by none claiming the land from the government, until the settlement of Hudson in 1876.

It seems to have been generally understood by all these occupants that the land was a part of the Moraga grant, and not subject to settlement.

The immediate predecessor of Hudson in such occupancy of the land was one Tisdale, who was a witness for Hudson at the hearing, and who says that he never laid any claim to the land as against the government, but intended to claim some portion of it if it ever was opened to settlement.

Since your judgment was rendered, Hudson has filed in this Department his own affidavit, corroborated by others, to the effect that he settled on the land in good faith in 1876, and paid George Tisdale \$700 for his "possessory claim" and improvements; that said Tisdale was, as affiant believes, a native-born citizen and had been occupying the said land since 1867; that his (affiant's) improvements are now worth \$3900; that if the land is awarded to the company, he and his family of five members will be left homeless; and when the company's right attached (January 21, 1870), and ever since, the land was occupied by parties duly qualified to enter the same, and that from all the information he can now gather, they would have entered the same had the land been subject to entry at the time of their respective claims.

The affidavit contains this further statement:

And affiant further swears that at the time of the trial of this case in the local land office he could and would have submitted additional testimony to that now in the record, and of a more definite and conclusive character, proving all the facts sworn to in his affidavits of contest against the railroad company, and proving all the facts herein set forth, had it not been for the advice of the then register, Mr. Bradford. That said register at that time advised the deponent that in his opinion the testimony he had offered was sufficient and it was unnecessary to go to further expense or trouble in the matter, and relying upon the advice of said officer he did not offer any more evidence.

Upon this corroborated affidavit he now asks that a new hearing be

granted to prove the matters therein stated, and also to more fully prove the allegations of his contest against the railroad.

If the facts above stated can be proven, I think, under the ruling in the case of the Northern Pacific Railroad Company *v.* Potter, 11 L. D., 531, such proof would be sufficient to except the land from the grant.

In that case it is said that:

Where possession or occupation alone are relied on to except the land from the grant, it must affirmatively appear that the party in such possession had the right at that time to assert a claim to the lands in question under the settlement laws of the United States.

It must follow that, if such right is shown affirmatively, the land is excepted from the grant, even though at the time the right of the company attached the party in possession was not asserting any claim under the land laws.

All that is necessary to prove is the possession or occupancy of a party having the qualifications of a settler. Inasmuch as it is asserted and not disputed that Hudson can prove such right in Tisdale, or other occupants, and that he failed to do so at the hearing solely through the advice of an officer of the government (the register of the local office), and in view of his great equities, I think justice will be best promoted by allowing him now to do so.

You will therefore order a further hearing, with notice to all parties in interest.

PRACTICE—SOLDIERS' ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3, 1891.

PAULSON *v.* OWEN.

An affidavit of contest may be based on the information and belief of the contestant. The right to make soldiers' additional homestead entry is not assignable, and a charge that such an entry has been made under an attempted sale and transfer of such right through double powers of attorney (one to locate, and one to sell the land when located), should be duly investigated.

A subsequent deed of ratification, executed by the soldier, will not validate an additional entry made under an attempted transfer of the soldier's right.

A pending valid application to contest an entry defeats the confirmation of said entry under the proviso to section 7, act of March 3, 1891.

Secretary Noble to the Commissioner of the General Land Office, July 29, 1892.

On September 20, 1889, soldiers additional final entry (No. 1446) for lot 1 and SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 5, T 62 N, R 12 W, was made at the Duluth land office, Minnesota, in the name of Alven Owen, by Thomas H. Presnell as his attorney in fact.

Said Owen's right to an additional homestead entry of not exceeding eighty acres, as provided in section 2306 of the Revised Statutes, had been certified on October 30, 1882, by the Commissioner of the General

Land Office, pursuant to the instructions contained in the circular of May 17, 1877, (1 C. L. L., 478).

On March 2, 1882, Owen subscribed and made oath to an affidavit for an additional homestead, and to the special affidavit as to military service, duly corroborated by two witnesses, before Y. E. McClen- don, judge of probate for Ozark county, Missouri.

On the same date he signed an application for additional entry, in blank as to description of land and the name of local land office. Also two powers of attorney, one to locate any land that he might be entitled to enter, and a second to sell such land when entered, acknowledged before said McClen- don.

On March 27, 1890, John Paulson filed a contest affidavit against said entry, and on April 19, 1890, an amended application to contest the same, alleging among other things,—

That said entry is invalid, void, and of no effect, for the reason that on or about March 2nd, 1882, the said Alven Owen sold all his right, title and interest in and to his additional entry absolutely and entirely to Y. E. McClen- don and Robert Q. Gilliland for the sum of eighty dollars, and made no reservation of any right therein, and made no condition of any kind that he was to have any interest in any lands which might be located under or by said additional entry.

That said powers of attorney appointing one Thomas H. Presnell 'attorney in fact,' were void and of no effect, in that it attempted to transfer to said Presnell for a considereration the right of said Owen to make an entry of public lands of the U. S. in accordance with the provisions of Sec. 2306, Rev. Stat.

That said powers of attorney were illegal and void for the reason that said Pres- nell, pretending to act for said Owen, was in fact acting for other parties.

These affidavits were transmitted to your office, and on May 13, 1890, there was also transmitted an affidavit of Alven Owen, dated April 7, 1890, alleging, after he had become entitled to his additional entry, as follows:

I sold all my right, title and interest in and to my additional entry absolutely and entirely to Y. E. McClen- don and Robert Q. Gilliland for the sum of eighty dollars, and made no reservation of any right therein, and I made no condition of any kind or nature by which I was to have any interest, share or ownership in any lands which might be located under or by said additional entry, and I reserved at said sale no right or disposition over said additional entry, or over any lands which might be located by virtue of said additional entry by the persons to whom I sold it or any other person or persons. And after the said sale of said additional entry I did not acquire at any time any interest in any way in said additional entry, or in any scrip, or in any lands which might be or were located by virtue of said additional entry in my name or in the name of any one else in the State of Minnesota, or any other state. That at the time of the sale of said additional entry I signed a power of attorney, but if there was any name inserted therein I do not remember it. And I do not think there was any land described in said power of attorney. I further state that I do not now, or did I ever know Thomas H. Presnell, and I never at any time had any busi- ness with the said Thomas H. Presnell, either directly or indirectly, and I did not at any time appoint the said Thomas H. Presnell my attorney to locate for me any land in lot 1 and SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 5, T 63 N, R 12 W, in the State of Minnesota, or any other state under the above additional entry referred to. I further state that I have not now or at any other time any interest, right, claim or ownership, directly or in- directly, in or to said above described tract of land. And I have never at any time been upon said land or any part of it, and have never had any one go upon or reside

on said land for me, or in my behalf or interest, and I have no acquaintance with said land.

By your office letter of June 5, 1890, you advised the local officers that a hearing was denied, and an appeal was duly taken to this Department.

The assignment of errors contains the following specifications, among others:

1. In ignoring the charge that said entry is "invalid, void and of no effect, for the reason that on or about March 2, 1882, said Owen sold all his right, title and interest in and to his additional entry absolutely," and refusing to order a hearing for the purpose of ascertaining the truth thereof;

2. In ignoring the charge that the power of attorney appointing Thomas H. Presnell attorney in fact to make an entry for said Owen is void and of no effect, in that it attempted to transfer to said Presnell the right of said Owen to make such entry, and in refusing to order a hearing as to the truth thereof;

3. In ignoring the allegation that said power of attorney to Presnell was illegal and void in that said Presnell, assuming to act for said Owen, was in fact acting for other parties, and in refusing to order a hearing thereon.

The affidavits of contest were made upon information, and it is contended that the contest should be dismissed for this reason.

But it was held in *Butler v. Mohan* (3 L. D., 513, 515) "A contest affidavit is in the nature of an information, and the party making the same need not necessarily do so on his own personal knowledge and observation of the facts therein stated, but may base his assertions upon information and belief." See also *Seitz v. Wallace*, (6 L. D., 299, 300); *Gotthelf v. Swinson*, (5 L. D., 657); *Strout v. Yeager*, (7 L. D., 41, 42). These affidavits, together with that of Owen himself above recited, make out a *prima facie* showing that Owen had sold his right of additional homestead entry.

In the case of *John M. Walker*, (10 L. D., 354, 357) it was held that "The right to make soldier's additional homestead entry under the statute is not assignable, but is a personal right which can be exercised only by the soldier," and the circulars and decisions to that effect are cited.

Affidavits are also submitted by Owen and his son in law that he did not swear to the above recited affidavit purporting to have been made by him, but it is a significant fact that neither of them deny the truth of the facts therein stated, or that he signed it by his mark, and that it was read over to him. The affidavit of McClendon is also submitted, but is silent on the subject of the sale. This silence in the face of the charge is equivalent to an admission of its truth, not conclusive as proof, perhaps, but very persuasive. The further fact that the two powers of attorney were originally made out in blank, and that Presnell's name was inserted afterwards, is additional evidence in support of the charge that there was a sale of the right of additional entry.

It is contended, however, that under the law of Minnesota, Chapter 40, Section 43, a power of attorney is valid when "executed in blank, or with the name of the grantee of the power omitted therefrom at the time of such execution." While this statute may make these powers of

attorney legal instruments it does not validate the illegal sale of which they are the evidence.

Again, it is contended that in the case of *Gilbert v. Thompson*, (14 Minn., 544,) involving the validity of a power to sell given by a Sioux half breed Indian, it was held that,—“A power to sell executed by a half-breed is good until revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms.” This decision is cited with approval in the case *Myrick v. Thompson*, (99 U. S., 291, 296). But these cases were between contending claimants for land, after the government had parted with its title, whereas in this case the government has not parted with the land and is a party to the controversy. These cases therefore furnish no support to the contention that the entry in question was valid in case the right to enter had been sold by Owen,—*Allen v. Merrill*, (12 L. D., 138, 153). They do not conflict with the principle uniformly upheld by this Department that “the law forbids and will not recognize an assignment of a soldier’s additional homestead entry.” *Hoffman v. Barnes*, (8 L. D., 608, 611), and that it is “the duty of the Department to cancel any entry which has been made contrary to law.” *Smith v. Custer*, (8 L. D., 269, 279). If it be assumed that such sale of the soldier’s right was made, then the powers of attorney executed to carry out such an illegal transaction were ineffectual for that purpose. “As between principals and agents, in all such cases, the guilt is deemed to be equal.” “The law will not assist the agent to recover his expenses or advances, or the principal to recover his property, or its proceeds.” Story on Agency, Sec. 344.

It further appears that on March 3, 1890, and before the contest affidavit was filed, Owen and his wife executed a quit claim deed of the land in dispute to Charles d’Autremont Jr., and on May 13, 1890, a second deed of the same land to the same party with the following clause, “hereby ratifying and confirming any and all deeds for said premises heretofore made by us or in our name by Thomas H. Presnell as attorney in fact for us.” It is contended that the location made by Presnell, which was thus subsequently ratified by Owen, was made good, whether it was before valid or not, and that these deeds conveyed a good title. In the case of *Hyde v. Eaton*, (12 L. D., 157, 159) where there was a like deed of ratification, it was held that such deed could have no effect, and that the question to be determined was whether the location in question was made in good faith in accordance with the law and regulations, and that if the location “was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which had not in it the germ or essence of legal vitality.”

Judge Story, in Conflict of Laws, Sec. 244, in speaking of contracts, says:

Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against reli-

ion, or against public rights; and contracts opposed to the national policy, or national institutions,—are deemed nullities in every country affected by such considerations.

The contract under consideration is within the above classification. It is in evasion and fraud of the law, and opposed to the national policy, and can not be ratified by any act of Owen, who was a party to the fraud.

As the entry in this case was made September 20, 1889, the period of two years therefrom elapsed on September 20, 1891, and since the latter date a motion has been filed that said entry be confirmed and patented under the provisions of section 7, of the act of March 3, 1891 (26 Stat., 1095). This motion must be denied.

The entry does not come under the body of said section because it was made after March 1, 1888.

Inasmuch as Paulsen's affidavit of contest was filed about six months after Owen's entry was made, if a hearing should now be ordered the rights of the parties would relate back to the date when said contest was so initiated, and therefore the contest would by relation date back to its initiation and be from that date, a pending "contest or protest against the validity of such entry" within the meaning of said proviso, and consequently not confirmed thereby. In the case of Henry C. Nelson (13 L. D., 458) it was held that—

A mere application to contest which had not been allowed by your office or the Department, which it would be contrary to the rules and precedents of the land department to allow, and which conferred no rights upon the applicant could not be considered a "contest or protest against the validity of the entry" such as would prevent its confirmation under the proviso to the 7th section of the act of March 3, 1891.

In that case there was a "mere application" to contest made while the case was pending on appeal, by a stranger to the record, which could not be allowed. Here there is an application which from the first has been pending before your office and this Department, and which has been denied by you and comes here on appeal by the applicant. It is therefore not governed by the ruling made in the case of Henry C. Nelson, *supra*, and those cases which have followed that ruling.

I am of the opinion that the application to contest the entry in this case should be granted, and, if upon investigation, it should be proved that the right to make said entry had been sold as charged, the same should be canceled.

The motion is denied.

Your judgment is reversed.

HOMESTEAD ENTRY—NON-CONTIGUOUS TRACTS.**AKIN v. BROWN.**

A homestead entry embracing non-contiguous tracts may be referred to the board of equitable adjudication where the non-contiguity is caused by the cancellation of a part of the entry on account of the prior adverse right of another, and the original entry is made in ignorance of said adverse right.

The Land Department has no authority to hold in reservation the non-contiguous tract, in such a case, so that an additional entry thereof may be made by the claimant under section 6, act of March 2, 1889.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 29, 1892.

The controlling question presented by this appeal is, whether a homestead entry can be perfected of a tract of land which has been rendered non-contiguous by the action of the land office canceling part of the original entry by reason of prior settlement, or whether, after entry of the contiguous parts, the non-contiguous portion may be held in reservation for the purpose of allowing the entryman to make additional entry under the 6th section of the act of March 3, 1889 (25 Stat., 854).

The facts material to an understanding of the issues involved are as follows:

On September 29, 1884, Mary A. Brown made homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 5 S., R. 3 W., Los Angeles, California, and offered final commutation proof, May 17, 1887, when Henry W. Akin protested against the allowance of said proof, as to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section, claiming a prior right thereto.

Upon the testimony taken at the hearing under said protest, the local officers found that Akin settled upon the SE. $\frac{1}{4}$ of said section, in July, 1884, and was authorized by Commissioner's letter of September 16, 1884, to make homestead entry of said tract under an application to amend his entry, which had been made for the SW. $\frac{1}{4}$ of section 14, township 6 south, range 3 west. They, therefore, recommended the cancellation of the entry of Mrs. Brown as to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, and their decision was affirmed by you, on March 5, 1890, and the entry of Mrs. Brown as to said forty acres was canceled, from which decision no appeal was taken. On August 14, 1890, said decision was declared to be final and the case closed, but no action was taken on the final proof of Mrs. Brown as to the remaining tracts, nor was it returned to the local officers for further action.

On November 12, 1890, Akin filed a contest against said entry, alleging abandonment, and that the tracts are not contiguous by reason of the cancellation of a portion thereof.

A hearing was had, and the tract books were offered in evidence to show that the tracts were not contiguous; but no evidence was offered

to sustain the charge of abandonment. The local officers dismissed the contest, holding that the "non-contiguity of the tracts was not a question subjecting said entry to contest, the matter being *res adjudicata*," and that the entry should be perfected on the final proof submitted, except as to the forty acres canceled, but in case she could not do so, by reason of the non-contiguity of the tracts, she should be allowed to perfect entry as to the non-contiguous portion under the 6th section of the act of March 2, 1889.

From this decision Akin appealed, and, on April 15, 1891, Mrs. Brown filed an application to have final receipt issued to her on her final proof, made May 17, 1887, of all the land embraced in her entry, except the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section awarded to Akin.

You affirmed the decision of the local office, dismissing the contest, but held that as the tracts were non-contiguous, Mrs. Brown could only perfect her entry under her proof of the tracts upon which her improvements are placed, to wit, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and that she can not now make entry of the non-contiguous forty acres, for the reason that additional entry can not be made under the 6th section of the act of March 2, 1889, until final receipt has been issued for the original entry. You, however, directed that final receipt should issue for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and that the entry should be canceled as to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, but that she may be allowed to make additional entry of said forty acres under the 6th section of the act of March 3, 1889, within ten days from the issuance of final receipt upon her original entry. From this decision Akin also appealed.

Whatever disposition should be made of the entry of Mrs. Brown, there was no error in dismissing the contest of Akin. The entry had been made non-contiguous by the action of your office in canceling the entry as to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ in a former proceeding, and the question of non-contiguity could not afterwards be taken advantage of by contest, and as there was no evidence offered to sustain the charge of abandonment, the contest was therefore properly dismissed.

As the issue now is solely between Mrs. Brown and the government, the only question to be determined is, whether she is entitled to perfect entry under her final proof to all the lands embraced therein, except the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, which was awarded to Akin, or whether her final entry should be limited to the contiguous tracts upon which her improvements are made, and whether the non-contiguous tract can be held in reservation for her benefit until after the issuance of final certificate, in order that she may make additional homestead entry under the act of March 2, 1889.

After the issuance of final certificates for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, she would unquestionably be entitled to make additional entry of the NE. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, if it was then public land, subject to entry; but I know of no authority to hold in reservation the non-contiguous portion to enable her to make additional entry of it, after the issuance of final certificate upon the other part of her original entry.

I am, however, of the opinion that this case may be sent to the board of equitable adjudication, under the authority of section 2457 of the Revised Statutes, providing for the equitable adjudication of homestead entries, "where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake, which is satisfactorily explained."

In this case the entry was made in good faith of contiguous lands, in ignorance of the fact that another had a superior right to a portion of the tract. She has complied with the law as to settlement and residence, is qualified to make entry, and each subdivision is subject to entry under the homestead laws.

Your decision is therefore modified, and you will prepare said case for submission to the board of equitable adjudication.

RAILROAD GRANT—ACT OF MARCH 3, 1887.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

A swamp land selection pending at the date of the definite location of a railroad excepts the land covered thereby from the operation of the grant.

Under the act of March 3, 1887, it is the duty of the Secretary of the Interior to institute proceedings for the recovery of title where lands have been erroneously patented on account of a railroad grant, although the patent may have issued in accordance with the practice then prevailing in the Department.

*Secretary Noble to the Commissioner of the General Land Office, July 29,
1892.*

With your letter of May 19, 1890, was submitted an adjustment of the grant made by the act of May 12, 1864 (13 Stats., 72), to the State of Iowa, for the use and benefit of the McGregor Western Railroad Company, to aid in the construction of a railroad "from a point at or near the foot of Main street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line in the county of O'Brien in said State."

The State accepted the grant by act of its legislature approved April 20, 1866 (Laws of Iowa, 1866, Chap. 144), and the road has been duly completed and accepted by this Department.

The McGregor Western Railroad Company built the road from McGregor to Calmar, and in 1868 the State resumed the grant and conferred it upon the McGregor and Sioux City Railroad Company, afterwards known as the McGregor and Missouri River Railroad Company, but provided that the grant should not be construed so as to embrace any lands for or on account of the railroad already built, as to which

lands a formal release was required. The latter company built the road from Calmar to Algona.

The present owner of the grant is the Chicago, Milwaukee and St. Paul Railway Company, under an act of the State legislature, approved February 27, 1878, which company completed the road west of Algona.

The adjustment submitted, which excludes from the grant the road east of Calmar, shows that there is yet due on account of the grant 870,225.55 acres. There is no question raised as to the correctness of the adjustment, the deficiency being so large, but a list of lands accompanies the same which are held to have been erroneously patented on account of the grant, under the rulings of this Department.

In answer to a rule issued by your office, to show cause why proceedings should not be taken as contemplated by the act of March 3, 1887 (24 Stat., 556), for the recovery of these lands, response has been made by the company, and opportunity has also been afforded it to present the matter orally.

It appears from the list that all of these tracts were claimed on August 30, 1864, the date given as the definite location of the road.

The nature of the claims existing at the date of definite location will be divided into three classes, and each considered separately: viz, 1st—Homestead and warrant locations; 2nd—Pre-emptions; 3rd—Swamp selections.

1. As to all the homestead claims, except one—viz: That covering the NW. $\frac{1}{4}$ of Sec. 11, T. 96 N., R. 28 W., and the warrant location covering the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, same section—the company admits the mistake in patenting the lands on account of the grant, and states “most of these have, on the request of the governor, been re-transferred to the State, and the remaining pieces are held by this company subject to the order or request of the authorities of the State of Iowa.”

Through correspondence with the State, it would appear that the cloud caused by such erroneous certifications might be removed, without proceedings under said act of 1887.

As to the exceptions above named, it is stated:

There are only two pieces of this kind, which are specially named in the fourth paragraph of the answer of this company, and the technical right of the United States to claim them is doubtless based upon a misapprehension of the Commissioner in supposing that the time of the final location of the grant, for the purpose of determining what was subject to it, was on August 30, 1864, instead of April 20, 1866, the time at which the legislature of Iowa accepted the grant.

From an examination of the list, I find that the entry and location referred to were intact upon the records at both dates; hence, the patenting of these tracts was erroneous, should either date be accepted as the date of definite location. Demand should therefore be made for the reconveyance of these tracts under the act of March 3, 1887 (*supra*), as in other cases provided.

Union Pacific R'y Co., 12 L. D., 210.

2. As to the tracts embraced in the list covered by pre-emption filings, you state that "the records show that they were offered some four years before the company's right attached, and all the filings had expired by limitation prior thereto."

There are no adverse claimants for the lands, and they were therefore properly patented to the company, and no further proceedings are necessary. St. Louis, Iron Mountain and Southern Railway Company, 13 L. D., 559; St. Paul and Pacific Railroad, 13 L. D., 637.

3. The greater number of the tracts contained in the list had been selected by the State as swamp lands during the year 1859-'60, under the act of September 28, 1850 (9 Stat., 519).

It appears that upon a contest instituted by the railroad company, these tracts were shown not to be of the character contemplated by the act of 1850, and therefore the selections on account of the swamp grant were canceled, and, under the practice then prevailing, they were patented to the company.

This practice seems to have prevailed until the decision in the case of the Southern Pacific Railroad Company (Bianch Line) *v.* State of California (3 L. D., 88), wherein it was held that, although the State indemnity selection is invalid, because made prior to the final survey of the rancho claim, nevertheless, as it was made in 1867, when the practice prevailed of allowing the State to make such selections prior to and subject to the determination of the loss of land in place by a rancho claim, it was voidable, and not void; such being its status at date the right of the company attached, there was such an appropriation as excepted the land from the railroad grant.

After this decision, it appears that all selections pending at the date of definite location have been held to defeat the grant.

In the case of the St. Louis, Iron Mountain and Southern Railway Company (11 L. D., 157), it was held that under the act making the grant for that company, lands covered by *prima facie* valid swamp selections at the date when said grant became effective are excepted therefrom. In this case the decision was based upon the ground that, "in the administration of the swamp grant, lands formally claimed thereunder must of necessity, during the pendency of such claim be reserved from any other disposition, and this is the ruling of the Department."

Under said decision the patents heretofore issued to the company for these lands were without authority of law, and, although issued in accordance with the practice then prevailing in this Department, yet, under the provisions of the act of March 3, 1887 (*supra*), it becomes my duty to demand of the company a reconveyance of the lands. Winona and St. Peter R. R. Co., 9 L. D., 649.

There remain a few tracts not embraced in the above classification, but included in the list, for which two patents are outstanding. In such cases a suit is unnecessary on the part of the United States, and

the parties should be left to their remedies in the courts. St. Louis, Iron Mountain and Southern Railway Company, 13 L. D., 559.

This disposes of all questions presented, and you will proceed as herein directed.

PRE-EMPTION ENTRY—INCORPORATED TOWN.

HARPER v. GRAND JUNCTION.

Land included within the corporate limits of a town is not subject to pre-emption, though in fact not platted, or occupied as a town for the purposes of trade and business.

Secretary Noble to the Commissioner of the General Land Office, July 29, 1892.

I have considered the appeal of John Harper from your decision of August 5, 1890, rejecting his application to file a pre-emption declaratory statement for the E $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 13, T. 1 S., R. 1 W., Montrose, Colorado, land district.

He made application to file for this tract January 6, 1890, and the same was rejected because it was within the limits of the additional townsite entry of the town of Grand Junction. He appealed from this action to your office, and on August 5, 1890, you passed upon the case and said:

The land applied for by Mr. Harper is distant, at the nearest point, one quarter of a mile from any part of the land covered by the townsite entries, and therefore the additional townsite entry of this land does not come within the requirement of the section of the act above quoted as acting (being) an entry of contiguous tracts.

The act quoted is the act of March 3, 1877 (19 Stat., 392) which provides that towns that have made or may make entry for less than the maximum quantity of land named in section 2389, R. S., may make additional entry or entries "of contiguous tracts which may be occupied for town purposes," etc., and you cancel the additional entry for the tract in controversy. You further say: "I therefore hold that although the townsite entry should be canceled in respect to the tract in dispute, yet said tract does not thereby become subject to entry."

The history of this town of Grand Junction is fully given in the case of Keith v. Grand Junction (3 L. D., 356) and it is repeated in the same case on review (*ibid.*, 431). In the former decision by Secretary Teller, it is shown that Keith was a settler, qualified, etc., upon the E $\frac{1}{2}$ SE $\frac{1}{4}$ of section 14 in said town and range at the time the townsite company initiated proceedings to make the townsite filing, and he was permitted to make final proof as of December 5, 1882, and the townsite entry as to this tract was canceled. This decision was adhered to on motion for review. Again, on a hearing between the same parties, but involving the W $\frac{1}{2}$ SW $\frac{1}{4}$ of section 13 (adjoining the former tract), it was held by Secretary Vilas (6 L. D., 633) that the additional townsite entry

could not be made for the last described tract for the reason given in the former decision. The land in controversy lies still east of Keith's land, and is really a half a mile distant from the town, as laid out and occupied, and also from the land included in the original townsite entry.

One George A. Crawford has filed an affidavit in which he states that Keith's land has been laid out into lots and blocks, streets and alleys, etc., but from the cases cited, it appears that this was done against the protest of Keith, and while the case of *Keith v. The Townsite Company* was pending.

Keith's land was not under the decision properly part of the town, and laying out in lots did not affect his rights and make it such. This affiant (Crawford) says further there is a street or road running the whole width of the land in controversy along on the southern part thereof, which has been and is now under the municipal control of the corporate authorities of Grand Junction; that there is a house and barn on the tract, etc.

Harper also files a statement in which he says certain parties came upon his land, tore down his house, threatened him with violence, etc. Attorney Casswell filed an affidavit in support of his application for time to prepare argument in this case, and he says "that the present owners of the land now involved in controversy live several hundred miles from the city of Grand Junction and one of them without the State of Colorado."

It is claimed on the part of Harper that this additional townsite entry is in the interest of Crawford and some other parties, and that so far as relates to this tract in controversy it is fraudulent, and that the occupants of the town are being used as "figure heads" to place the Crawfords and others in possession of the land.

The certificate of incorporation included the Keith land, but when it was decided that the same could not be appropriated to townsite purposes, it left the tract in controversy non-contiguous to the original townsite entry, and it appears that this tract is not in fact laid out in lots, blocks, streets and alleys, or used as a town for purposes of trade or commerce, although in fact included within the corporate limits of the town by the certificate of incorporation of the town or city of Grand Junction.

It was held in *Root v. Shields* (Woolworth's Circuit Court Reports, 340) that a person can not make pre-emption filing for land included within the limits of an incorporated city even though they are not occupied as a town.

In *City of Cheyenne* (13 L. D., 327) it was said "Lands included within the limits of any incorporated town or selected as the site of a city or town are not subject to pre-emption."

Keith went upon the land awarded him prior to the townsite entry. Harper went upon the tract in controversy long after it was included

in the certificate of incorporation, and must have had knowledge of the status of the land.

Your decision is accordingly affirmed.

The townsite company appealed from your decision on the ground that the case was not before you to be decided. It was properly before your office and had been for about eight years, and so far as the land in controversy was affected, the consideration of one case involved the other, and to decide one was virtually to decide both. There is a motion on file to dismiss this appeal, but as there is no merit in the appeal, nothing further need be said of it, and the motion is overruled.

CERTIORARI—APPEAL—SUPERVISORY ACTION.

NICHOLS *v.* CARLSON.

Certiorari will not be granted, if the appeal is not wrongfully denied, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary.

*Secretary Noble to the Commissioner of the General Land Office, July 29,
1892.*

On November 10, 1891, John Carlson filed in the local office an application for a writ of certiorari in the case of Albert T. Nichols against said Carlson, involving the NE. $\frac{1}{4}$ of Sec. 9, T. 16 N., R. 16 W., Grand Island land district, Nebraska.

Said application was on March 19th last denied, because not accompanied by a copy of your decision of which complaint was made.

He has now furnished a copy of your decision of October 29, 1891.

Under the rules of practice that obtain in courts of law, the omission to file a copy of the decision, in the first instance, can not be cured by filing the same after the application has been dismissed upon that ground (*Hoover v. Lawton*, 13 L. D., 635). This Department may, however, in the exercise of its supervisory power, when it is shown that injustice would otherwise be done, waive this technical rule of law, and consider the application as if properly presented.

It appears from the record that your original decision against Carlson was rendered June 20, 1890. He filed a motion to re-open the case, which you denied, October 29, 1891. It is the second decision that he has forwarded; no copy of the first and more important one has been furnished.

Notice of the decision of June 20, 1890, was sent by register and receiver's letter of the 24th of the same month to Carlson's attorney, who signed return registry receipt for the same on June 26. No appeal being filed within the time prescribed by the rules of practice, the entry was canceled and the case closed on September 23, 1890. Nor was Carl-

son heard from again until October 7, 1891, when the local officers transmitted his motion for a re-opening of the case.

A writ of certiorari will not be granted where the right of appeal was lost through failure to assert the same within the prescribed period (*Cassidy v. Arey*, 5 L. D., 235; *Ariel C. Harris*, 6 L. D., 122; *Edward B. Sargent*, 13 L. D., 397; *Frary v. Frary*, ib., 478). He claims that his failure to appeal in time was the fault of his attorney. But this is not recognized as a sufficient excuse; notice to his attorney was notice to him (*Holloway's Heirs v. Lewis*, 13 L. D., 265; *Graham v. Lansing*, ib., 697).

The application for certiorari consists exclusively of an explanation of the reason why the applicant failed to appeal in time. It does not state in what respect your decision was in error: if in its statement of facts, it does not set forth what facts were misstated; if in its conclusions of law, it does not show *wherein* your conclusions were erroneous. "If the appeal is not wrongfully denied" (and in the present case the appeal was not wrongfully denied, for it was not filed within the time prescribed) "certiorari will not be granted, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary" (*Anderson v. Amador and Sacramento Canal Company*, 10 L. D., 572, syllabus; *St. Paul, Minneapolis and Manitoba Ry. Co. v. Vannest*, 5 L. D., 205; *F. P. Harrison*, 2 L. D., 767; *Northern Pacific R. R. v. Schoebe*, 3 L. D., 183; *Jacob Schaetzel*, 4 L. D., 28; *Reed v. Casner*, 9 L. D., 170; *Lyman C. Dayton*, 10 L. D., 159; *Robert H. Steeves*, 11 L. D., 473).

No reason having been shown why the supervisory authority of the Secretary should be exercised in connection with the case at bar, the application for certiorari is denied.

VIRGINIA MILITARY LAND WARRANTS.

JOHN MILLINER.

The act of the Virginia State legislature directing the delivery of certain military land warrants to the applicant herein does not operate to validate said warrants, or make them subject to exchange for scrip, if they were not valid subsisting claims allowed prior to March 1, 1852.

*Secretary Noble to the Commissioner of the General Land Office, July 30,
1892.*

I have considered the appeal of John Milliner, administrator of Robert Milliner, deceased, from the decision of your office dated June 23, 1890, rejecting his application for Revolutionary bounty land script for four thousand acres, on account of military land warrant No. 671 issued to said John Milliner as administrator etc. for the same amount of land on April 4, 1883, by the Virginia State land office.

On the back of said warrant the State register certifies that it was issued in conformity with the laws of Virginia in force prior to the cession by that State of her western lands to Congress; that no other warrant has issued from the land office of Virginia on account of the service of the within mentioned Robert Milliner,

except Nos. 6777-6778-6779-6780-6781-6782-6783-6829-6830-6831 and 6862 issued to the heirs of said Robert Milliner returned to this Office canceled, but this warrant is now issued in lieu and exchange thereof that the warrants formerly issued for the services of said Robert Milliner were returned and filed in this office by the attorney for the heirs, and that by an act of the General Assembly of Va., approved February 4th. 1880, (Act of 1879 and 1880 Chapter 4), the register (of the) land office was authorized to deliver the said warrants to said administrator or his authorized agents. Said warrants were duly delivered and upon their return and cancellation, this warrant is now issued in exchange thereof.

Your office held that under the acts of Congress approved August 31, 1852, (10 Stat., 143), and June 22, 1860, (12 Stat., page 84), providing for the surrender of unsatisfied Virginia military land warrants and the issuance of scrip by the United States payable in public lands in lieu thereof, the claimant was not entitled to the scrip because it appeared that the claim was originally allowed by the executive and council of Virginia December 1, 1830, that the grant was afterwards recalled on December 10, 1831, and the claim of the heirs rejected; that on September 15, 1833, the register of the State land office was advised of the fact "through the Secretary of the Commonwealth and authorized to cancel the warrants." On July 8, 1890, your office declined to change said ruling, and the complainant has appealed to the Department.

The grounds of error assigned by the appellant are (1) In "refusing to prepare and sign said scrip and to submit the same for the favorable action of the Secretary". (2) "in rejecting said application in view of the facts and the law". These specifications of error are quite defective and the appeal might be dismissed for that reason. Rules of Practice 88-90. *Pederson v. Johannessen*, (4 L. D., 343); *Schweetzer v. Wolfe* (5 L. D., 158); *Horton v. Wilson* (9 L. D., 560); *Devereux et al. v. Henderson* (11 L. D. 214); *United States v. Hulbert* (12 L. D., 29). But independently of the foregoing, I am not satisfied from the record as presented that the claimant has shown himself entitled to the scrip as prayed for. The exhibits accompanying the petition show that on December 7, 1830 the claim of Robert Milliner was allowed by the governor and council of Virginia for military land bounty on account of service during the war of the Revolution, as a lieutenant in the Virginia State navy; that, in pursuance of said allowance, warrants were issued to the several heirs of said Robert Milliner, by name, on December 8, 1830, February 14, January 21, February 21, and March 12, 1831, and delivered to one John G. Joynes the agent of said heirs; that on December 10, 1831, the State register "transmits sundry papers" which in his opinion show that said Milliner had resigned and was not entitled to said

bounty, and, upon these papers, the council advised the cancellation of said warrants as improvidently issued; that afterwards, according to the record of the Executive Journal of said State dated September 25, 1833, (p. 100)

On the 10th of December, 1831, the grant in this case was recalled and the claim of the heirs rejected, and on the 15th of September, 1833, the register of the State land office was advised of the fact through the Secretary of the Commonwealth, and authorized to cancel said warrants.

It is stated by Register Harrison "that said warrants were returned to the register in consequence of said notification and have remained in the office ever since, a period of nearly fifty years," and "under these circumstances and under the advice of the Atty. General he has declined to deliver said warrants to the petitioner."

By the Virginia act of February 4, 1880, (p. 35), it was enacted that the register of the land Office be and he is hereby authorized and directed to deliver to John Milliner, administrator of Robert Milliner, an officer of the Revolutionary War, or his authorized agent, the warrants now in the Land Office which were issued in favor of the heirs of the said Robert Milliner, and in case any of the original warrants so issued have been lost or destroyed to deliver to the said administrator or his authorized agent duplicates thereof.

On July 28, 1882, the attorney general of Virginia advised the State register that without entering into a discussion of the merits of the original application under said act of February 4, 1880, he was "not only authorized but directed to deliver to the administrator named, the warrants, duplicates and copies described." The warrants were accordingly delivered, as stated by the register, and the warrant upon which scrip is requested was issued by him in lieu thereof.

The act of August 31, 1852, Vol. 1, (*supra*) provides

That all unsatisfied outstanding military land-warrants or parts of warrants issued or allowed *prior* to the first day of March, eighteen hundred and fifty-two, by the proper authorities of the Commonwealth of Virginia, for military services performed by the officers and soldiers, seamen or marines, of the Virginia State and continental line in the Army or Navy of the Revolution, may be surrendered to the Secretary of the Interior, who, upon being satisfied, by a revision of the proofs or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said Commonwealth, for military services so rendered, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, for the whole or any portion thereof yet unsatisfied, at the rate of one dollar and twenty-five cents for each acre mentioned in the warrant thus surrendered and which remains unsatisfied, which scrip shall be receivable in payment for any lands owned by the United States subject to sale at private entry; and said scrip shall, moreover, be assignable by indorsement attested by two witnesses. In issuing such scrip, the said Secretary is authorized, when there are more persons than one interested in the same warrant to issue to each person scrip for his or her portion of the warrant; and where infants or feme coverts may be entitled to any scrip, the guardian of the infant and the husband of the feme covert may receive and sell or locate the same. *Provided*, that no less than a legal subdivision shall be entered and paid for by the scrip issued in virtue of this act.

This act secured a legislative construction by said act of June 22, 1860, directing the allowance of scrip upon all warrants or parts of

warrants issued prior to or after the act of 1852. The allowance of the original claim by the Executive of Virginia was prior to March 1, 1852.

It is manifest from the foregoing that the executive and the parties in interest considered that the warrants issued to the Milliner heirs were satisfied and canceled long prior to 1852. Indeed the Attorney General of Virginia was of the opinion that the register had no authority prior to the passage of the act of February 4, 1880, by the State legislature to deliver said warrants to said administrator. It may be conceded, that the State could direct the register as to the disposition of the papers filed in his office, but such direction could not validate a claim and make it subject to the provision of said act of 1852. In other words, if said warrants were not valid and subsisting claims for bounty land under the laws of Virginia allowed prior to March 1, 1852, the action of the Virginia State legislature on February 4th, 1880, could not validate them and make them subject to exchange for scrip. The burden is upon the applicant to show that he is entitled to the scrip, and the fact that the heirs to whom the scrip was issued in the first instance, have not moved in almost fifty years to secure scrip in lieu of said warrants, is persuasive that they acquiesced in the judgment that they were not entitled to the same. But it is not necessary to decide that Robert Milliner, in his life time was, or was not, entitled to military bounty land under the laws of Virginia, or that the warrants issued to his heirs were, or were not, fairly and justly issued, it is sufficient to state that upon the record as presented, the claimant is not entitled to the scrip asked for and the decision of your office must be and it is hereby affirmed.

DESERT LAND ENTRY--RECLAMATION.

ATWATER *v.* GAGE.

To establish the fact of reclamation, as required under the desert land act, the evidence must not only show that water has been brought upon the land, but that proper means have been supplied for the distribution of such water to each legal sub-division.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 1, 1892.

I have considered the case of William E. Atwater *et al.*, *v.* Matthew Gage on appeal by the former from your office decision of May 27, 1890, dismissing their contests and allowing Gage "a reasonable time in which to make final proof" in support of his desert land entry for Sec. 30, T. 2 S., R. 4 W., Los Angeles, California land district.

On March 1, 1882, Gage made desert land entry for said tract. On January 23, 1886, William E. Atwater, Otto H. Newman and J. J. Gunther each filed affidavit of contest against said entry, and at the same time presented applications to make homestead and timber culture en-

tries for various portions of said section. These affidavits of contest charged that Gage had not reclaimed said section or any part thereof by conducting water upon the same within three years from the date of his entry and that said land had not been reclaimed according to the spirit and tenor of the "desert land act" up to the date of said affidavits. The statement in the decision appealed from that "the allegation on which this contest was brought, is the single charge that the entryman failed to irrigate said land within the time prescribed by law" is not exactly correct. The failure was charged to still exist at the date of filing the affidavits.

The local officers rejected the various applications to enter and refused the contest affidavits because an appeal was then pending before this Department in a former contest. This former contest which involved the character of the land embraced in Gage's entry, was, it seems, decided in favor of the entryman, whereupon your office on January 25, 1887, ordered a hearing on these subsequent charges. The cases were by agreement of the parties consolidated and tried together. The local officers found that the claimant had acted in good faith and endeavored by all means in his power to get water to the land, but that he failed to accomplish this within the period prescribed by law, and decided therefore that his entry must, in the face of these intervening adverse claims be canceled. Your office held that these parties, being contestants and applicants to enter, had "no adverse claim to the land in dispute within the meaning of the law," and decided that Gage's final proof, which had been submitted February 9, 1887, should be referred to the board of equitable adjudication and the contest was dismissed.

There is no material dispute as to the facts in this case.

Gage himself testified that when he went to Riverside in 1881, he saw a grand future for the dry land east of Riverside if water could only be procured and he "began at once to investigate the question of water supply with a view of reclaiming it from its then worthless, desert condition." This tract contained about 20,000 acres. In the spring of 1882, he bought for \$400 the relinquishment of a former desert land entry for section 30 and made his own entry therefor. He also bought for \$300 a claim to a part of section 32, and made timber culture entry therefor, and leased section 33 from the Southern Pacific Railroad Company, expecting to procure water on these tracts for his desert land entry. After working for about two years to obtain water by means of artesian wells he found himself heavily indebted and unable to obtain further credit and still without any adequate water supply. About this time he conceived the plan of constructing a canal and by securing contracts with land owners along the proposed line, was enabled to secure money for the purchase of the necessary water rights, the right of way and to begin the work. He prosecuted this work to completion, the canal when finished as far as section 30 being twelve miles long, seven feet wide and four feet deep, the expenditures in con-

nexion therewith having amounted to over \$375,000. As a further source of water supply for the canal he had also sunk a number of artesian wells. He states that he then had water enough at his disposal to irrigate not only section 30 but also some 15,000 acres besides. On November 10, 1886, water was for the first time turned on to section 30, and was then allowed to flow about twenty-four hours. While a few furrows had been plowed on a portion of the land, there were no proper distributing ditches on section thirty at that time nor had such ditches been constructed at the date of the hearing. A part of this section amounting to 160 or 200 acres of land laid higher than this canal and could not be irrigated therefrom. Mr. Gage stated that he intended as soon as his title to the land should be assured to convey water on this elevated portion by means of a pumping apparatus and proper distributing pipes. Mr. Gage states that he has some 5,000 acres of other land which he expects to irrigate from this canal.

It seems to me evident from this statement of the facts, which is made up from the testimony of Gage himself, that the construction and operation of this canal was a gigantic enterprise of itself separate and independent from the irrigation of the land embraced in the entry under consideration. That the irrigation of this tract was an incident to rather than the ulterior object of, as asserted by the entryman, the construction of the canal is further shown by the fact that said land has not been irrigated and that a large portion of it is not subject to irrigation by said canal. The statement by Mr. Gage that he intends to put in pumping apparatus for the purpose of lifting the water to that portion of this land which lies above the level of his canal and that he intends when his title is assured to put in a system of distributing pipes through the whole tract, may be honestly made, but that can not be accepted in place of the work required by the law to be done before the claimant under this law can entitle himself to the land.

As was said in the case of *Lee v. Alderson* (11 L. D., 58): "The question is not what may be done; but the proof must show what has been done to reclaim the land."

The final proof submitted by this entryman does not come up to the requirements. It does not show that there was any ditch for distributing the water over the land, but the claimant said it was his intention eventually to pipe it. He failed to mention in his final proof the fact that one-fourth or more of the land laid above the level of his canal.

In the case of *Lee v. Alderson, supra*, it was claimed by the entryman, as it is by this entryman, that having conveyed water to the land he had complied with the requirements of the law, and in speaking of this claim it was said:

He says from this ditch water *can be distributed* over and through all of the soil; that if necessary he will build a reservoir on the 'coulee' to distribute the water; that this ditch will enable him to irrigate the land.

This may all be true, but the carrying of water to the land, and even through the land without showing the presence of lateral ditches and water therein through the

several smallest legal subdivisions, is not sufficient to show the reclamation of the land within the meaning of the statute.

This language applies with even greater force to the case now under consideration because here it is shown that something more than the construction of lateral ditches was necessary to distribute the water over all the land. It is not contended by this entryman but that this tract might have been reclaimed by a much less expenditure of both time and money had his efforts been directed wholly or even mainly to that object. He chose however rather to engage in an enterprise calling for its accomplishment, for a much longer period of time than that fixed by the law for reclaiming the land embraced in his desert land entry, making the reclamation of that a mere incident of the greater undertaking and must abide the result. The law had not been complied with at the time these contests were begun, and the various applications to enter were filed, and the final proof submitted in the presence of these contests and applications falls far short of the requirements.

Under these circumstances, which are very similar to those shown in the case of *Lee v. Alderson* *supra*, the judgment must be adverse to the entryman Gage.

The decision appealed from must be and is hereby reversed. Gage's final proof is rejected and his entry will be canceled.

MINING CLAIM—INTERSECTING LODE.

PATTEN EXTENSION LODE.

Under the provisions of section 2336 R. S., a mineral entry may be allowed of a tract divided by a patented intersecting lode.

Secretary Noble to the Commissioner of the General Land Office, July 29, 1892.

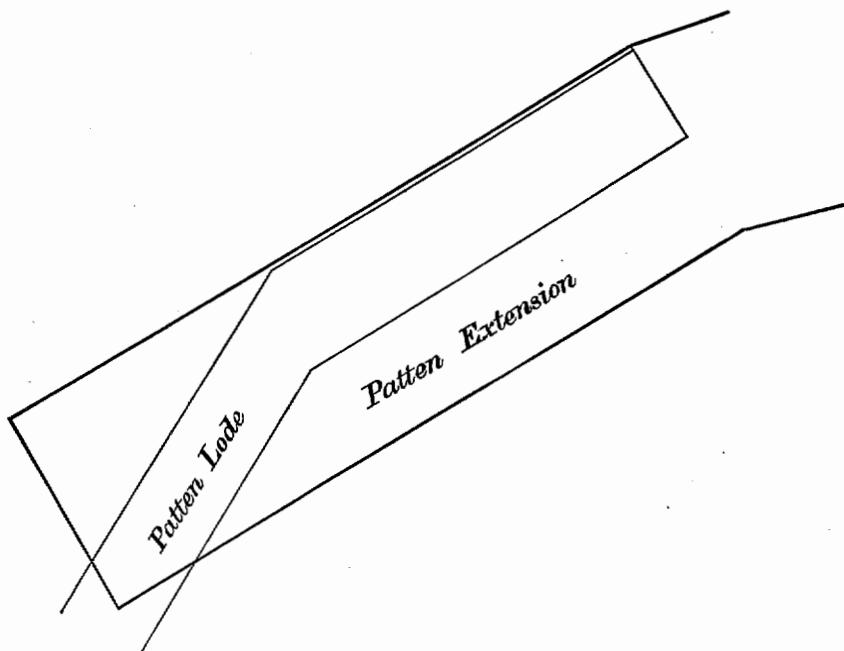
On April 4, 1891, you considered the mineral entry made by George A. Patten, September 7, 1888, for the Patten Extension lode claim, survey No. 4836, in the Central City, Colorado, land district, and by decision of that date held said entry for cancellation to the "extent of ground lying west of the (its) intersection with the Patten Lode claim."

By letters dated May 18 and June 17, 1891, after considering the entryman Patten's corroborated affidavit, filed May 2, 1891, and his application for rehearing filed June 1, 1891, you adhered to your said decision. Thereupon Patten on July 3, 1891, filed his appeal here.

The Patten Extension claim is shown by its plat of survey to be 107.9 feet in width and from its easterly end line to extend of that width S. $75^{\circ} 30'$ W. 750 feet; thence S. $62^{\circ} 50'$ west, a like distance to its westerly end line. The Patten claim, which it seems was also entered by the appellant, and which conflicts with the Patten Extension claim, the one in question, was patented September 6, 1876. The width of said pat-

ented claim is about half that of the one in question, and its initial point or corner No. 1, of its survey, is about in the center of the Patten Extension claim, from which point its easterly end line extends northwesterly to the northerly side line of the Patten Extension. The Patten claim then extends westerly of the width of its said easterly end line within the Patten Extension and parallel with the northerly side line thereof, a distance of some four hundred feet; thence southwesterly until it passes out of the Patten Extension at its southwest corner.

This leaves of the Patten Extension claim a triangular space west of the Patten's southwesterly side line and between the northerly side line and the westerly end line of the Patten Extension, such triangular space is the ground now claimed (in connection with the ground within the Patten Extension claim, east of the "Patten" eastern end line) by the claimant under his Patten Extension claim, as that part of said claim in conflict with the Patten was expressly excepted from the application for the former.



In your said decision you held the Patten Extension entry invalid as to the ground embraced therein lying west of the "Patten" eastern end line, because the lodes of both claims were either identical or parallel, and that it was accordingly

evident that any vein or lode within the ground mentioned must either be the Patten vein or one parallel to it. If it be the same vein then all between the southwesterly and southeasterly side lines of the Patten Lode claim, and the easterly end line thereof, passed with the "Patten" patent because it has its apex within the side lines of the ground included in the patent. See decision in case of the Colonel Hall Lode Claim, 2 L. D., p. 736.

Per contra, the appellant avers in his said corroborated affidavit that said lodes are in fact cross or intersecting lodes. To more fully explain the matters alleged in said affidavit the claimant, in his said application for re-examination, states that,—

Although the Patten and Patten Extension are two distinct veins, yet they are not parallel veins as we understand the term, they meet each other at or near a point four hundred feet west of the east end of the Patten claim, keep together for a short distance, *then cross each other*, the Patten Extension lode on its westerly strike passing to the north of the Patten claim and on its easterly strike passing to the south of said lode diverging gradually from each other after they cross.

I am aware that the Patten patent took the ground and apex of the Patten Extension lode from where it enters the east end line of the Patten claim to the point where it leaves on the north side line of said Patten claim *said ground being excluded from my application*, but I claim the westerly part of the Patten Extension after it leaves the north side of the Patten patent where it does not conflict with the Patten or any other claim and where my working adit is on the Patten Extension *vein* the mouth of which is entirely clear and about forty feet north of the Patten patent side lines.

The red lines on diagram shows the different apexes, the angle on the Patten Extension lode is caused by the pitch of the vein and the contour of the mountain, the adit shown starts on the Patten Extension vein near the canon, entirely clear and distinct from the Patten patent ground and was public domain at the time it was located. I would not dispute the Hon. Com'r's reason for objecting to grant me a patent to the ground west of the east end line of the Patten patent, if the veins were parallel and *both* remained inside the Patten patented claim, but I have presented duly corroborated evidence that the veins cross each other, that no part in which the apex of the Patten Extension lode passed with the Patten patent, is claimed by this application and that my improvements and developments by an adit on the Patten Extension vein near Virginia canon are for a long distance entirely clear of any conflict with the Patten claim.

By your letters of May 18, and June 17, 1891, you find respectively, the claimant's showing to be unsatisfactory, because "any parallel vein or lode passed with the Patten patent because it had its apex within the side lines of the ground included in said patent," and because "any parallel vein or lode found within the boundary of the Patten patented ground can not now be the basis for a subsequent claim."

In the case of the Col. Hall lode claim, *supra*, to which you refer, it was held that a location which is separated along the line of the lode by a patented lode claim is invalid as to that portion beyond the patented claim. This ruling was, however, made upon the theory that the lode in the location was identical or parallel with that in the patented claim. Consequently, if as the claimant avers, the lodes hereinbefore referred to are cross lodes, then the case at bar is materially different and is not controlled by that cited.

The claimant's showing is, I think, sufficiently explicit to sustain his contention that the said lodes are intersecting, particularly as it is shown that his adit or open cut is on the space claimed. Moreover, as a lode claim must be located along the lode the respective surveys showing the relative positions of the Patten and Patten Extension claims, tend to support the claimant's statement.

Having thus reached the conclusion that the Patten and Patten Extension are cross lodes, the entry for the latter claim should, I think, be allowed to embrace the ground hereinbefore described, beyond the intersecting space between said claims, as by section 2336 Revised Statutes, the junior location (Patten Extension) is given the right of way through such space "for the purposes of the more convenient working of the mine."

Your judgment is accordingly reversed.

I deem it well to add that the ground embraced in the Patten Extension claim, lying south of the Patten claim, can not be included in the former, as the patent for the latter carried the lode along such ground.

*Revised
J. D. 5/*
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SOLDIERS' ADDITIONAL ENTRY—CONFIRMATION.

DAVID WALTERS.

2d
The right of purchase under section 2, act of June 15, 1880, extends to one holding under an attempted sale (by double power of attorney) of a soldier's additional homestead right, and also having title by judicial decree and intermediate conveyance.

A soldier's additional homestead entry, on which final certificate has not issued, is not confirmed by section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 3, 1892.

On July 1, 1875, soldiers' additional homestead entry (No. 841) for the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ section 29, T. 28 N., R. 6 E., M. D. M. Susanville, California, was made in the name of David Walters, as additional to his original homestead entry (No. 6877) on the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ section 35, T. 39, R. 16, made September 18, 1869, at Booneville, Mo., but canceled as to said S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, March 9, 1876, and final certificate issued on said N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, March 14, 1876.

Said Walters served as a private in Company D 29th Regiment of Missouri Infantry Volunteers, in the war of the rebellion, from August 15, 1862, to June 12, 1865, when he was discharged.

On May 17, 1875, said Walters, with Sarah A. Walters, his wife, executed a power of attorney irrevocable to Charles D. Gilmore of Washington, D. C., to locate said "additional homestead" thereby granting said attorney "full power and authority to grant, bargain, and sell the same, the said described premises, or any part or parcel thereof or any interest therein, for such sum or prices, and on such terms as to him shall seem meet." And for \$100 released all "claim to any of the proceeds of any sale, lease, or contract, that shall accrue by reason of the conveyance of the said premises," with power of substitution. The said Sarah A. Walters, released and quitclaimed her right of dower in and to said premises.

The same was executed and acknowledged at Camden county Mo., before the county clerk of said county in the presence of two witnesses.

The description of land in said power of attorney is the same as that afterwards entered in the name of Walters (No. 841) but in a different handwriting from that generally in the body of the instrument.

On the same day (May 17, 1875) when said power of attorney was executed, the said David Walters made oath to the affidavit required for the entry of his additional homestead, and before the same county clerk and in the presence of the same witnesses.

The final certificate (No. 2252) of March 14, 1876, on said original entry was issued to David Walter, Jr., while said additional entry was made in the name of David Walters; on account of this discrepancy in the name, you suspended the additional entry by your letter of July 11, 1877, and called for supplemental affidavits to establish the fact that both names referred to the same person.

On September 12, 1889, the Sierra Lumber Company of San Francisco, addressed you a letter, claiming to have acquired title to the land covered by said additional entry December 4, 1878, by judicial decree and intermediate conveyances from said Gilmore as said attorney and also inclosed copy of said power of attorney, and a deed from Gilmore to Alvinza Hayward, and certain letters from V. Bowers of Decaturville, Mo., who claimed to be able either to perfect the additional entry or have it canceled and offering to perfect it for \$600.

On November 15, 1889, said Bowers forwarded to you the affidavit of David Walters to the effect that he had never sold his "additional homestead," and that the land embraced in said additional entry "was located without his consent or his knowing anything about it."

On May 9, 1890, you instructed the local officers to advise said lumber company, that they would be "allowed sixty days from notice hereof to disclose their interest in said entry, and establish the legality of the same."

In response thereto the president of said company forwarded his affidavit of June 18, 1890, in which he detailed the facts of the case and contended that said suspension of said entry should be removed and claiming the right to purchase the land under the second section of the act of June 15, 1880. (21 Stat., 237)

By your letter of March 30, 1891, you held the said additional entry for cancellation on the ground that you were satisfied from the records that Walters had sold his right of additional entry, which is not assignable, citing the case of John M. Walker (10 L. D., 354).

You also denied the right of said company to purchase said land under the act of June 15, 1880,

because said entry being illegal, and fraudulently made, is not subject to purchase under said act, See J. B. Haggan (6 L. D., 457), J. S. Cone, (7 L. D., 94) Puget Mill Co., (Ibid 301), Sah-Wah-Goo-Do-Gaw (8 L. D., 55), and Joseph W. Jones, (9 L. D., 195).

On April 28, 1891, said lumber company, filed a motion for review of said decision on March 30, 1891, and also asked for the confirmation of said entry under section 7, of the act of March 3, 1891, (26 Stat., 1095).

On June 3, 1891, you denied said motion, and held that said additional entry was not confirmed by section 7, of the act of March 3, 1891, for the reason that "the provisions of said section have no reference to entries void *ab initio*, and furthermore, it will be observed that a final certificate has never issued upon said entry."

An appeal now brings the case before me.

The name David Walters and David Walter, jr., are signed to the various papers by mark, and I am satisfied were simply different ways of writing the same name, and represent one and the same person. I am also satisfied that the power of attorney above mentioned was executed by said Walters and his wife, on May 17, 1875, as it purports and that his alleged affidavit of October 7, 1889, more than fourteen years thereafter, to the contrary, is erroneous. I am further of the opinion from the contents of said power of attorney, taken in connection with the execution on the same day of said affidavit, that said Walters sold his right of additional entry contrary to law, as construed by this Department. See Richard Dotson (13 L. D., 275) and Allen *v.* Merrill (12 L. D., 138) where the principle is applied to the location of half breed scrip.

Numerous errors are assigned as grounds of appeal in this case, but it is only necessary to consider two of them, which are as follows:

Error in denying the right of the Sierra Lumber Company to purchase this land under the act of June 15, 1880, as the case is one which clearly falls within the intent and meaning of the act of Congress.

Error in holding that the entry of Walters does not fall within the meaning of the purview and intent of section 7 of the act of March 3, 1891.

Section 2 of the act of June 15, 1880, provides—

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor.

The manifest object of this statute is to allow parties to get a title directly from the government to lands to which the right "may have been attempted to be transferred by *bona fide* instrument in writing," but who have not, however secured a good title to such lands. It is a remedial statute and should be construed favorably to accomplish the purpose intended.

In the foregoing cases cited by you, there was not a "*bona fide* instrument in writing" transferring the right, but the papers were forged or obtained fraudulently or without the authority of the entryman.

In the present case, although there was a sale of the additional right by Walters, which was illegal, there was no fraud practiced upon him,

and the power of attorney by him and his wife was a "bona fide instrument in writing" to "attempt the transfer" of his additional right. He cannot be heard to plead that he violated the law with the \$100 that he received as a consideration of the sale which he still retains; the transaction had his full authority and consent.

I am of the opinion that it was the very purpose of the act cited above to cover just such an "attempt to transfer" as exists in his case, and that to hold otherwise would strip the act of nearly all of its operation and effect.

The said lumber company acquired title to said tract December 4, 1878, by judicial decree and intermediate conveyances, and, therefore, have the right to purchase under said act of June 15, 1880.

Their motion to that effect is granted.

The said additional entry is not confirmed by section 7 of the act of March 3, 1891; because no final certificate has ever issued thereon, and hence it does not come within the provisions of said section. (*United States v. Bush*, 13 L. D., 529.)

Your judgment is modified accordingly.

SECOND HOMESTEAD RIGHT—ACT OF MARCH 2, 1889.

TALMADGE *v.* CRUIKSHANK.

The right to make a homestead entry, accorded under section 2, act of March 2, 1889, to one who has theretofore exhausted his homestead right by a soldiers' filing, cannot be exercised in the presence of an intervening adverse claim existing prior to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 3, 1892.

This record presents the appeal of Stafford P. Cruikshank from your decision of June 20, 1891, in the case of Carlton H. Talmadge *v.* said Cruikshank involving the N. E. $\frac{1}{4}$, Sec. 25, T. 157 N., R. 76 W., Devil's Lake, Dakota.

The township plat was filed October 12, 1887. On that day Talmadge made homestead entry for said land and Cruikshank filed pre-emption declaratory statement alleging settlement thereon the second of said month.

On September 10, 1880, Cruikshank in pursuance of his published notice submitted proof, before the register and receiver, in support of his claim. The same day Talmadge filed a protest against said proof and averred that he was the "first bona-fide settler upon and improver of said land;" that Cruikshank "never in good faith settled upon or made any improvements" thereon and that Cruikshank had "full knowledge and notice of the prior rights of said Talmadge."

Cruikshank moved to dismiss said protest, and Talmadge asked for continuance from November 26, 1888, the day previously set for trial. Cruikshank objected to a continuance.

No action seems to have been taken on said motion to dismiss. The register and receiver however over-ruled Cruikshank's objection to said motion for continuance and fixed December 21, 1888, at the local office, as the time and place of trial, when the parties appeared with counsel.

Talmadge cross-examined Cruikshank and the witnesses to his final proof and submitted testimony and Cruikshank called and examined one of said witnesses.

Upon the evidence thus offered the local officers by their joint decision dated March 1, 1889 rejected Cruikshank's proof, "for lack of sufficient evidence and improvements and for want of general good faith." They also found that at the date of his said entry Talmadge had exhausted his homestead right by previously filing (as shown by the records) April 1, 1886, soldier's declaratory statement for other land in the said district.

Both parties appealed from this ruling whereupon, you rejected Cruikshank's proof as aforesaid and held his filing for cancellation. You also found that Talmadge had not exhausted his homestead rights and that his entry must accordingly remain of record.

From this judgment Cruikshank has taken the pending appeal.

You reach the conclusion that Talmadge's entry should remain intact upon the theory that

while his homestead entry was not authorized by law at the time it was made, on account of the fact that he had previously exhausted his right by making said soldiers' declaratory statement, yet inasmuch as he had not heretofore perfected title to that tract of land on which he has made said soldiers' declaratory statement his said homestead entry will be allowed to stand since the act of March 2, 1889, validates the same.

And in this connection you refer to the decision in the case of John J. Stewart, 9 L. D., 543 and in that of George W. Blackwell, 11 L. D., 384.

In these cases there were no intervening claims and the question being solely between the government and homestead entrymen who had previously filed soldier's declaratory statements, their entries were, by reason of the additional privilege given by the act of March 2, 1889, 25, Stat., 854, allowed to stand.

The case at bar differs materially from those cited by you, in that Talmadge's entry conflicts with Cruikshank's existing pre-emption claim.

Therefore unless Cruikshank's claim is so inherently defective as to warrant its cancellation the entry of Talmadge cannot be considered ex parte.

Cruikshank's proof shows that he was a single man, twenty five years of age; that October 2, 1887, he moved a house on the land, and same day established his residence thereon, that until February 15, 1888, he was employed at Berwick and absent from his claim for different periods aggregating about three months, that from that date he was "on the claim all the time" during a larger part of which he took

his meals with neighbors, that his improvements comprised a house, stable, well, and three acres broken, and that he cut two hundred tons of hay from the land, but raised no crops.

The testimony of Talmadge and witnesses produced by him at the trial, so far as it relates to the acts of Cruikshank, is of negative character and does not seriously impeach the matters set up in his proof. Nor does the evidence show that Cruikshank, as found by the local officers, abandoned the land after submitting said proof. On the contrary, he testified at the hearing that with the exception of certain absences of a week or two at a time when employed elsewhere he continued to live on the land; that the stable referred to in his proof having been destroyed he had recently built another thereon and that he had "acquired a horse" not "home" as stated in the opinion of the register and receiver.

The evidence as thus outlined satisfies me that from the date of his settlement Cruikshank has rendered a reasonable compliance with the law in regard to residence and improvement. It follows that his claim is not inherently defective and that it must be allowed unless it be ascertained that Talmadge has the better right.

Talmadge bought certain improvements on the land and it appears settled thereon some three months before Cruikshank.

You accordingly hold in view of your finding that he (Talmadge) was a qualified homesteader, that because of such prior settlement his rights are superior to those of Cruikshank.

In this conclusion I cannot concur. The bona fides of the residence which Talmadge claims to have maintained on the land after his said settlement may in the light of the evidence well be questioned.

This however is immaterial. When Talmadge made his present entry he had by filing his said soldier's declaratory statement exhausted his right of entry under the homestead laws. George W. Blackwell, *supra*, and cases cited.

His settlement and residence, conceding the same to have been in good faith, could therefore prior to the act of March 2, 1889, give him no right to the land and he could acquire it, if at all, only under said act, the second section of which provides:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding;

Any right that he may have is necessarily inferior to a subsisting right in existence at the passage of the act referred to.

The record as herein-before outlined shows the right now asserted by Cruikshank to be of such character and that it consequently must prevail over that of Talmadge.

Cruikshank's proof will accordingly be accepted and the entry of Talmadge canceled.

Your judgment is reversed.

TIMBER CULTURE ENTRY—ACT OF MARCH 3, 1891.

WILLIAM J. MILLER.

An act of Congress takes effect as a law from the time of its approval by the President, and the portion of the day that expires before such approval is excluded from the operation of such act.

The act of March 3, 1891, repealing the timber culture law was not approved by the President until after the local offices were closed for business on that day, and it therefore follows that timber culture entries made on said day are valid so far as said act is concerned.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 2, 1892.

William J. Miller has appealed from your decision of June 9, 1891, holding for cancellation his timber-culture entry of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 27 N., R. 34 E., Folsom land district, New Mexico.

The ground of your decision was that the application was filed March 3, 1891—the date of the approval of the act “to repeal timber-culture laws, and for other purposes.”

This case resembles that of Alvin A. Wiltse (14 L. D., 614), in that the entry was made on March 3, 1891—the date of the passage of the act repealing the timber-culture laws. It differs from it in that Wiltse had contested a prior entry, and secured its cancellation, thus obtaining a preference right under the second section of the act of May 14, 1880 (21 Stat., 140); while in the case at bar the applicant had not contested a prior entry. He states (under oath):

I made an application of February 19, 1891, to enter as a timber-culture the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of sec. 11, T. 27 N., R. 34 E., and the same was rejected by the local officers for the reason that the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ was covered by homestead entry 449, F. C. 121, December 9, 1880, of Rafael Galindre; that immediately on receipt of notice rejecting said application I appeared at the local office and made timber-culture entry No. 68, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, of sec. 11, T. 27 N. R. 34 E.; that said entry was made March 3, 1891, at 9 o'clock a. m., immediately upon the opening of the land office.

The syllabus in the Wiltse case correctly sets forth the gist of the decision therein, to wit: “A timber-culture entry made on the date of the repealing act, March 3, 1891, by a successful contestant, may be allowed to stand.” In the case at bar the question at issue relates to an entry made on the day of the repealing act by one who was not the contestant of a prior entry.

In the departmental decision in the case of Rosa Dore (14 L. D., 596), it was held “that a statute for the commencement of which no time is fixed, commences from its date”—language quoted from the cited case of *Mathews v. Zane* (7 Wheaton, 211).

In that case no attempt was made to establish the exact time when

the act went into effect. The question there was, whether an entry made two weeks after the passage of the act could be allowed; there was no necessity of deciding or discussing whether an act approved March 3d became effective on the morning of said 3d of March, or not until the morning of the next day; or whether so much of March 3d as had elapsed before the act received the signature of the President was excluded from the operation of the act.

The case of *Mathews v. Zane*, cited in the *Dore* case, has for its purpose the determination of the question whether, in view of the act of March 3, 1803, establishing a land district at Zanesville, Ohio, land within the limits of the district so established could be sold at the Marietta land office (in which it had been previously included), on May 12, 1804—fourteen months later. The court held that it could not; but whether or not it could have been sold *on* the 3d of March, 1803, was not decided nor discussed. The decision was that:

The known rule being that a statute for the commencement of which no time is fixed, commences from its date, the act of the 3d of March, 1803, separated this land from the Marietta district on that day, and withdrew it from the direction and power of the officers of that district.

Here, again, the question whether the separation that was effected "on that day," operated inclusive of that day, or exclusive of it, or excluded so much of it as had elapsed before the President signed the bill and included the remainder, was not in issue, and was not decided.

While the case of *Mathews v. Zane* does not involve the question at issue in the case at bar, there are numerous cases where the same principle is decided. On an examination of these it will be found that it has not infrequently been held that the part of a day which had elapsed before the approval of a bill made it a law should be excluded from its operation. Otherwise, it would be, as regards the preceding part of the day, an *ex post facto* law, which the Constitution of the United States prohibits. Lord Mansfield said: "Though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary. And I do not see why the very hour may not be so too, where it is necessary and can be done." (*Combe v. Pitt*, 3 Burr, 1423.)

In Massachusetts the supreme court of that State has held:

Common sense and common justice equally sustain the propriety of allowing fractions of a day whenever it will promote the purposes of substantial justice.—A bill which is approved by the President takes effect as a law only by such approval, and from the time of such approval. The approval cannot look backward, and, by relation, make that a law, at any antecedent period of the same day, which was not so before the approval. (*In re Richardson*, 2 Story, 571.)

Other decisions of State supreme courts might be cited, to show that the same principle prevails elsewhere.

The decision which controls this Department in the matter, however, is of the supreme court of the United States in the case of *Burgess v. Salmon* (97 U. S., 381). In that case Congress passed an act increasing

the tax on tobacco from twenty to twenty-four cents per pound—but providing that such increase should “not apply to tobacco on which the tax under existing laws shall have been paid *when this act takes effect.*” The act was approved March 3, 1875. (18 Stat., 339).

On the same day Salmon and Hancock, tobacco dealers, paid to collector Burgess, of the 3d collection district of Virginia, the tax on a certain number of pounds of tobacco. Upon the passage of the act above named, the collector demanded of Salmon and Hancock \$377.80, the increased tax. The manufacturers paid the amount, under protest, but brought suit to recover the same, on the ground that:

The tobacco in question was stamped, sold, and removed for consumption or use from the place of manufacture and beyond the control of Salmon and Hancock in the forenoon of March 3, 1875; and the above act of Congress was approved in the afternoon of that day.

After a full discussion of the question the supreme court held:

The acts and admissions of the government establish the position that the duties exacted by law had been fully paid, and the goods had been surrendered and transferred before the President had approved the act of Congress imposing an increased duty upon them. To impose upon the owner of the goods a criminal punishment, or a penalty of \$377, for not paying an additional tax of 4 cents a pound, would subject him to the operation of an *ex post facto* law.

It is proper to examine the public records, “the journals of the two houses of Congress, and other circumstantial facts”—in short, we “have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer”—to learn as nearly as possible the exact time when the President signed the bill under consideration. (*Gardner v. The Collector*, 6 Wall., 499.) It is a fact conclusively shown by the public records, that the act “to repeal timber-culture laws, and for other purposes,” was not signed by the President until very late in the day of March 3, 1891.

The record of proceedings in the Senate show that after that body re-assembled for its evening session, at 8 o'clock p. m., and after a brief discussion upon several questions, a messenger from the House of Representatives arrived, with the announcement that the Speaker of the House had signed a number of bills, among which was the bill, “to repeal timber-culture laws, and for other purposes”—which was “thereupon” signed by the Vice-President. Certainly it was not until after this that the President affixed his signature to the bill, which thereby became a law.

It is a presumption so strong that it may be relied upon as a certainty that every land office in the United States had been closed for business on the 3d of March, 1891, before said act was signed. During that day, therefore, it stood unrepealed, and timber-culture entries made on that day should, if otherwise lawful, stand.

Your decision holding the entry in question for cancellation is therefore reversed.

JURISDICTION—SECTION 7, ACT OF MARCH 3, 1891.

SEWARD E. ALDRICH.

The courts have no jurisdiction, prior to the issue of patent, to make any decree affecting final proof or the certificate issued thereon.

An entry is confirmed by the proviso of section 7, act of March 3, 1891, where two years have elapsed since the issuance of the receiver's receipt, and there is no pending contest or protest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 2, 1892.

I am in receipt of your letter of November 19, 1891, transmitting an appeal by Seward E. Aldrich from your decision of August 21, 1891, affirming the decision of the local officers in rejecting his application to make homestead entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 36, T. 45 N., R. 23 W., Marquette, Michigan, land district.

This case involves the military bounty land warrant location of Oscar Graetz for the same tracts.

The record shows that Graetz filed on this land October 7, 1886, and made final proof July 16, 1887. It appears from a letter written by the receiver June 20, 1887, that on the 14th of June, 1887, Aldrich called at the office and applied to enter the land; he was informed of the filing of Graetz and that he would offer proof on the 16th of the same month. That, thereupon, he requested the local officers to hold his application and said he would go and see the land, and that he would be present on the day the proof was to be offered, but he failed to appear, and there being no contest or protest against said filing, the proof was taken and approved, payment was made by military bounty land warrants and final certificate issued. Aldrich on the 20th of the same month returned to the office. He claimed he could not get back sooner. Said that Graetz's proof was false and his filing fraudulent, but he filed no affidavit of contest and left the office leaving his application to enter, at the office, but there is nothing to show that he tendered the entry fees then, or that he had previously done so. On December 18, 1890, he returned to the office, tendered the fees, and asked that his entry be allowed. It was then considered by the local officers and rejected, from which action he appealed, and you, on August 21, 1891, affirmed said action and held that there having been no contest or protest against the entry and that more than two years having elapsed since the issuance of the receiver's receipt that the entry came within the purview of the proviso of section 7 of the act of March 3, 1891 (26 Stat., 1095). From this decision Aldrich attempted to appeal and sends up a long statement of facts signed by himself but not sworn to, and it really contains no assignment of errors. He claims in substance that he made the application to enter on June 14, 1887, that it was received by the officers; he supposed it would receive consideration and proper action in due

time. He says the officers were in possession of this application when they allowed Graetz to make entry. That he had consulted the United States attorney of his district, who advised him that proper steps were being taken to set aside Graetz's claim, when his entry could be perfected. He says the delay in the matter is not by his fault, that he has sought at all times to procure action on his claim, and has frequently requested the land officers to take it up and act upon it. He says he appeals from the decision of the Commissioner because he overlooked or ignored the fact that his application was pending in the office when Graetz was allowed to make entry. He does not controvert the statement of the officers in saying he simply left the application with them until he could go and see the land, and the further statement that he assured them he would be present at the taking of the proof. He does not say that he ever tendered the entry fee until December, 1890, about three and one-half years after the final proof had been taken. He does not say that Graetz had not complied with, and was not complying with the law.

In March, 1890, Special Agent Worden made an investigation of the claim and a report on the case, and on this report the entry was, on December 2, 1890, held for cancellation, and on April 30, 1891, a hearing was ordered on the application of the entryman.

It appears by a transcript sent up by the special agent, that on a proceeding commenced and prosecuted by the United States district attorney in the western district of Michigan (northern division) the circuit court of the United States for the 6th circuit and western district, northern division of Michigan, adjudged and decreed that said entry of Graetz had been secured by fraudulent means, and the same was decreed to be null and void.

You very properly held that no patent having issued for said land, the said court had no jurisdiction to make any decree affecting the final proof and certificate.

I further concur in your action relieving said entry from suspension and in deciding that this entry is confirmed by the proviso of section 7 of the act of March 3, 1891 (26 Stat., 1095)—and said decision is therefore affirmed.

REPAYMENT—COAL LAND ENTRY.

D. A. AND G. W. MULVANE.

Repayment of the purchase price paid for coal land is not authorized where the entry is canceled on account of its fraudulent character.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 4, 1892.

Messrs. D. A. and G. W. Mulvane have appealed from your decision of October 7, 1891, denying their application for the return of the purchase money paid by Adolph Peterson and John Carlson upon the coal-

land entries made by them respectively upon the NE. $\frac{1}{4}$ of Sec. 31, and the NW. $\frac{1}{4}$ of Sec. 32, T. 33 S., R. 63 W., Pueblo land district, Colorado.

Said entries were cancelled, and being illegal and fraudulent, by departmental decision of December 2, 1887 (6 L. D., 371), under the circumstances therein set forth, and which therefore need not be here set forth in detail. The lands were entered under a contract to convey the same to the Trinidad Coal and Coking Company, as soon as entry should be made; and they afterward were so conveyed. Said company sold the same to the appellants herein.

It will be seen that the case is quite similar to that of the Trinidad Coal and Coking Company, reported in 137 U. S., 160; the suit in that case being to set aside patents, while in the case at bar entries (upon which patents had not yet issued) were canceled by the land department.

It has been the uniform ruling of the Department that where an entry has been canceled on account of its fraudulent character, or because it had been secured through false testimony, repayment would not be allowed.

Counsel for the applicants, however, contend that while false swearing under the pre-emption law is punished with forfeiture of land and money as an express condition precedent (Sec. 2262 R. S.), yet such penalty cannot be impliedly extended to entries made under other and different statutes, wherein no such conditions or provisions are found.

No such distinction is found in the rulings of this Department. Thus, among the reported cases in which repayment has been refused because fraud had been found on the part of the entrymen, those of Lydia Kelley (8 L. D., 322), Edmund F. Morcom (9 L. D., 103), Alonzo W. Graves (11 L. D., 283), and John B. Block (12 L. D., 528), were homestead entries; and those of Spencer V. Raymond (11 L. D., 313), and David J. Morgan (12 L. D., 78), were desert-land entries.

Your decision holding that under the circumstances of this case, "repayment of the purchase-money is not authorized by any statutes," and denying such repayment, is therefore affirmed.

CONTEST—SOLDIERS' ADDITIONAL HOMESTEAD.

LEE *v.* ARENDT.

A contest will not lie against an application to make a soldier's additional homestead entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1892.

On the 15th of June, 1882, your office issued to John Arendt a certificate, stating that he was entitled to an additional homestead entry

of one hundred and nineteen and three quarter acres, as provided in section 2306 of the Revised Statutes.

On the 26th of the same month, Arendt executed a power of attorney, authorizing John W. Fordney to locate such additional homestead, and on the 6th of June, 1884, Fordney presented such power of attorney, and certificate at the local land office at Marquette, Michigan, and applied to enter the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 15, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 47 N., R. 40 W., in said land district.

The local officers rejected the application, for the reason that the land applied for was within the indemnity limits of the Marquette and Ontonagon railroad grant. He appealed from this action by the local officers, but before you took action on such appeal the withdrawal orders for railroad purposes were revoked. This revocation was dated August 15, 1887 (6 L. D., 92), and by its terms the lands in question were opened to settlement from that date, but not to entry or filing until October 10, of that year.

On the 23rd of August, 1887, Peter Cameron applied to make homestead entry of the SE. $\frac{1}{4}$ of Sec. 15, but his application was rejected by the local officers, for the reason that the land was still reserved from entry.

On the 10th of October, 1887, Arendt, by his attorney, renewed his application to enter, making special reference to his former application and appeal then pending. Two days later, Cameron renewed his application, alleging settlement on the 3rd of September. You directed a hearing to determine the rights of the respective parties, and at its conclusion the local officers decided that, notwithstanding Cameron settled upon the land in 1887, the application of Arendt to make entry in 1884 gave him a prior right to the land in dispute. From this decision Cameron appealed to your office.

On the 21st of February, 1890 Grant A. Lee filed in the local office an application to contest the application of Arendt to make entry for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23 (the land not in dispute between Arendt and Cameron), alleging as grounds therefor that the scrip attempted to be located under Arendt's application has been assigned, and was therefore void. The local officers rejected this application to contest, and Lee appealed to your office.

You considered the appeals of both Cameron and Lee, and on the 14th of August, 1890, rendered a decision in which you affirmed the action of the local officers in rejecting Lee's application to contest, and awarded the land to Arendt, holding as a matter of law that "Arendt's right to make the proposed entry admits of no dispute, and that he is authorized to exercise such right in person or by attorney without inquiry as to his purpose." You also affirmed the action of the local officers in refusing to allow Cameron to include in his proposed homestead entry the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 23 (embraced in Arendt's application), and dismissed his appeal.

On the 13th of September, 1890, a motion for a review of your decision of August 14, was filed in your office, and on the 31st of August, 1891, you rendered a decision on said motion. In the meantime, to wit, on the 21st of June, 1891, a relinquishment of all the claim, title, and interest of Arendt to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 15, was filed in the local office, and thereupon the application of Cameron to make homestead entry for the SE. $\frac{1}{4}$ of said section was allowed.

In your decision of August 31, 1891, you approved of the action of the local officers in allowing Cameron to make homestead entry for the quarter section mentioned, after the filing of Arendt's relinquishment, and you also expressed the opinion that "Lee's application to contest was premature, and that the same was properly rejected." Upon the question as to the right of Arendt to sell or assign his scrip, which was the ground upon which Lee proposed to contest his application to make homestead entry, you held that, "if Arendt had parted with his interest in said certificate attempted to be located hereon, prior to June 6, 1884, the date upon which said Fordney presented the same at the local office, his application based thereon should be rejected." In reference to this question you find the evidence unsatisfactory, and you say:

Upon consideration of the whole record, I am convinced that further hearing should be had. Cameron's claim having been satisfied by Arendt's relinquishment of his interest in the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 15, and inasmuch as I have held that Lee has no rights in the premises by virtue of his contest, yet, in the interest of the government, you will call upon Arendt to show that he never assigned his certificate of right to make additional entry prior to location. If he fails to make this showing his application, which now includes only the NW. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 23, T. 47 N., R. 40 W., will be rejected.

You modified your decision of August 14, 1890, accordingly, directed the local officers to fix an early day for the hearing ordered, and awarded to Lee the right to appeal. It is an appeal by him from that decision which brings the case to the Department.

In Lee's application to contest, after stating that he is acquainted with the land in question, he alleges that the location of said scrip thereon was fraudulent and not according to law, "for the reason that said scrip was assigned, and that said assignment rendered the same void under the law and departmental decisions." He concluded by saying:

And this the said contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said case, and he therefore asks to be allowed to prove said allegations, and that the application to enter said scrip on said NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, T. 47 N., R. 40 W., be rejected, and said land forfeited to the United States, he, the said contestant, paying the expenses of said hearing.

All that Lee asks is that the application to enter said scrip on said land be rejected, and that the land be forfeited to the United States. Under the decision appealed from, therefore, if the charges made by Lee are true, the result which he sought will be accomplished. Arendt's application to make entry for the land will be denied, and it

will belong to the United States. He will not even be obliged to prove his charges, and will be relieved from the expenses of said hearing. The decision requires "Arendt to show that he never assigned his certificate of right to make additional entry prior to location," and informs him that if he fails to do so his application will be rejected.

In his appeal Lee does not ask for a reversal or modification of your decision, but insists that you erred in holding that he had no settlement claim to the land, and that his application to contest was premature. He also insists that an application under a soldier's additional homestead claim is practically the final entry, and that such an application is contestable.

I am not prepared to admit the correctness of this claim. Rule 1 of the Rules of Practice says:

Contests may be initiated by an adverse party or other person against a party to any entry, filing, or other claims under the laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

In case a person was, to the knowledge of another, seeking to make an illegal entry, filing, or other claim, a protest might be filed against the allowance thereof, but no contest would yet be in order, as an application is simply the expression of a desire to establish a claim upon a tract of land.

While an application to make a soldier's additional homestead entry, when allowed, may be more complete than an ordinary homestead application favorably considered, still as an application it is simply "the act of making a request or soliciting," and does not amount to a contestable "entry, filing, or other claim."

I think therefore, that you did not err in holding that when Lee presented his contest affidavit he had no settlement claim for any portion of the land involved, and that his application to contest was premature. The conclusion reached in your decision is therefore approved, and the appeal of Lee dismissed.

I find among the papers transmitted by you an application made by Lee, on the 12th of September, 1891, to file his pre-emption declaratory statement for the land in question which was rejected by the local officers on that day, "because the land applied for is embraced in the soldier's additional homestead scrip application of John Arendt, pending on appeal, and for the further reason that the pre-emption law was repealed by act of Congress approved March 3, 1891." From this action by the local officers, he appealed to your office, all of the papers being transmitted to you by the register on the 19th of October, 1891.

These papers, together with the others in the case, are herewith returned.

FORT REYNOLDS MILITARY RESERVATION—SCHOOL LAND.

GREGG ET AL v. STATE OF COLORADO.

Land formerly included within Fort Reynolds military reservation is not subject to homestead entry, but must be sold at public sale, in accordance with the act of June 19, 1874.

This reservation was created prior to survey, and as the act of 1874, did not except from its provisions such sections as might be numbered sixteen and thirty-six on survey, the State is entitled to indemnity therefor.

Secretary Noble to the Commissioner of the General Land Office, August 5, 1892.

On April 8, 1890, William R. Gregg applied to make homestead entry of the NE. $\frac{1}{4}$ of Sec. 16, T. 21 S., R. 63 W., Pueblo, Colorado, and on the same day Lyman Thompson applied to make homestead entry of the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, same section. Said applications were rejected, for the reason that the land applied for is within the limits of the Fort Reynolds military reservation, and therefore not subject to entry under the homestead laws. Upon appeal therefrom you affirmed said decision, and applicants appealed to the Department.

The land in controversy is within the limits of what was formerly the Fort Reynolds military reservation, which was created by executive order, June 22, 1868. The act of June 19, 1874 (18 Stat., 85), provided for the transfer of said reservation to the custody and control of the Secretary of the Interior to be disposed of for cash, after appraisement, to the highest bidder, at not less than the appraised value, nor less than one dollar and twenty-five cents per acre. No reservation was made by the act, but it provided for the sale of the entire reservation in tracts of not more than eighty acres, at public outcry, after giving not less than three months public notice of the time and place of sale.

The tracts applied for are not subject to homestead entry, for the reason that Congress, by the act of June 19, 1874 (*supra*), had provided that they should be disposed of only at public sale to the highest bidder, and your decision rejecting said applications is therefore affirmed.

You also considered in said decision indemnity school selection made by the State of Colorado, for the N. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 29, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, T. 21 S., R. 54 W., containing in all six hundred acres, February 24, 1890, in lieu of said section 16, which is embraced within the limits of what was formerly the Fort Reynolds military reservation.

The consideration of the validity of this selection was unnecessary to a decision of the issues raised by the appeals of Gregg and Thompson, but you rejected said selections, for the reason that the basis used therefor is a school section found in place, which was excepted from

the operation of the act of June 19, 1874, and to which the school grant attached as soon as surveyed.

The State has not appealed from this decision, but it is in my judgment so clearly in conflict with the decisions of the supreme court upon this question and the well established rules of the Department that I deem it proper to call attention to it that the error may be corrected by re-instanting the selections, before further complications ensue in the adjustment of this grant.

The grant to the State of Colorado for school purposes is of the sixteenth and thirty-sixth sections in every township, and where such sections have been sold or otherwise disposed of other lands equivalent thereto are granted. The grant does not attach to the specific sections, until they are designated by survey, and, if at that time they are in reservation or otherwise disposed of, the State has the right to select equivalent lands in lieu thereof.

The words of present grant are restrained by words of qualification, intended to protect the State from loss by substituting other lands where the government has actually disposed of the specific sections, or has provided for their disposal by other means. This interpretation was clearly announced in the decision of the supreme court in the case of *Mining Company v. Consolidated Mining Company* (102 U. S., 167), and *Heydenfeldt v. Daney Gold Mining Company* (93 U. S., 634). In the case last cited, the court says:

Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

The principle distinctly announced by the court is, that until the status of the land is actually fixed by survey, as shown by the township plat, so that the grant may attach to the specific section, the government has the absolute power to dispose of it as a part of the public domain, or to provide for its disposal in any manner that may promote the public interest.

In the case of the State of Colorado (6 L. D., 412), the Department held that,

where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent land in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

So, in the case of the State of Michigan (8 L. D., 312), referring to the decision of the supreme court in the case of *Cooper v. Roberts* (18 Howard, 173), it is said:

The principle broadly and distinctly ruled by the court, is, that the sixteenth

section is subject to the operation of the grant, although in reservation, if disencumbered before the compact has been fulfilled by the assignment of equivalent land; or in other words, that while the grant is a grant *in presenti* attaching to the specific lands which have not at the date of the survey been sold or disposed of, it is nevertheless subject to a reservation of such lands, so long as such reservation shall continue.

To the same effect are the decisions of the court in the cases of *Ham v. Missouri*, 18 How., 126, and *Beecher v. Wetherby*, 95 U.S., 517, from which it will be seen that a mere reservation does not defeat the grant as to the section reserved, but merely suspends its operation. The government may, however, in restoring the land and before the right of the State attaches to the specific section, provide for its disposal in such manner as to defeat the grant to this particular section, in which event the State would be authorized to take indemnity lands in lieu thereof.

This accords with the rule announced by the supreme court in the cases of *Heydenfelt v. Daney Gold Mining Company* and *Mining Company v. Consolidated Mining Company, supra*.

The Fort Reynolds military reservation was created June 22, 1868, before the lands were surveyed. The land embraced in said limits continued in reservation for military purposes, until it was transferred to the custody and control of the Secretary of the Interior, to be disposed of under the act of June 19, 1874, providing that said reservation, "containing twenty-three square miles, as set apart and declared by the President, on June 22, 1868," shall be offered in tracts of not more than eighty acres, and sold to the highest bidder for cash, after appraisement and notice, at not less than the appraised value, nor less than one dollar and twenty-five cents per acre.

The plain and express declaration of the law is that all of the land shall be sold at public outcry, and there is not the slightest expression in the act indicating an intention to except from its provisions land that might upon survey be designated as a sixteenth or thirty-sixth section, or any other land, nor can such intention be gathered by implication, because of the grant to the State of the sixteenth and thirty-sixth sections for school purposes. The government, in the exercise of its absolute power to dispose of these lands in any way that it saw fit to promote the public interest, provided for the disposal of the entire reservation at public sale, leaving the State to be compensated by other lands, and this intention was clearly expressed by the act.

In the case of *Beecher v. Wetherby (supra)*, the authority under which you base your opinion, the Indian title to the land in controversy was extinguished prior to survey. The Indians were permitted to remain on the reservation for two years and until the President should notify them that the lands were wanted. While so occupied the township was surveyed and the grant attached. Afterwards, the government ceded the lands to the Indians for a permanent home, and in 1871 Congress authorized the sale of the lands, and directed that the pro-

ceeds be applied to the sole and separate use of the Indians. It was held that congress did not intend by the act of 1871 to authorize a sale of the school lands, because they had been previously disposed of, the grant having attached after the Indian title was extinguished and before the lands were ceded to them for a permanent home.

The land in this reservation was not surveyed until September, 1875, and the survey was not approved until 1880, long after the act of June 19, 1874, providing for its sale at public outcry. When the survey was made, it was in pursuance of the act providing for its disposal, and, hence, the grant to the State never attached to any lands within said reservation, the manner of their disposal having been otherwise provided for prior to survey.

But, independently of this, the act of February 28, 1891 (26 Stat., 796), provides, that:

Where any State is entitled to said sections 16 and 36, or where said sections are reserved to any territory, notwithstanding the same may be mineral land, or entered within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections.

Conceding that the school grant attached to the specific sections after they were designated by survey, the State having selected equivalent land in lieu thereof, the government may hold the State to its waiver of the school section and dispose of it as part of the public domain.

You will therefore reinstate the indemnity selections made by the State, in lieu of the sixteenth section, within the limits of the Fort Reynolds military reservation, as a basis, and notify the State authorities. If any lands within the limits of said reservation remain undisposed of, I see no reason why they should not be offered for sale under the provisions of said act.

CONTEST—SECOND HOMESTEAD ENTRY.

MILLER v. CRAIG.

A contest will not lie against an entry that is held for cancellation on proceedings by the government.

Failure to secure title under the first homestead entry on account of bad faith or non-compliance with law does not defeat the right to a second under the act of March 2, 1889.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1892.

William F. Miller made homestead entry No. 5435 December 14, 1886, for the NW. $\frac{1}{4}$ of Sec. 18, T. 24 N., R. 45 E., W. M. Spokane Falls, Washington.

He made final proof on the entry October 24, 1890, which was rejected by the register and receiver. A motion was filed asking per-

mission to submit supplementary proof, and on November 14, 1890, such proof was received, but was rejected. Miller appealed to you, and on March 3, 1891, you affirmed the finding of the register and receiver, and held the entry for cancellation, but directed the local land officers to notify him of the time allowed him to appeal from such decision, or, if he desired to do so, and was qualified, he might re-enter the land under the provisions of the act of March 2, 1889, (25 Stat., 854).

He thereupon applied to make entry under the act of March 2, 1889, *supra*, but his application was rejected by the register and receiver on June 30, 1891, "for the reason that application to contest the tract by John S. Craig was offered April 21, 1891, was rejected and appeal was taken to the Department April 23, 1891, and is now pending;" and further, that "no application by Miller to enter the tract was made in the specified time allowed by the Commissioner's letter of March 3, 1891."

He again appealed to you, and after considering the questions involved, on January 27, 1891, you dismissed Craig's application to contest the entry; and Miller not having appealed from the order of March 5, 1891, holding his entry for cancellation, you canceled his entry, but allowed him thirty days in which to make new entry of the tract under his application, in accordance with the provisions of the act of March 2, 1889, *supra*.

On August 18, 1891, Craig applied to enter the tract in question. His application was rejected by the local officers for the reason "that William F. Miller is allowed to make entry under the act of March 2, 1889, for the same tract. Notice having been issued to Miller August 3, 1891, as to the advice of the Commissioner's letter of July 27, 1891, the thirty days does not expire until September 3, 1891."

On August 22, 1891, Miller applied to make entry in accordance with your direction in the letter of July 27, 1891, but his application was "held awaiting evidence of citizenship," and the register applied to you for instructions.

Craig appealed to you from the action of the local land officers in rejecting his application made August 18, 1891, and on September 15, 1891, after considering the case, you affirmed their decision and notified them that proper evidence of Miller's citizenship was on file in your office, and that his application should be allowed. Craig has appealed from your judgment to this Department.

Your judgment dismissing the application to contest filed by Craig was correct, for it is well settled by the rulings of the Department that where the government has proceeded against an entry and held it for cancellation for invalidity, contest will not be received.

Craig's application to enter the land was made before the expiration of the thirty days allowed Miller in which to enter the tract under the act of March 2, 1889, *supra*, and, of course, his application must be held subject to the rights of Miller.

You hold that Miller should be allowed to make the entry and have directed the local land officers to do so when your judgment shall become final.

It is contended by Craig that the act of March 2, 1889, is not to be construed to inure to the benefit of Miller, because he attempted to get title to this tract fraudulently, that is, by offering final proof under his original entry, when he knew he had not resided upon the land; you have already decided that he did not act in good faith, and hence he should not be allowed a second chance to get the land under the act cited.

While it is a principle of law that no one shall be permitted to take advantage of his own wrong to the prejudice of another yet the act in question makes no provision to the effect that those who have acted in bad faith and failed to secure title under their homestead entries by reason of their conduct and non-compliance with law should not be allowed to make a second entry; on the contrary, it seems to afford protection to all who have failed to secure title under the homestead law. The Department construing the act has held that a second home stead entry may be made by one who fails to secure title under the first, because he failed to comply with the law in the matter of residence. John Halblieb (13 L. D., 217); *Ashwell v. Honey*, (13 L. D., 436); see also the case of Robert R. Bratton, (9 L. D., 145) and Arthur P. Toombs on review (9 L. D., 312).

Your judgment is affirmed.

HOMESTEAD APPLICATION—ACT OF MAY 26, 1890.

WILLIAM WEBB.

Under the provisions of the act of May 26, 1890, distance from the local office, and the expense of making homestead application there in person, warrant the execution of the preliminary affidavit before a clerk of the county court.

A homestead application in due form, signed for the applicant by his attorney, may be properly accepted, where it appears that such act is duly authorized by the applicant.

Secretary Noble to the Commissioner of the General Land Office, August 5, 1892.

I have considered the motion of William Webb for a review of departmental decision of March 22, 1892, rejecting his application to make homestead entry for the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 22, T. 11 S., R. 2 W., Huntsville, Alabama.

The material facts in this case are as follows: The homestead entry of John Boden for said tract was canceled for reason of expiration of seven years, by your letter of November 13, 1890.

On November 6, 1890, William Ran filed an application to enter said

land as an additional homestead. This application was rejected on account of prior homestead entry of Boden.

On November 15, 1890, W. E. Brown, an attorney for William Webb, filed the application of Webb to enter the land as a homestead. This application was rejected by the local officers for the reason that the name of the applicant Webb was signed to the application by his attorney Brown.

You sustained the action of the local officers, and your decision was affirmed by departmental decision of which review is asked.

The homestead affidavit was sworn to by Webb before the clerk of the court of Cullman county, Alabama, in which the land is situated. In this affidavit Webb did not swear that he was residing upon the land, neither did he state what improvements he had thereon. He swore that the reason why he did not appear at the local office was on account of the expense and the distance thereof.

Departmental decision was based upon the theory that an applicant who does not appear at the local land office, and who is residing on the land, must state in his affidavit what acts of settlement, improvement and residence have been made, what members of the family have resided on the land, the length of time, &c., of such residence, as prescribed by the regulations of your office; and further, that the applicant did not appear personally at the local office and present his application.

In his motion for review, Webb asserts that his application was made under the provisions of the act of May 26, 1890, and that it was not necessary to state that he was residing upon the land, or that he had improvements thereon.

The act of May 26, 1890 (26 Stat., 121), provides:

In any case in which the applicant for the benefit of the homestead, preemption, timber-culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions to the register and receiver.

Prior to the passage of this act the regulations of the land department required that the applicant should state in his affidavit the facts of settlement, improvements, etc., as is stated in the decision of March 22, 1892. This requirement was based upon section 2294 R. S. But as is stated in the general circular issued by the land department on February 6, 1892, page 9, the act of May 26, 1890, modified the requirements of the previous laws in this respect and allowed the preliminary affidavits of all homestead applicants whether residing upon the land or not, to be made before certain officers, other than the register and receiver. Under the provisions of this act, the affidavit of Webb was sufficient to base his application upon. This is clear, not only from the act itself, but from the instructions issued by the land department June

25, 1890 (10 L. D., 687), and which were in force at the time this application was madé. Is the fact that his application was signed by his attorney sufficient to defeat the same? Webb makes affidavit that he can neither read nor write, and that he instructed his attorney, Brown, to sign his name to his application. In corroboration to this statement I find attached to the homestead application (with the annotation that it was filed with the same) a letter dated May 19, 1890, from Webb to his attorney, Brown, stating that he was living on this eighty acres; that he desired to enter it, and requesting Brown "to see after the matter" for him. He acknowledges said application as his own and gives full force and effect to the same.

All that the homestead law and the instructions thereunder contemplated is, that a *bona fide* and proper application should be made for the tract desired by the applicant. Such an application has, according to Webb's own statement, been made by him, and in my opinion it is sufficient.

Webb swears that he settled upon the land in good faith; that he resided thereon for four years; that he has a wife and two children and that said land is his only home. His was the first legal application for the land, and in my opinion, it should be allowed.

Departmental decision of March 22, 1892, is therefore recalled, and you will allow the entry of Webb.

HOMESTEAD ENTRY—ACT OF MARCH 3, 1891.

PAUL BAGLEY.

The amendment of section 2289 R. S., by the act of March 3, 1891, disqualifies homestead applicants who own more than one hundred and sixty acres of land, irrespective of the law under which the title to such land is acquired.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1892.

Paul Bagley has appealed from your decision of September 30, 1891, sustaining the action of the local officers in rejecting his application to make homestead entry of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 3, T. 25 N., R. 9 W., Neligh land district, Nebraska.

The application contains the statement that the applicant is the owner of one hundred and sixty acres of land in Arkansas—only eighty acres of which, however, were obtained under the homestead law; and that he has one hundred and sixty acres in Kansas obtained under the timber-culture law.

The application was rejected because of the passage on March 3, 1891, of the act "To repeal timber-culture laws, and for other purposes," which, among other things, amends section 2289 of the Revised Statutes so as to read that "no person who is the proprietor of more than

one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law" (26 Stat., 1095.)

The appellant contends that the local officers and your office misconstrued the law; that the meaning and intent of said amendment is that any person who had previously acquired one hundred and sixty acres *under the homestead law*, should not acquire any further rights under said law.

This contention can not be supported without importing into the law words that are not to be found therein, and that are not necessary to give it a clear and reasonable meaning. The purpose of the act was to give the public land to the landless and those who did not own one hundred and sixty acres of land. The source of title or the manner of acquiring the same cuts no figure in the case. It is enough to disqualify the applicant if he is the proprietor of more than one hundred and sixty acres.

Your decision is affirmed.

RAILROAD GRANT—SETTLEMENT RIGHT.

DEGENHART v. NORTHERN PACIFIC R. R. Co.

The settlement and continued occupancy of one who intends to purchase the land covered thereby from the railroad company will not serve to defeat the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, August 6, 1892.

I have considered the appeal by Bennett Degenhart from your decision of March 24, 1891, sustaining the action of the local officers in rejecting his application to make homestead entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 5, T. 1 N., R. 4 W., Helena land district, Montana, for conflict with the grant for the Northern Pacific Railroad Company.

This tract is within the primary limits of the grant for said company, as shown by the map of definite location filed July 6, 1882, and was included within the limits of the withdrawal upon the map of general route filed February 21, 1872.

The records show that one John Paul filed declaratory statement No. 1632, embracing this land, April 4, 1871, alleging settlement March 1, same year.

On December 27, 1883, Degenhart presented his application to homestead this land, alleging settlement in July, 1882, and upon the protest filed by the company against the acceptance of the same, hearing was regularly held.

There appears to be no dispute about the facts.

John Paul, together with his family, settled upon this tract in 1867,

and they have since continuously resided thereon and made improvement, valued at about \$2000. Prior to settling upon this tract, Paul had completed a pre-emption for land within the Denver land district, Colorado, upon which patent issued in 1865.

It seems to be virtually admitted that Paul was not qualified to file for or enter the land, and after offering proof, which was rejected, he entered into contract to purchase the land of the company, and at date of hearing had paid \$200 thereon.

Degenhart urges that the filing of record, without regard to its validity, excepts the tract from the operation of the grant.

If the filing alone is relied upon to except the tract from the grant, it is sufficient to say that the same had expired long prior to the date of the definite location of the road, and had been held to be illegal by the local officers at the time of Paul's offer of proof. His continued settlement, then, is all that remained at the date of the definite location of the road.

It has been repeatedly ruled by this Department that where a settlement is relied upon to except a tract from a railroad grant, it must affirmatively appear that such settlement was made by one possessing the necessary legal qualifications to perfect the claim initiated by such settlement. Northern Pacific R. R. Co. v. Fitzgerald, 7 L. D., 228; same *v.* Potter *et al.*, 11 L. D., 531.

The continued settlement upon the land by Paul, after the rejection of his proof upon his filing covering the tract, must have been with a view to purchasing the same of the company, and such settlement will not defeat the grant. Northern Pacific R. R. Co. v. Dunham *et al.*, 11 L. D., 471; same *v.* Pile, 12 L. D., 322.

It would be unreasonable to hold that the continued occupation of the land by Paul with a view to purchasing the same of the company as he did, served to defeat the grant, and thereupon award the land to another to dispossess Paul of the accumulations of years of toil upon this tract.

It but remains to consider another ground of error urged in the appeal, viz: "That the Northern Pacific Railroad Company has accepted other lands within the indemnity limits in lieu of the land in controversy."

No proof is offered by Degenhart in support thereof, nor reference made to the tract taken in lieu thereof.

The Commissioner's decision states that the tract here in question was embraced by the company in list dated July 28, 1886, number 12, and in the answer to the appeal the statement as to the selection of indemnity in lieu of this tract is denied by the company.

Without considering the effect of such a condition, if shown, in the absence of proof of this fact, I must hold that the land was not subject to the entry by Degenhart, when applied for, and your decision rejecting his application is affirmed.

PRE-EMPTION ENTRY—SECTION 2260, R. S.

SAMUEL LEWIS.

A homesteader who removes from his claim, after the submission of final proof, and resides upon land covered by his existing timber culture entry, which he subsequently changes to a pre-emption claim, is not within the inhibition of section 2260 R. S., where it is apparent that at the time he moved to said land he did not intend to acquire title thereto under the pre-emption law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 6, 1892.

By your decision of October 10, 1891, you held for cancellation the pre-emption cash entry of Samuel Lewis, made December 1, 1890, for the SW. $\frac{1}{4}$ of Sec. 24, T. 20 S., R. 22 W., Wa Keeney, Kansas, because, as stated by you, "it appears from the proof and special affidavit furnished therewith that the entryman abandoned a residence on his homestead entry to effect residence on the land above described."

The facts upon which your decision is based, and which are shown by his final pre-emption proof and affidavit accompanying same, are briefly as follows:

After making his final proof on his homestead claim in the fall of 1887, he moved on to the land in controversy, which was at that time held by him under a timber-culture claim. He continued to live on his said timber-culture claim until May, 1889, nearly two years after moving thereon, when he made pre-emption filing for the same.

The affidavit further shows that at the time he moved to the land he had no intention to make pre-emption entry for it, but moved there because there was water on this land and none procurable on his homestead. He further says that he had no intention of changing his timber-culture entry to a pre-emption, until more than eighteen months after he had moved on the land.

This affidavit is corroborated by two witnesses, who say that from their own knowledge of the facts and of the man, they believe all these statements to be true.

I think these facts, if true, and they are not disputed or questioned, takes the entryman out of the inhibition of section 2260 of the Revised Statutes.

Your decision is therefore reversed, and his entry will be allowed.

TIMBER CULTURE CONTEST—DEVISEE—RELINQUISHMENT.**STARKWEATHER ET AL. v. STARKWEATHER ET AL.**

A timber culture entry is subject to devise by will, and the executor thereunder, who complies with the law, may submit final proof the same as the entryman could have done if living.

A minor who signs a relinquishment is not estopped from rescinding such act on reaching majority, where no fraud on his part appears, and the relinquishment is against his interest.

An adverse claim at date of final entry, or want of good faith on the part of a transferee, defeats confirmation of an entry under section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 8, 1892.

I have considered the case of Reuben Starkweather, George Starkweather and Galo Starkweather (the last two by their guardian), v. Austin Starkweather and Solomon Jacob, transferee, on appeal by Jacob from your decision of July 22, 1891, holding for cancellation the cash entry of said Austin Starkweather, and setting aside the relinquishment and reinstating the timber-culture entry of John Starkweather, deceased, for the W. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 12, T. 19 S., R. 21 E., Visalia, California, land district.

John Starkweather made timber-culture entry for this land in April, 1878. He died November 14, 1883, leaving a widow and nine children, seven of whom were minors.

On June 10, 1884, a relinquishment of said entry was filed in the local land office, signed by Sarah A. Starkweather (his widow) and seven of the children, and the names of George E. and Galo were attached to the paper, each "by his mother, Sarah A. Starkweather," and the timber-culture entry was thereupon canceled.

On the same day Austin Starkweather, the oldest son, being of full age, filed his pre-emption declaratory statement for the tract. On October 5, 1885, upon due notice, he made final proof and cash entry for the land, and on November 4, following, mortgaged the same to Hugh Fowler. This was done by the execution of a quit claim deed, and the delivery back, from the grantee to the grantor, of a bond for a deed, upon payment of the consideration money, \$885, it being a pre-existing debt.

On November 4, following Fowler deeded by quit claim to S. Rehofer, and on January 21, 1886, Rehofer deeded to Arthur Dunkenspiel, by like conveyance. Arthur Starkweather assigned to Dunkenspiel his bond for a deed, and Dunkenspiel deeded the land, by quit claim, to Solomon Jacob, on July 11, 1887.

On December 12, 1887, Reuben Starkweather, on behalf of himself and his minor brothers, George E. and Galo, filed in the local office his affidavit of contest against the cash entry of Austin Starkweather, making Jacob party thereto, in which pleading he asked to be allowed

to contest the entry, assigning as grounds therefor, fraud on the part of Austin Starkweather, with knowledge on the part of the transferee. After stating a history of the matter and what his father had done toward cultivating trees, he sets forth in substance that his late father died testate; that by his will, which was duly probated, he (Reuben) and his brothers George and Galo, were devised this "Tree claim;" that his mother was given certain real estate and chattel property in lieu of dower; that he was appointed executor of the will and guardian of his said brothers' estate, and gives the terms and limitations of his trusteeship of the property. He says while he and his brothers were minors, and had no guardian, the local officers canceled the said entry without their knowledge or consent; that no contest had been filed against said entry, and no complaint had ever been made to them as a basis for any action. He avers that said cancellation was procured by the fraudulent act of said Austin Starkweather, and that the pre-emption declaratory statement was fraudulent, and the final proof thereon was false; that said Austin Starkweather had never resided a single day on said land, but he went upon it in 1886, in violation of their rights, and cut down a large number of the trees growing thereon and chopped them into cord wood and converted it to his own use. He asked the cancellation of said cash entry, that the said relinquishment be said aside and said timber-culture entry be reinstated. The statement of the case was very full and complete, and the affidavit being fully corroborated, you, on November 5, 1888, ordered a hearing thereon, upon notice to the parties.

Due notice was given, the hearing being set for February 25, 1889, but a continuance was had, at the instance of the defendants, until March 14, following, because Reuben had no authority to represent his brothers, who were minors, and on March 4, he was duly appointed their guardian he entered their appearance on March 14, and the case was continued till April 4, following. Thereupon, April 4 to 10, the testimony was taken, and on June 28, following the local officers passed upon the case. They found substantially that the allegations of the petition or affidavit were true, but that other rights had been acquired and they held, as a matter of law, that when the local officers canceled an entry "they acted judicially, and their decision cancelling the entry cannot now be revised in the face of other *prima facie*, valid and existing claims to the land in controversy." They further say—

We think the contestants have not shown good faith in waiting so long to institute this investigation. The land has since become valuable, improvements have been made, and the purchaser and present owner felt secure in their title. We are therefore of the opinion that this contest should be dismissed, and we so recommend.

The contestants appealed from this action, and you, on July 22, 1891, reversed said decision, held the cash entry for cancellation, set aside said relinquishment, and reinstated the timber-culture entry, from which decision Jacob appealed.

To briefly state the testimony, I will say the local officers and you were correct in saying that the entryman during his life had fully complied with the requirements of the timber-culture law. He made in his will provision for his wife, in lieu of dower, and devised the land in controversy to Reuben, George E. and Galo, Reuben being twenty, George E. eight, and Galo four years of age at his death.

The will was duly probated, but owing to the minority of Reuben he could not act as executor of the will or guardian of the estate of his two brothers, as he had been nominated and appointed by the will. Thereupon the widow was appointed administratrix with the will annexed. She accepted, gave bond, and entered upon the discharge of her duties as such. She thereby elected to take under the will and is bound by it. No guardian was appointed for Reuben, George or Galo. When the relinquishment was made Mrs. Starkweather filed an affidavit, which had been prepared for her by an attorney, and which she says was read over to her, but she says she is quite deaf, and she says on examination she did not understand it, but it contained the statement that her husband had died and had left no will. She says she did not intend to state this.

The relinquishment was, however, signed by her for the two minor heirs, George E. and Galo. She did not sign as guardian, but as "mother."

After the cancellation, Austin, the oldest son, made a pre-emption filing for the land and made proof. He immediately mortgaged the land to secure debts due Kutner, Goldstine and Co. Afterward he went upon the land and cut a large number of the best trees, then from forty to fifty feet high, cut them into cord wood, and carried this away, but the trees were poplars and sprouts came up around the stumps, so that there was at the date of hearing a nice forest, of five acres, on the land.

John Starkweather lived during several years about two miles south of the town of Hanford, where Kutner, Goldstine and Co. did business. This town was his post-office address and his trading point. The land in controversy was situated a half mile west of Starkweather's home-stead.

Rehofer, of the firm of Kutner, Goldstine and Co., says in his testimony that Reuben *prevailed* upon Austin to mortgage this land to secure the debt of Mrs. Starkweather and sons due to said firm. Reuben testifies that he advised Austin not to mortgage it. He says Austin never talked of selling it, and he says he did not know he had decided to until the spring of 1886. Reuben, it appears, signed this relinquishment, while yet a minor, under the advice of his brother Austin and an attorney at law. He says DuBentz, the attorney, advised him and his mother that to file a pre-emption or homestead for the land would get rid of settling that part of the estate; that he had not abandoned the timber-culture entry. Austin proposed to file on it for the benefit of the whole family.

There is nothing showing that any portion of the debt secured by the mortgage was the debt of John Starkweather; besides, the entry could not have been taken for debt.

I have carefully considered all of the testimony, a large portion of which is incompetent as affecting the rights of George E. and Galo, and much of it is irrelevant.

The various transfers of this land were made for the convenience of the firm of Kutner, Goldstine and Co. When Rehofer went out of the firm Dunkenspiel succeeded him, and as the former had held the land for the benefit of the firm, it was transferred by him to the latter for the same purpose. Jacob was the father-in-law of Goldstine, and the deed to him was made by Dunkenspiel on July 11, 1887; the consideration named is \$4,500. There is no evidence that any money was paid, and Mr. Dunkenspiel, while on the stand, does not say any was paid. He says he held the land in trust for the firm. Goldstine was not called as a witness.

The improvements on the land made after the first deed, were hardly equal to the damage done by cutting the timber, and there is nothing to show the great increase in value that the difference in the consideration in the first and last deed would indicate.

It is barely possible, but not at all probable, that this firm doing business in Hanford did not know John Starkweather, or his business or financial standing; or of his homestead and timber-culture entry; nor of his death, or that he left a large family. This seems the more improbable when they allowed the widow and sons to become indebted to them over \$800 in so short a time after the death of Starkweather.

The relinquishment was on file in the land office, showing that two of the heirs' names had been affixed without warrant of law; the will was on record in the superior court of Tulare county, in which the land is situated.

Their attorney, one Phillips, who is employed by the year by the firm, took the acknowledgment of the relinquishment, and has figured in the several transactions, including the transfer of the bond, for a deed, from Austin Starkweather to Dunkenspeil, and as counsel and witness in the case.

I am, upon a full and fair consideration of all the testimony, forced to conclude that from the first purchaser down to Jacob there has not been an "innocent purchaser" in the entire line. But the whole evidence points to one condition of affairs. When the widow and Austin became indebted to the firm, they attempted to work out their pay, and the plan conceived was carried out as adopted and the relinquishment followed. I cannot believe that Reuben *prevailed* upon Austin to mortgage this land as stated; from what appears in this case Reuben had but little influence with Austin, and if the purchase was made in good faith, with no understanding with Austin, it is unaccountable why they would allow him to commit waste as he did on the land.

If Solomon Jacob had no insight in the matter, it is very strange that he should come from San Francisco and pay \$4,500 for this timber-culture entry containing only eighty acres, over \$56 per acre, which was probably over twice its real value. In any event it was his duty to make inquiry. The records showed John Starkweather's entry; and its cancellation or relinquishment, after his death, was on file. In fact, the entire case, records in the land office and in the court, were there open to be seen.

It is said in the argument of counsel for Jacob, that "The government does not recognize a devise of a timber-culture entry as transferring any right or title to the devisee." The homestead law provides that upon the death of the entryman before making final proof, his widow, or in case of her death, his heirs or devisees shall make the proof (Sec. 2291 R. S.). That is, the law gives the homestead directly to the widow first, then to the heirs or devisees. The homestead of a widow goes to her heirs or devisees.

The timber-culture law does not give the claim to the widow, but in the first instance gives it, upon the death of the entryman, to "his heirs or legal representatives." Now in the homestead case, the law is framed to protect the home, but a timber-culture is not considered a home—it is property that may and does descend to the heirs. Why may not a man by his will direct its descent to certain of his heirs, naming them? The law says "heirs or legal representatives." An executor of a will is a legal representative, as is an administrator of an estate. In the case at bar the testator attempted to give it to his legal representative, Reuben, in trust for himself and the minor sons named, and it was to remain in the control of the legal representative, he being charged with the duty of complying with the law until final proof. "A trust should not fail for want of a trustee." It was the duty of the court, when it was found that Reuben was under age, and could not act as guardian and discharge the trust, to have appointed some judicious person to act until the disability was removed. This was not done, but are two minors, one only eight years and the other only four years of age, to be deprived of their patrimony by reason of their father naming a person who was not qualified to act as their guardian, and by the neglect of the Court to protect their rights?

I am satisfied that a timber-culture entry is subject to a devise by will, and if the executor of a will complies with the requirements of the law, he may make final proof, as the deceased entryman could have done if living; the law so says.

It is claimed that the mother was the natural guardian, and that she relinquished for these two minors. Had she been their legal guardian, she could not have done so without an order from the court appointing her, upon good cause shown, much less could she do it as their mother. See Section 1770, p. 587, California Code, Vol. 3.

Reuben was twenty-one years of age January 15, 1885. His applica-

tion to contest the entry was transmitted to your office July 11, 1888. He says in answer to the question why he did not commence proceedings sooner, that he had spoken to Attorney Babcock to attend to the matter for him in 1886, and offered to pay him a fee. Babcock kept promising he would investigate the case, and so kept promising until 1887, when he employed a Mr. Powell, who told him he had sent the papers to Washington. He waited to hear from Powell for several months, then Powell died, and he employed McNamra, his present attorney.

His act in signing the relinquishment was the act of a minor. There was no consideration paid him, and no fraud is charged against him. The relinquishment was clearly against his interests, as it was against the interests of the younger brothers. It is constructively fraudulent, and he is not estopped when he reaches his majority to rescind the act; he having received nothing, has nothing to restore. While he might have commenced proceedings as soon as he reached his majority, he was not bound to do so. Under the law of California (sect. 328 Code and Statute 1886, Vol. 3, p. 96) he would be allowed five years after the disability of non-age was removed, if the case was in the State Courts. He tried to begin proceedings in 1886, and accounts for the delay, but five years had not elapsed when proceedings were commenced. While the Department may not be bound by the State law of limitation, an equity was never considered stale, when the action would not be barred were it a suit at law.

Besides this, no laches can be imputed to George E. and Galo; they are in law incapable of doing any act, and in fact did none.

Counsel lay great stress upon the fact that the widow swore her husband left no will, and they accuse her and Austin of committing perjury, and are not sparing in the severity of their language in this matter. Plaintiffs claim that Mrs. Starkweather and Austin perpetrated a fraud on them, and however much perjury they committed to get the land away from these minors, to use it in paying their own debts, can in no way affect the plaintiffs' rights in the premises. The rights of these plaintiffs vested on the death of their father, and their rights to the lands have remained, and so were existing at the time of final entry, and I agree with you that section 7 of the act of March 3, 1891, is not for that reason applicable, and the further reason the want of *bona fides* in Solomon Jacob, the purchaser, and of his grantors.

In equity these devisees hold the timber-culture entry as if no relinquishment had been made, and in equity and good conscience they should hold it as against the claimant, Jacob. Your decision is therefore affirmed; the cash entry No. 3809 for the land will be canceled; the relinquishment set aside, and the timber-culture entry will be re-instated.

RAILROAD LANDS—RIGHT OF PURCHASE—ACT OF SEPTEMBER 29, 1890.

BROWN *v.* HINKLE.

The right of purchase accorded by the forfeiture act of September 29, 1890, to settlers on railroad lands, cannot be exercised by one who has not theretofore settled on such land, and has no interest therein except as the tenant of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 8, 1892.

On March 20, 1891, George W. Hinkle made cash entry No. 4261 for the S. $\frac{1}{2}$ of Sec. 21, T. 5 N., R. 32 E., La Grande, Oregon. His entry was made under the 3d section of the act of September 29, 1890 (26 Stat., 496), which provides:

That in all cases where persons being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor.

He stated in his application, that he settled on the land, April 7, 1884; that he had been in "full and peaceable possession of all of said tract of land ever since and to the present time;" that he settled thereon, "with the expectation of purchasing the same from the Northern Pacific Railroad Company, if they should obtain title to the same." To this statement he appended the following: "And that I am now residing on said lands and have been since November, 1889; that I have fenced all said land and have cultivated about sixty acres thereof, and that no one has molested me in my occupation of said land."

Thereupon, the entry was allowed, the money paid (\$400), and certificate duly issued.

On March 30, 1891 (ten days thereafter), Almon N. Brown filed his corroborated affidavit, stating that he settled on the SW. $\frac{1}{4}$ of said section, February 20, 1891; that he purchased the improvements thereon (of the value of \$100), and the interest in and the right to said land from one E. H. Boyer, "who theretofore was in possession of said tract under and by virtue of a license from the Northern Pacific Railroad Company, dated, executed and delivered on the — day of — 1882;" that said Boyer had been in possession of said tract under said license ever since 1882, continuously until September 29, 1890, and thereafter until said purchase on February 20, 1891, and has made improvements thereon,

consisting of fencing and plowing; that after said purchase by plaintiff on the 11th day of March, 1891, said Boyer, "as an evidence of said purchase," made, executed, and delivered to said plaintiff a deed of conveyance of all his right, title, and interest to said land, and the improvements thereon, and that on or about March 15, 1891, plaintiff built a house (ten by twelve) on said tract; that defendant, George W. Hinkle, never settled upon said tract on or before September 29, 1890, or had any improvements thereon, or any contract or any deed or written contract with or license from the Northern Pacific Railroad Company, or right to or interest in said tract, save and except that said defendant occupied the same for the purpose of pasturing stock thereon by and with the consent of and as the tenant of said Eugene H. Boyer; that defendant's application and proof to purchase said tract under said act was fraudulent from its inception. He asked for a hearing to enable him to prove said allegations. He also filed his application to make homestead entry of the land, which was rejected, because "of conflict with" Hinkle's entry.

On July 25, 1891, you denied the application to contest, because "it does not appear that applicant was residing on said land at the date of the passage of said act, and therefore not protected by that clause relating to settlement."

By the terms of section 3, a part of which is above quoted, it is seen that before any person is authorized to purchase three hundred and twenty acres at the minimum price, he must be in possession of the lands, "under deed, written contract with or license from the State or corporation to which such grant was made or its assignees, executed prior to January 1, 1888, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance," etc.

The entryman made no averment in his application that he held the land under any deed, contract, or license of the State or the railroad company, but his entry was allowed on his sworn statement that he settled on the land, April 7, 1884, "with the expectation of purchasing the same from the Northern Pacific Railroad Company, if they should obtain title to the same."

In the application to contest, it is averred that the entryman never settled on the land before September 29, 1890, or had any improvements thereon, or had any interest therein, except that he occupied the land for the purpose of pasturing stock "by and with the consent of and as the tenant of said Boyer." If this be true, he was not entitled to make the entry, and the same should be canceled.

I think the application sufficient to authorize a hearing, and, accordingly, direct that a hearing be ordered.

The decision appealed from is reversed.

VALENTINE SCRIP—UNSURVEYED LAND.

HENRY A. BRUNS.

*conflict**51 S. L. 454*

See 44-19548
The owner of Valentine scrip, who has located the same upon unsurveyed land, may withdraw said scrip, or change the location, at any time prior to the public survey, and before the adjustment of such location.

Secretary Noble to the Commissioner of the General Land Office, August 8, 1892.

The question presented by this appeal is, whether the owner of Valentine scrip, who has located it upon unsurveyed lands, has the right to withdraw it, or to change such location, at any time prior to the public survey and before the adjustment of the location.

On June 13, 1887, Henry A. Bruns located Valentine scrip on unsurveyed land in the Bismarck land district, North Dakota, and on September 17, 1890, he made application to the local officers for the return of said scrip, which was refused, for the reason that the records show that said location is regular in every respect.

Upon appeal, you affirmed the action of the local officers, holding that as there is no protest against the location or any objection on the part of the government, the locator should not be permitted at his pleasure either to perfect his location, or to abandon the same and reclaim his scrip.

I see no ground upon which this ruling can be sustained, unless it be held that the location of Valentine scrip on unsurveyed land is the vesting of a right in the land covered thereby that can not be defeated by the government, or, unless the exercise of the right is limited by the act to one location.

This scrip was issued under the authority of the act of Congress approved April 5, 1872 (17 Stat., 649), which authorized and required the circuit court for the district of California to hear and decide upon the merits of the claim of Thomas B. Valentine, claiming title under a Mexican grant, in the same manner as if the claim had been submitted to the Commissioners under the act providing for ascertaining and settling private land claims in California. As the land covered by said claim had been disposed of by the government, the act provided that a decree in favor of the claimants should not affect any adverse right or title to the land described in said decree,

but, in lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys;

and scrip was authorized to be issued to said Valentine, or his legal representatives, in accordance with the provisions of said act.

The location or selection of lands under this act was therefore nothing more nor less than an application to purchase public lands of the United States to be paid for with said scrip. Under the laws regulating the disposition and sale of the public lands, an application to purchase unsurveyed lands could not be entertained, for the reason that no portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local office. *Buxton v. Travers*, 130 U. S., 235.

In special cases the public lands of the United States may be disposed of prior to survey, and have been so disposed of, as in the cases of present grants of specific tracts of lands where the identical tract is described or is of designated sections, as in railroad grants, requiring only the definite location of the road to cause it to attach to the sections granted, whether surveyed or unsurveyed; but the general rule is that no portion of the public domain is subject to sale or disposition under the general land laws until it has been surveyed and the plats of the survey filed in the local office, and this rule applies in the purchase of lands in Valentine scrip, for the reason that there was no grant of land, but merely a right conferred to purchase with said scrip the public lands generally, by legal subdivisions, as designated by the public surveys.

But under the act allowing Valentine, or his representatives, to select, in lieu of the land described in the decree of the court, an equal quantity of public lands of the United States, in legal subdivisions, whether surveyed or unsurveyed, a right was given by the location of the scrip issued therefor to select in satisfaction thereof a quantity of unsurveyed land equal to the amount of such scrip, and thus to initiate an inchoate right to purchase said land in preference to others when it was surveyed and came into market, in the same manner that a settler by the occupation of a tract of land acquires a preference right to purchase the same by taking the proper steps after the filing of the township plats. But it did not deprive Congress of the power to make any other disposition of the land before it was offered for sale, nor did the United States by these acts enter into any contract with the settler or locator, or incur any obligation to any one that the land so occupied or located should ever be offered for sale. *Frisbie v. Whitney*, 9 Wall., 187; *Yosemite Valley case*, 15 Wall., 77; *Buxton v. Traver, supra*; *Frank Burns*, 10 L. D., 365.

The filing of this scrip upon unsurveyed land does not segregate the land covered thereby, nor is it such an appropriation of the tract as will prevent others from initiating claims thereto, upon the same principle that more than one settlement may be made and more than one declaratory statement filed for the same tract.

These inchoate rights are all subject to the right of the prior claimant, and, if he fails to perfect his claim after survey within the time

required by law, it is then subject to the right of the next claimant in order of priority.

The circular of instructions to the local officers, issued by the General Land Office, June 17, 1874, to carry into effect the provisions of the act of April 5, 1872, directed that within three months after the filing of the township plat in the local office, "the party who may have filed the said scrip will be required to appear before you and designate upon the official plat the specific subdivisions embraced in the said filing, whereupon the location thereof will be consummated." They were further instructed that, if the applicant failed to appear within the three months after the filing of the township plats, they should proceed to adjust the filing themselves.

The circular further directed that:

After a piece of the said scrip shall have been filed upon an unsurveyed tract, you will in no event allow the party to amend the description or diagram, or to reclaim the scrip, without express instructions from this office.

While this language might indicate that it was the intention of the Department to hold that after filing, the owner had no longer any control over the scrip, except to adjust it to the public survey and thus perfect his location, yet no ruling to this effect has been made by the Department, either in said circular or in any of the decisions that have come to my knowledge.

If no right is vested by the filing of this scrip upon unsurveyed land, and if the land is not segregated by such filing, but open to settlement until the location has been consummated, I can see no reason for refusing to allow the owner to abandon a filing upon unsurveyed lands and to withdraw his scrip for the purpose of re-filing it upon other land. The scrip is the property of the owner, and, if he does not desire to purchase the land with it, he is not compelled to do so. Why, then, may he not withdraw it, unless by the act of filing on unsurveyed land the scrip has become *functus officio*. I do not see how it could have such an effect, unless the land was subject to entry at the date of the filing, or unless some condition was subsequently performed by which the right under the filing became vested. When the land is subject to purchase, the location of the scrip is equivalent to a purchase, and has performed its office, but when the right acquired by a filing is merely inchoate, he would have the same right to abandon such filing and withdraw his scrip as a settler would have to abandon a settlement upon one tract and to make settlement upon another of which he might perfect entry.

The owner of the scrip can not require that the land shall be surveyed, but he must await the pleasure of the government. When this would be done no one could tell, and to hold that the scrip could be held in this status for an indefinite period, with no right in the locator to perfect his claim, but with the right remaining in the government,

either to dispose of the land to others, or to defer indefinitely the consummation of the entry by neglecting to survey the land, is not warranted upon any principle of law, right, or justice.

Your decision is reversed.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

HUDSON v. FRANCIS.

An application to enter, filed by a second contestant with his affidavit of contest against a timber culture entry, operates to reserve the land, subject only to the rights of the first contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 8, 1892.

On January 29, 1879, Moses Votaw made timber-culture entry of the SE. $\frac{1}{4}$ of Sec. 6, Tp. 5 S., R. 27 W., Oberlin land district, Kansas.

On June 13, 1885, Martin L. Campbell brought contest against the entry.

On April 12, 1888, Mattie Hudson filed contest against the entry, alleging not only that Votaw had not complied with the law, but that the contest of Campbell against it was collusive and fraudulent, to prevent it from being attacked by any other contestant until a sale of the relinquishment could be made. Her contest was held subject to that of Campbell.

Campbell's contest case in due time reached the Department, by which it was considered, and on July 1, 1889, dismissed.

On that same day, Votaw's relinquishment was filed, together with Campbell's waiver of his preference right; and James A. Francis was allowed to make timber-culture entry of the tract.

On August 28, 1889, Hudson (the second contestant) applied to make timber-culture entry of the same by virtue of her preference right, but her application was rejected because of the prior entry of Francis. Hudson appealed to your office, which ordered a hearing to determine the rights of the parties. Both parties and their attorneys were present.

The local officers recommended that Francis' entry be canceled and Hudson's application allowed.

Francis appealed, and you affirmed the judgment of the local officers. He now appeals to the Department.

The question at issue is as to the validity of Francis's entry, made while Hudson's contest and application to enter were pending.

Counsel for Francis contends that said contest

never became operative, because no notice was ever issued, nor costs paid by her, consequently she has never brought herself within the spirit and meaning of the act, and for this reason, as a matter of law, she never had any preference right of entry.

It is the ruling of this Department that the pendency of an application to enter, filed by a second contestant with his affidavit against a timber-culture entry, operates to reserve the land, subject only to the rights of the first contestant. (*Carson v. Finity*, 10 L. D., 532.)

Your decision recognizing Hudson's preference right of entry is affirmed, and the entry of Francis will be held subject thereto.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

RENO *v.* COLE.

On publication of notice of intention to purchase under section 5, act of March 3, 1887, an adverse claimant is entitled to special notice of such proceeding.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 9, 1892.

The N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 3, T. 3 S., R. 69 W., Denver, Colorado, is within the limits of the grant to the Union-Pacific Railway Company, the right of which attached August 20, 1869.

In March, 1874, the company sold it to William H. Rand, and through several transferees it finally reached the hands of Lyman H. Cole in January, 1885, who immediately took possession and has continued so in possession ever since, and has made improvements amounting to several thousand dollars. It is all under cultivation, supplied by water by irrigating ditches, and is valued at more than a hundred dollars an acre.

The tract was excepted from the grant to the railroad by the unexpired pre-emption filing of one Amos Rand, made in 1865. His claim was never prosecuted to patent, and the only other claim existing against that of Cole is the homestead entry of Evan E. Reno, allowed December 28, 1888, while Cole was so as aforesaid in the possession and cultivation of the land.

In May, 1889, Cole published notice of his intent to offer proof July 5, in support of his right to purchase under the 5th section of the act of March 3, 1887 (24 Stat., 556). On the day named in the notice, he appeared, with his witnesses, and submitted his proof, neither Reno nor the company appearing to oppose it.

July 13, eight days after Cole had made proof, Reno filed an affidavit with the local officers, setting out his entry of the land in 1888, his residence there since, and improvements of the value of \$250; that he had no notice of Cole's application to purchase, and did not know of it until July 12, or he would have been there to oppose it and assert his own claim to the land, and that the "statements of said Cole in said proof, as to affiant's building his house in the night, and as to the value of affiant's improvements and as to other facts which affiant is now unable to specify, are not true;" and asked for a rehearing to enable him to appear in his own behalf and defend his entry.

The then register and receiver sustained his motion, and appointed September 23, 1889, for him to appear and submit testimony in support of his claim. Both parties (Reno and Cole) appeared on that day, and stipulated that the case be continued until October 26. At that date they again appeared, when, on motion of counsel for Cole, the hearing was dismissed by the local officers, they holding that it was error to continue to continue the cause to allow Reno to submit his proof. They then, on the proof submitted by Cole, recommended that the entry of Reno be canceled and the proof of Cole allowed. Reno appealed, and, by your decision of July 31, 1891, now before me on appeal of Reno, you held his entry for cancellation.

The land having been excepted from the grant to the railroad by the filing of Rand, was unappropriated when Reno made his entry, in 1888. His entry was properly allowed, subject only to the preference right of purchase by Cole, upon showing compliance with the terms of the 5th section of the act of March 3, 1887, *supra*.

The circular of this Department of February 13, 1889, in reference to proceedings to obtain title under this act, prescribes that, "Applicants to purchase under this section (5) will be required to publish notice of intention, as directed by instructions, under the third and fourth sections," which is the same as in pre-emption and homestead cases (see 8 L. D., bottom of pages 350 and 351).

When there are adverse claimants under pre-emption filings and one publishes notice of his intention to make final proof, the adverse claimant should always be *specially cited*. (Instructions, 3 L. D., 112.) This requirement also extends to railroad companies who have made selection of the land for which proof is offered. (Central Pacific R. R. v. Geary, 7 L. D., near bottom of page 150).

While such notification to an adverse claimant need not be a personal notice, as required on resident defendants in contest cases, yet it should be actual notice, either personal or by registered letter (or unregistered letter, the receipt of which is shown or acknowledged). I do not think that personally mentioning the other claimants in the published notice, as in this case, is a sufficient compliance with the rule requiring them to be *specially notified*.

Reno in his affidavit shows that he received no actual notice, and knew nothing about Cole's submission of proof, until a week after he had made it. He then appeared and asked to be heard in defense of his rights. This was at first granted him, and the privilege subsequently withdrawn, when he was present, ready to offer his testimony.

It is true, the evidence submitted by Cole seems to give him a clear title to purchase the land, yet Reno says he can show a different state of facts, and for fear injustice might possibly be done him by refusing him a trial, I shall reverse your judgment.

The case is therefore remanded, to allow Reno, upon proper notice to all parties interested, to show if he can, any good reason why Cole's application to purchase should be denied and his entry sustained.

TIMBER CULTURE ENTRY-COMMUTATION.

ANDREW W. GLENN.

The right to commute a timber culture entry under section 1, act of March 3, 1891, can only be exercised by a resident of the State or Territory in which the land is situated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 10, 1892.

On the 15th of December, 1882, Andrew W. Glenn made timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 11, T. 129 N., R. 62 W., Aberdeen land district, Dakota Territory.

On the 8th of June, 1891, he made commutation final proof, under the first section of the act of March 3, 1891 (26 Stat., 1095), before the clerk of the district court, fourth judicial district, Dickey county, State of North Dakota, which was within the Fargo land district, wherein said land in situated. In such commutation proof he stated that his post office address was Aberdeen, South Dakota, and that he had resided continuously within the limits of the territory comprised in said State, ever since the date of making his said entry.

His final proof was forwarded to the local land office at Fargo, and, on the 13th of June, 1891, Glenn was notified by the register that it was rejected by that office, "for the reason that it appears from the said proof that you are not an actual *bona fide* resident of the State in which the tract is located, as provided by the act of March 3, 1891."

From such action by the local officers, he appealed to your office, and, on the 25th of July, 1891, you rendered a decision in the case, affirming the decision appealed from. A further appeal brings the case to the Department, the errors complained of in your decision being specified as follows:

First. In holding that claimant was not qualified to make proof, under act of March 3, 1891.

Second. In holding that because claimant's residence was not in the same State in which the said tract is located, he was not entitled to make proof, under the provisions of said act of March 3, 1891.

Residence upon the land for which entry was made has never been required by any of the acts of Congress, the object of which was to "encourage the growth of timber on western prairies." These acts required the possession of certain qualifications by persons desiring to make entries, and the performance of certain acts and the securing of certain results after entry was made, before title to the land could be obtained. They also provided that no certificate or patent should issue for any land so entered, until the expiration of eight years from the date of such entry, and allowed five years further time to fully comply with the provisions of the law, should such additional time, or any part thereof, be necessary.

The act of March 3, 1891, which was "an act to repeal timber-culture laws, and for other purposes," provided

that any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws and who is an actual *bona fide* resident of the State or Territory in which said land is located shall be entitled to make final proof thereto, and acquire title to the same, by the payment of one dollar and twenty-five cents per acre for such tract.

It is under the provision quoted that Glenn seeks to obtain title to the land in question. His final proof shows that he has for a period of more than four years in good faith complied with the provisions of the timber-culture laws, in the matter of cultivation, and the planting of trees and tree seeds.

The provision allowing cash commutation in timber-culture entries was not contained in any act prior to that of 1891, neither was a residence in the State or Territory, in which the land was located, made a condition in those acts upon which title could be secured.

In his appeal from the decision of the local officers to your office, the counsel for Glenn sought relief from the requirements of the act of 1891, as to residence in the State or Territory in which the land is located, under Section 1978, Revised Statutes, which provides that:

All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

This section was intended to protect citizens of the United States from discriminating legislation on the part of the several States and Territories, and has no application to acts of Congress which confer equal privileges upon all persons similarly situated.

By Glenn's own showing he has never resided in the State in which the land in question is located. It is clear, therefore, that he can not commute his timber-culture entry and purchase the land under the act of March 3, 1891, and the decision appealed from is accordingly affirmed.

PRE-EMPTION ENTRY—ADMINISTRATOR.

DUNCAN *v.* CLIFTON.

It is the policy of the pre-emption law to allow final proof and entry to be made by an administrator for the benefit of the heirs of a deceased pre-emptor, but the administrator, in such case, must show, within a reasonable time after appointment, that heirs, capable of inheriting, in fact exist.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 10, 1892.

The land involved in this appeal is the S $\frac{1}{2}$ of SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 6, and NW $\frac{1}{4}$, NE $\frac{1}{4}$ Sec 7, T. 18, S., R. 4, Los Angeles California, land district.

The record shows that Joseph August filed pre-emption declaratory statement for said land April 10, 1886. It is shown that in April, 1887, he died intestate and that William W. Clifton was appointed administrator of his estate. On June 29, 1887, William P. Duncan made homestead entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 6, and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 7, said township and range.

In pursuance of published notice the administrator made final proof before the county clerk of San Diego county, February 13, 1889, when Duncan appeared and protested against the acceptance of the same. The testimony was taken and considering the same the local officers, June 4, 1889, recommended that the proof offered by Clifton be rejected, and that Duncan's homestead entry be canceled, for non-compliance with the law. On June 12, 1889, said Duncan filed his relinquishment of said land, and on the same day Jesse R. Duncan made homestead entry of the same.

Clifton appealed from the decision of the register and receiver rejecting his final proof, and by letter of May 26 1891 you decided that his final proof should have been accepted and that he could make the entry for the benefit of the heirs of August. You also held that the local officers erred in allowing Jesse R. Duncan's entry of the land pending decision on the final proof of Clifton, but concluded that the entry should not be canceled without allowing the entryman a day in court, and therefore ordered that:

I shall hold Clifton's final proof for acceptance, and the issuance of final certificate in the name of the heirs of Joseph August deceased, subject to Jesse R. Duncan's right to show cause within sixty days, why his entry should not be canceled, and final receipt issued to the said heirs.

Pursuant to said order Jesse R. Duncan filed a motion, and affidavits in support thereof, June 5, 1891, setting forth reasons why his entry should not be canceled, and why final receipt to said heirs should not issue for said land. You by letter of July 3, 1891, refused to grant a hearing and in passing upon the matter said:

Duncan knew when he made the entry that Clifton had offered final proof, and he also knew, or is charged with knowledge, that Clifton, as administrator, had the right of appeal from your decision adverse to him, and he certainly had no right to presume that August left no heirs, and that therefore the said D. S. would be canceled. Moreover the probate records show that Clifton alleged that August left heirs, and the testimony in the case of Wm. P. Duncan against the said administrator also shows that August had several times mentioned the existence of relatives who could inherit under him.

Duncan appealed and assigns as error, substantially that your decision is against the law and evidence, and that you should have granted him a hearing to prove that there are no heirs of August.

In the view that I take of this case, I do not consider it necessary to order a hearing to determine the rights of these parties. It is alleged that there are no heirs of August to inherit this land, and, from the testimony taken at the hearing, I conclude that there is some founda-

tion for this assertion. It is certainly shown that if there were any they were unknown to both the administrator and the friends of the deceased. It is true that they heard the deceased say he had brothers or sisters, somewhere, yet from all the inquiry made by the administrator he had not been able to find or get any trace of either. More than five years have now elapsed since the administrator was appointed and it would seem as if, with any degree of diligence, he should have ascertained their existence.

While it is the policy of the pre-emption law to allow final proof and entry to be made by the administrator for the benefit of all the heirs of the deceased entryman, yet I take it that it must be shown by the administrator, within a reasonable time after his appointment, that such heirs exist, capable of inheriting, and that the land may not be kept from honest settlement an unreasonable length of time to suit the wishes or caprice of the administrator.

You will, therefore, direct the local officers to order the administrator to make entry of said land within sixty days from receipt of notice of this decision in the name of all the heirs of the deceased entryman, and he shall present to the register and receiver satisfactory evidence of the existence of any and all legal heirs to the estate of Joseph August before being permitted to make such entry, giving Duncan notice of the time when said entry will be made, that he may be present and object to the same if he so desires. In the meantime the entry of Jesse R. Duncan will be suspended, and if entry be made as aforesaid by the administrator then the entry of Duncan will be canceled. If the entry be not made within the time mentioned, then the final proof made by the administrator shall be rejected and the pre-emption filing of August canceled, and the homestead entry of Jesse R. Duncan reinstated as of the date of the original application.

Your judgment is thus modified.

PRE-EMPTION—SETTLEMENT—ACT OF MARCH 3, 1891.

BENTLEY v. BARTLETT.

Settlement on land covered by the existing entry of another confers no right under the pre-emption law that is protected by the repealing act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 11, 1892.

I have considered the appeal of Henry T. Bentley from your decision of April 10, 1891 rejecting his application to file pre-emption declaratory statement for the NW. $\frac{1}{4}$ of Sec. 22 T. 22 N., R. 54 W., Alliance, Nebraska land district.

On January 15, 1891, he filed an affidavit of contest against the homestead entry of one E. J. Bartlett for said land alleging abandonment,

change of residence for more than one year, failure to settle upon and cultivate the land according to law, and that the default had not been cured. Notice was issued on this affidavit fixing March 10, for the hearing but does not seem to have been served. On March 6, Bentley presented the relinquishment of Bartlett duly acknowledged under date of January 8, 1891, and his own application to file pre-emption declaratory statement for said land alleging settlement January 15, 1891. Bartlett's entry was thereupon canceled and Bentley's filing received and made of record. When the matter was considered in your office it was held that Bentley could not initiate a claim as against the government by his settlement made while the land was covered by an existing homestead entry and his filing was held for cancellation because made after the passage of the act of March 3, 1891 (26 Stat., 1095) by section 4 of which all laws allowing pre-emption of the public lands were repealed. Said section contains the following provisions:

But all bona-fide claims lawfully initiated before the passage of this act, under any of said provisions of law so repealed, may be perfected upon due compliance with the law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.

A claim under the pre-emption law was initiated by settlement rather than by filing in the local office a declaratory statement, so that in this case the question to be determined is as to whether Bentley's settlement, made while the former entry was of record, lawfully initiated a claim under said law.

In the case of *Pool v. Moloughney* (11 L. D., 197) there was presented the question as to the effect to be given a settlement made upon land reserved for the purposes of a railroad grant, and after saying, that it had been repeatedly held that settlement upon a tract of land covered by a homestead entry was sufficient to constitute a legal claim thereto that would attach the instant it became again a part of the public domain, it was said:

Furthermore, the Department has repeatedly held that while no party could secure any right as against the United States, by virtue of a settlement made upon a tract withdrawn from entry, still as between two claimants the question of priority of settlement can properly be considered in determining their rights to the tract in contest. See *Geer v. Farrington* (4 L. D., 410); *Gudmunson v. Morgan* (5 L. D., 147); *Rothwell v. Crockett* (9 L. D., 89); *Wiley v. Raymond* (6 L. D., 246); *Tarr v. Burnham* (6 L. D., 709).

This same doctrine was laid down in the case of *Etnier v. Zook* (11 L. D., 452) and in *Orvis v. Birtch et al.* (*id.*, 477). It was said in the latter case that no rights could be acquired, under the pre-emption law, by settlement upon land reserved from entry and settlement. See also *Smith v. Place* (13 L. D., 214) and *Hobson v. Holloway et al.* (*Id.* 432).

In *Stone v. Cowles* (13 L. D., 192) it was said:

It is true that Stone, not having applied to contest the timber culture entry of French, must be regarded as a trespasser up to the time of the relinquishment and

cancellation of such entry. While the entry remained of record, he could establish no rights by his settlement, residence and improvements as against French, or the government; but the instant the entry was canceled, his settlement ceased to be a trespass, and he by operation of law became a settler on the public domain. His settlement must therefore be regarded as of the date of the cancellation of French's entry and such right of settlement 'is superior to that of a homesteader who enters the land immediately after the said relinquishment.' *Wiley v. Raymond* (6 L. D., 246.)

In this same case on review (14 L. D., 90) it was held:

As against French, so long as his entry remained of record, or as against the United States, neither Cowles nor Stone could acquire any right by virtue of their settlements upon the land covered by French's entry, yet as between the parties who have thus settled, the settlement first made in point of time is entitled to the highest consideration. *Kruger v. Dumbolton* (7 L. D., 212).

If Bentley had on January 15, the date of his settlement, or at any time prior to the cancellation of Bartlett's entry March 6, presented to the local officers an application to make homestead entry for said land such application could not have been allowed.

Hanscom v. Sines et al. (15 L. D., 27) and authorities cited.

A homestead entry might, however, have been made for any lands subject to pre-emption and if Bentley could not legally make homestead entry for this land because it was not subject thereto he could not for the same reason lawfully initiate a claim thereto under the pre-emption law. It is clear that under the authorities cited above Bentley did not, by his settlement upon which his declaratory statement was based, acquire any right as against the United States and it necessarily follows that he did not thereby lawfully initiate a claim to said land under the pre-emption law. There was no change in the status of said land until after the repeal of the pre-emption law by the act of March 3, 1891, and hence Bentley had no claim that would come within the purview of the provision of section four of said law, hereinbefore quoted.

It is probably true that the former entryman had abandoned said land and all claims under his entry therefor; he had executed a relinquishment thereof, and Bentley had secured possession of such relinquishment and had placed it in the mail addressed to the local office, all before the passage of said repealing act. All these things indicate good faith on the part of Bentley and a desire and intention to lawfully appropriate said land; but the fact yet remains that the land was not subject to such appropriation and did not become so while the pre-emption law remained in force.

Bentley acquired no rights by his purchase of Bartlett's relinquishment, the rule being well settled that the purchaser of a relinquishment can acquire no rights by virtue of his purchase.

Wiley v. Raymond (6 L. D., 246);

Gilmore v. Shriner (9 L. D., 269);

Armstrong v. Miranda (14 L. D., 133).

Neither the mere execution of the relinquishment nor the delivery thereof to Bentley restored the land to the public domain or made it subject to appropriation by settlement, for a relinquishment is ineffectual, so far as releasing the land is concerned, until filed in the proper office.

Wiley v. Raymond supra;

Webb v. Loughrey et al. (9 L. D., 440);

Armstrong v. Miranda supra.

I must conclude from the facts in this case that Bentley had not a claim to this land that can properly be held to come within the scope of the saving clause of said repealing act and that, therefore, his pre-emption declaratory statement should not have been received and placed of record.

The decision appealed from is affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN.

SERL v. SULLIVAN'S HEIRS.

A charge of failure to improve and cultivate the land will not lie against the heirs of a deceased homesteader where the death of the entryman occurs within less than six months of the expiration of the statutory period of residence required of the homesteader.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 11, 1892.

I have considered the appeal of Adam A. Serl from your decision of August 27, 1891, dismissing his contest against the homestead entry of Jerry Sullivan, deceased, for lots 2, 3, 4, and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 33 T. 41 N., R. 4 E., Seattle land district, Washington.

On July 24, 1885, Sullivan made homestead entry of said tracts and on November 5, 1890, Serl filed affidavit of contest against said entry alleging that the entryman died on or about April 1, 1890, and that his heirs and devisees had failed to improve and cultivate said land, since the death of the entryman, for a period of six months.

November 5, 1890, a notice of hearing was issued designating therein January 15, 1891, as the day for trial at the local office. The contestant reported his inability to obtain personal service on the heirs of said deceased party, whereupon notice was given by registered letter and by publication, and the time set for the hearing extended to February 19, 1891.

On the day set for the hearing the plaintiff appeared with his witnesses and submitted testimony, the defendant being in default, and then the case was continued to February 23, following, when the plaintiff submitted further testimony, and the case was closed, the defendant still failing to appear.

The local officers decided in favor of the plaintiff and recommended the cancellation of the entry. The usual notice of such action was sent to the last post office address of the deceased entryman addressed to the heirs of Jerry Sullivan, but was returned unclaimed.

July 21, 1891, before any steps in the matter had been taken by you, the heirs of Sullivan, who in the meantime had become cognizant of the facts in the case, filed a motion for the dismissal of the contest or that a re-hearing be allowed.

Under date of August 27, 1891, you dismissed the contest, whereupon the plaintiff appealed.

The facts in this case as brought out are as follows: The entry was made July 24, 1885, and the entryman was found dead in his home on the land May 24, 1890. Those who viewed the body when found, judging from appearances, were of the opinion that he had been dead about a month, or that he died about April 24, 1890, making a period of about four years and nine months from date of entry to the date of decease, or within about three months of the full period of five years that the settler is required to comply with the requirements of the homestead law.

The plaintiff charges no default of any kind against the entryman, and there is no apparent reason to doubt that he fully complied with the law from date of entry in 1885 to date of decease in 1890, and as a matter of fact the evidence submitted by the contestant shows that the deceased was living on his claim, and died there leaving crops of timothy and potatoes growing on the land.

Section 2297 Revised Statutes provides: that if at any time after a homestead entry has been properly initiated and the expiration of five years thereafter, it is satisfactorily proved that the entryman had changed his residence therefrom or abandoned the land, then his entry shall be forfeited and the land revert to the government. Furthermore section 2291 Revised Statutes provides that if a settler dies before the end of the five years specified in the homestead law, the widow, or if there is none, the heirs may continue the settlement or cultivation and obtain title on making the necessary proof.

In the case at bar a contest could not lie against the heirs of the deceased settler from the fact that the death of said settler occurred only three months before the end of the five years specified in the homestead law and therefore an abandonment on the part of the heirs for a period of six months as provided for by said section 2297 could not possibly be made, and therefore it naturally follows that for the period after the decease of said settler, it being less than six months, the heirs were not required to reside upon or to cultivate the land, but may, if they so desire, submit final proof under section 2291 (*supra*.) I am of the opinion that the contest should not have been allowed and should now be dismissed; your decision is therefore affirmed.

LOCAL OFFICE—SECOND TIMBER CULTURE CONTEST.

HEILMAN v. SYVERSON.

*On June 11
J. F. P.
23*
The report of local officers as to their official acts should be received as correct and true, and of full force, in the absence of any charge or evidence to the contrary.

An application to enter, filed by a second contestant against a timber culture entry, reserves the land covered thereby on the cancellation of such entry, subject only to the preferred right of the first contestant if exercised within the statutory period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 11, 1892.

I have considered the appeal of George Heilman from your decision of June 16, 1891, rejecting his application to make timber culture entry for the NE. $\frac{1}{4}$ of Sec. 7, T. 124, R. 73 W., Aberdeen, South Dakota.

The facts in this case are as follows: On May 18, 1888, Syver Syverson filed a contest against the timber culture entry of M. C. Johnson for said tract.

On March 24, 1890, George Heilman filed a contest against said entry of Johnson, which was held subject to the prior contest of Syverson. On July 2, 1890, you canceled Johnson's entry as the result of Syverson's contest.

The local officers report that on July 10, 1890, J. M. Paul, the attorney for Syverson, received a notice from them notifying him of the cancellation of Johnson's entry and of Syverson's preference right of entry. Syverson failed to make entry within the thirty days allowed as a preference right, but did make homestead entry for the tract September 9, 1890. On September 16, 1890, Heilman, the second contestant, made application to enter the land under the timber culture law. This application was rejected by the local officers by reason of the prior entry of Syverson. On appeal, you sustained the entry of Syverson on two grounds: First, that there was no evidence that he had been notified of the cancellation of Johnson's entry, and of his preference right to enter the land; and Second, that at the time Syverson filed his contest against the entry of Johnson he filed an application to enter the land and that this application had not been formally acted upon at the date of his homestead entry, September 9, 1890.

The contention of Heilman is that when he filed the affidavit of contest against the entry of Johnson, he filed an application to make entry of the land under the timber-culture law, that when the thirty days allowed Syverson to enter expired, that his (Heilman's) application took effect upon the land, and his right attached that day, viz., August 10, 1890, which was thirty days after the notice was given to Syverson, and which was prior to the date of Syverson's homestead entry for the

tract. In holding that Syverson was not in default in making his entry within the time allowed by law, you say:

As before stated, I hold that Syverson filed an application to enter, with his contest affidavit; that application reserved the land to him, until it was finally acted on and although it is treated as abandoned unless the applicant perfects it within thirty days after receiving notice, still, as it is not shown that he was so notified, you not having transmitted evidence of any notice to him, and having, according to your report, only notified him of the cancellation, and of his preference right, I am compelled to hold that the time allowed him by the regulations in which to perfect his entry never commenced to run.

The fact, however, is, that the local officers officially report that the recognized attorney for Syverson was notified by them of the fact of the cancellation of Johnson's entry and of Syverson's preference right. This statement is not denied in any way, it is nowhere alleged that such notice was not received, hence your finding seems to be simply a judgment that the official report of the local officers can not be accepted as correct or true. The correctness of such a doctrine can not be admitted.

The report of the local officers, as to their official acts, should be received as correct and true and of full force in the absence of any charge or evidence to the contrary.

It must, therefore, be held that Syverson did not make his entry within the thirty days allowed him for that purpose.

You also found that Syverson filed an application to enter the land at the time he filed his contest against the prior entry on the land. No application is found with the papers, no assertion is made that he did file such an application, but you base your finding upon the fact that among the contest papers is found a non-mineral affidavit bearing even date with the contest affidavit, and the presence of pin-holes in said affidavit indicates that it had been attached to other papers which have been removed from the record, and as it is not likely that Syverson would file a non-mineral affidavit, without at the same time, filing an application to enter, you find that he did file such an application.

In the absence, during all this time, of the assertion by Syverson or his attorney that such an application was filed your finding to that effect is based upon a rather weak foundation. In opposition to your theory, I find from the record that when Syverson made his homestead entry for the tract in question under the provisions of the act of March 2, 1889, he made affidavit that on June 25, 1885, he made homestead entry for a certain tract of land which he relinquished May 19, 1887, as it was not the land he wanted to file on, and was so stony that he did not want it, hence at the time he filed his contest he was not qualified to make application to enter the land as a homestead and on May 14, 1888, four days prior to filing his contest he entered another tract under the timber-culture law, hence he was not qualified to make application to enter the tract in question under that law. In view of these facts

and in the absence of any assertion that he did file an application to enter, I think your finding was erroneous, and his homestead entry can not be sustained on that ground.

Syverson having failed to make entry within the time allowed by law, his right as a contestant was forfeited, and the land became subject to the pending application of Heilman. *Kiser v. Keech* (7 L. D., 25); *Carson v. Finity* (10 L. D., 532); *Hudson v. Francis* (15 L. D., 173).

Your decision must, therefore, be reversed; the entry of Syverson canceled, and that of Heilman allowed.

SOLDIERS ADDITIONAL HOMESTEAD—CONFIRMATION.

DOCTOR F. CUSHMAN.

A soldier's additional entry, transferred to a *bona fide* purchaser prior to March 1, 1888, is confirmed by section 7, act of March 3, 1891, even though the alleged military service of the entryman is not verified by the records of the War Department.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 13, 1892.

On March 30, 1878, Doctor Fuller Cushman made a homestead entry at Benson, Minnesota for the SW $\frac{1}{4}$ of Sec. 6, T. 117 N., R. 39 W., containing 152.86 acres. He received a patent for the tract on March 30, 1880.

On August 30, 1879, you certified that Cushman was entitled to an additional homestead entry of not exceeding 7.14 acres, as provided in section 2306 Revised Statutes.

On November 18, 1881 he made soldiers' additional homestead entry No. 9349 upon which he received final certificate No. 874. Said entry is made for lot 7, Sec. 32, T. 136 N., R. 48 W., Fargo, North Dakota. The right to this additional entry is based on service in Co. "G" 51st Ills. Vols.

On May 9, 1891, you directed the local land officers to inform the party in interest that it would be necessary for him to furnish the data by which the entryman's military service could be verified, stating that in answer to repeated calls the Adjutant General U. S. A. reports: "The name of Doctor F. Cashman or Cushman has not been found in rolls of Co. "G" 51st Ills. Vols."

You held that should the entryman not furnish the data called for within sixty days from notice, his entry would be canceled. He has appealed from your judgment to this Department, alleging substantially that the entry is confirmed by the seventh section of the act of March 3, 1891 (26 Stat., 1095).

It is shown by the affidavit of the attorney of Cushman that he acted as attorney in fact for Cushman, to sell and convey the land in question, and that he believes said conveyance was made sometime in the

year 1884, and to one Erick Johnson; that he is informed by the register of deeds, under date of June 2, 1891, that said Erick Johnson deeded said property to Charles Julen (or Julin) on March 20, 1891.

The record shows that the entry in question was made in 1881, and the final certificate issued. The tract was sold after final entry and before March 1, 1888, to one Erick Johnson. No adverse claim exists which originated prior to the final entry, and no fraud has been found on the part of the purchaser. It follows that the entry is confirmed by the seventh section of the act of March 3, 1891 (26 Stat., 1095), provided, always, that the sale to Johnson was for a valuable consideration and he was a *bona fide* purchaser. Your judgment denying confirmation is reversed. Jesse W. Finch (14 L. D., 573).

You will issue a patent on the entry in question as soon as the present holder of the land shall furnish evidence that Johnson paid a valuable consideration for the tract, and, in short, furnish all the evidence required by the circular of instructions to Chiefs of Divisions, (12 L. D., 450).

Cox v. NEWBURY.

Motion for the review of departmental decision of April 5, 1892, 14 L. D., 352, denied by Acting Secretary Chandler August 15, 1892.

PRACTICE—APPEAL—AMENDED RULE 81.

SANDERS v. NORTHERN PACIFIC R. R. Co.

The General Land Office should not deny the right of appeal until an attempt is made to exercise such right.

The failure of a party to appeal from the decision of the local office upon a question of fact, as a rule deprives such party of the right to appeal to the Department in the event that the action of the local office is approved by the Commissioner; but where such action is disapproved, said party is entitled to be heard on appeal in case of subsequent adverse action in the General Land Office.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 16, 1892.

I have considered the petition for certiorari, filed by the Northern Pacific Railroad Company, in the case of Junius G. Sanders against said company, involving the NW. $\frac{1}{4}$, Sec. 21, T. 10 N., R. 3 W., Helena land district, Montana.

This land is within the primary, or granted, limits of the grant for the Northern Pacific Railroad Company, as shown by the map of definite location filed July 6, 1882, and was also included within the limits of the withdrawal upon the map of general route filed February 21, 1872.

This township was surveyed in 1868, the tract in question being re-

turned as "agricultural lands," and is in close proximity to the city of Helena.

The records show no claim to this land, until on August 12, 1880, George P. Reeves *et al.* made mineral application, No. 803, for a patent to said tract as a placer mining claim, the same being based upon a location made by the applicants, March 15, 1880.

The company protested against said application, upon which a hearing was directed to determine the character of the land, but the case never went to trial.

On May 11, 1888, Sanders applied to make homestead entry of the land, and his application not being received, he filed a protest, alleging the non-mineral character of the land, and that the pendency of the mineral application at the date of the definite location of the Northern Pacific Railroad served to defeat the grant for that company. Upon this protest the local officers ordered a hearing, citing the mineral applicants and the company to appear.

After a continuance, all parties appeared, and the hearing was proceeded with. Upon the testimony adduced, the local officers held the land to be agricultural in character and subject to Sanders' application, they having considered the pendency of the mineral application at the date of the definite location of the road as sufficient to defeat the grant.

From this decision the company filed notice of appeal, but the same was not served as required by the rules of practice, and did not contain a specification of errors.

The mineral claimants also appealed, but out of time.

Your decision of November 6, 1890, therefore, reviewed the case under rule 48 of practice, and reversed the decision of the local officers, holding that the pendency of the mineral application at the date of the definite location of the road did not serve to defeat the grant.

Upon a motion for review filed by Sanders, you, under date of April 19, 1892, reversed your decision of November 6, 1890, and sustained the decision of the local office, holding the tract to be excepted from the grant, and therein held, under amended rule 81 of practice, that the company "will have no right of appeal from this decision, but action in the case will be suspended for twenty days under rule 85," etc.

On May 4, 1892, the company filed its appeal from your decision of April 19, 1892, and in the letter of transmittal urged that your denial of their right of appeal was due to an error of fact.

May 13, 1892, you returned the appeal; the company next day filing the petition for certiorari now under consideration.

A motion is made on behalf of Sanders to dismiss the petition of certiorari, upon the ground that it is filed out of time. This motion must be denied, for the reason that so much of the Commissioner's decision of April 19, 1892, as held against the right of appeal in the company, was premature, because made before the company had offered to

file an appeal. *Atlantic and Pacific Railroad Company v. Pate*, 4 L.D., 52.

The appeal was filed May 4, 1892, with a letter calling attention to what was claimed to be an error of fact. Said appeal was returned May 13, 1892, and, as before stated, the petition under consideration was filed next day.

I must therefore hold that the company is properly before the Department on the petition, which will be considered on its merits.

The sole ground for the denial of the right of appeal in the company is that it failed to take a perfect appeal from the decision of the local officers. It did appeal, however, but the same was defective.

While under rule of practice 81, as amended, a failure to appeal from the decision of the local officers upon a question of fact will, as a general rule, deprive the party of the right of appeal to this Department, where, upon consideration of the case, your office affirms the decision of the local officers, yet I am of the opinion that said rule does not affect a case of this nature.

In the first place, admitting the company to have been in default in not filing a proper appeal from the local office, yet under the rules of practice it became your duty to consider the case, even though no appeal had been taken, and in your first decision you reversed the action of the local officers, not upon a question of fact, but an application of the law to the given facts, and by that decision, which was in favor of the company, it was placed in proper standing in the case and must be held to be entitled to thereafter defend its case from any subsequent action.

It is true that, upon a motion, you reversed your former decision, but having brought the company into court by your first decision, which must be the legal effect of your judgment in its favor, it can not thereafter be deprived of its rights to prosecute its case to a higher tribunal, providing it complies with the rules.

There are other reasons why the company should be entitled to the right of appeal in this case, but having already decided that the right of appeal exists in the company, a further discussion of the matter is unnecessary.

The petition is therefore granted, and the papers accompanying your letter of May 20, 1892, are herewith returned, with directions to advise the company of its right of appeal.

PRACTICE—REVIEW—APPEAL—CERTIORARI.

CRAWFORD ET AL. v. DICKINSON ET AL.

The promulgation of a departmental decision is not subject to review by the Commissioner, nor will an appeal lie from such action.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 17, 1892.

By your letter of May 10, 1892 you transmitted the application of George B. Crawford *et al.* for certiorari in the case of George B. Crawford *et al.*, *v.* John T. Dickinson *et al.*, involving the W. $\frac{1}{2}$ of Sec. 35, T. 10 N., R. 7 E., Salt Lake land district, Utah.

On the 21st day of May, 1892, an answer to said application was filed here, and upon an inspection of the papers the Department on the 8th day of July found that, in order to pass upon the questions involved, it would be desirable to examine the original papers and record in the case, and thereupon directed them to be sent up, which you did by letter of July 25, 1892. It appears from an examination of the application and the papers in the case, that on September 18, 1883, Dickinson made desert land entry for the W. $\frac{1}{2}$ of said section 35; and on May 2, 1884, made final proof, and received a final certificate therefor; that on May 5, 1884, he sold and transferred his interest in said land to William Crawford; and on May 30, 1885, Harry Booth and Edwin S. Crocker purchased it from Crawford.

On June 7, 1890, you canceled Dickinson's entry, and on November 29, 1890, Booth and Crocker, as transferees, applied to have said entry reinstated.

After Dickinson's entry was canceled, and on the 22nd day of July, 1890, Crawford made homestead entry for a part of the land embraced in said entry, and on August 1, 1890, Smock make homestead entry for the remainder of said land.

On December 12, 1890, you directed the local officers to notify Crawford and Smock to show cause, within sixty days, why their entries should not be canceled, with a view to the reinstatement of said desert land entry.

The homestead entryman filed certain affidavits, in response to your direction to show cause, which were considered by you, on April 7, 1891, in connection with the application of Booth and Crocker for the reinstatement of the Dickinson entry, and thereupon you held said homestead entries for cancellation, and also held that "it would seem that the canceled entry (of Dickinson) should be, as the petitioner prays, reinstated." From your decision all of the parties, filed what purported to be appeals, but as no notice was served on either party by the other in taking said appeals, they were all dismissed by the Department on the 20th day of November, 1891, and the record was returned

to you for appropriate action. *Crawford et al., v. Dickinson et al.*, 13 L. D., 574.

After the record was returned to you, and on the 19th day of December, 1891, you promulgated the departmental decision of November 20th, and at the same time canceled the homestead entries of Crawford and Smock, and reinstated the entry of Dickinson. You also directed the register and receiver to "advise all parties in interest of this action, allow thirty days within which to file motion for review of said decision, and at the proper time report the action taken."

On the 6th day of February, 1892, the local officers transmitted to you a motion by the homestead entrymen "for review of decision of Hon. Commissioner of the General Land Office, under 'G' December 19, 1891, to cancel homestead entries 8816 and 8823." which motion you dismissed on the 21st day of March, 1892, for the reason that said motion was not for the review of the departmental decision of November 20, 1891, but for the review of the action of your office of December 19, 1891, and

The only action taken by this office in the letter which was not determined by the Acting Secretary's was the reinstatement of Dickinson's desert land entry, a matter solely between the government and parties claiming under said entry, and one in which neither Crawford nor Smock appear to have any interest.

This action of yours the homestead entrymen seek to have reviewed under rules 83 and 84 of the Rules of Practice.

Your decision of April 7, 1891, holding for cancellation the homestead entries of Crawford and Smock, became final by reason of the failure of said parties to perfect their appeals therefrom within the time, and in the manner, provided by the Rules of Practice. The legal effect, of the departmental decision in dismissing said appeals, was to make the decision appealed from final and binding upon all parties concerned, so long as the judgment dismissing the appeals remains in force. No motion for review, or rehearing of that judgment having been made, within the time prescribed by the Rules of Practice, it has become final, and conclusive upon all parties to it. The right of the parties to be heard on their appeals was lost by their laches in failing to serve notices of their appeals as provided by the Rules of Practice.

The writ of certiorari will not be granted when the right to be heard on appeal is lost through the laches of the applicant. *Frary v. Frary et al.* (13 L. D., 478); *Nichols v. Gillette* (12 L. D., 388).

Your decision of March 21, 1892 dismissing the motion for review of your letter of December 19, 1891, was correct, for the reason that in so far as Crawford and Smock are concerned, said letter simply promulgated the departmental decision of November 20, 1891, dismissing their appeals, and as such was not in any manner the subject of review by you. Nor will an appeal to the Department lie, from the promulgation by you, of a departmental decision. A careful examination of the record fails to show that any injustice has been done to the applicants.

The application for certiorari is therefore denied.

RIGHT OF WAY—STATION GROUNDS—UNSURVEYED LAND.

SPOKANE FALLS AND NORTHERN RY. CO.

The approval of a right of way map over unsurveyed land confers no franchise, and under the regulations of March 21, 1892, a plat of station grounds, on unsurveyed land, will not be approved, although a map showing the line of road over such land may have been approved in accordance with former practice.

*Acting Secretary Chandler to the Commissioner of the General Land Office,
August 17, 1892.*

I have at hand your letter of the 16th instant submitting a plat filed by the Spokane Falls and Northern Railway Company, for the purpose of securing the benefits of the right of way act of March 3, 1875, and covering a tract of unsurveyed land in Washington selected for station purposes.

You set forth the fact that on March 21, last, 14 L. D., 336, the Department directed in a letter to your office, that maps over unsurveyed lands should not be submitted for approval as the right of way railroad act does not provide for the filing and approval of maps over lands of that character. You state further that a map filed by the company and covering the section of road over unsurveyed lands for which this selection is made, was approved by the Department on October 28, 1890, and submit the question as to whether or not this plat should be approved, in face of the above determination of the Department, because of the approval of the map before March 21, 1892.

The precise point on which you desire a ruling is stated to be that as the franchise for right of way had previously been granted it is desired to know whether this franchise would not also secure the approval of the selection by the company for station grounds.

In reply I have to state that on February 12, 1883, in departmental letter to the then Commissioner of the General Land Office, 1 L. D., 397, it was decided that

any regulation of this Department requiring or providing for the filing of maps over the unsurveyed lands must be held to operate for purposes of information merely, and such filing and approval cannot take the place of nor supersede the approval required by the express language of the law.

This ruling under the right of way act of March 3, 1875, has always been maintained, and because the approval of such maps secured no rights to the companies filing them, nor served any useful purpose in the administration of the act, the practice was discontinued by direction in the letter referred to.

The Spokane Falls and Northern Railway Company has not as stated by you, secured any franchise by the approval of its map over unsurveyed lands on October 28, 1890, and this station plat, like the map referred to, could in any event be filed for purposes of information only. Hence as the filing of the plat occurred subsequent to the direction covered by the letter of March 21, 1892, it cannot be approved.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

COPPOCK *v.* TITSWORTH.

One who settles on railroad land with the permission of the company, and with the intention of acquiring title therefrom, may purchase such land from the government, under the act of January 13, 1881, on failure of the company's title, providing the application is made within three months after the restoration of the land, and the applicant cannot secure title thereto under the pre-emption, homestead or timber culture laws.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 18, 1892.

I have considered the case of Robert Coppock *v.* George W. Titsworth on appeal by the former from your decision of February 2, 1891 dismissing his contest against the homestead entry of the latter for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 23, T. 4 N., R. 34 E., La Grande, Oregon land district.

This land was withdrawn in favor of the Northern Pacific Railway Company on October 20, 1870, under the provisions of the act of Congress of July 2, 1864 (13 Stat., 365).

It appears that one Johnson had attempted in 1878 to purchase it of the railroad company, but a letter from the assistant land commissioner of the company informs him that it "conflicts with S. T. Wormley." In 1881, however, Johnson appears to have settled on the land and made some improvements; these he sold to one Miller who made a homestead entry for the land and in October, 1884 sold all his interest in the land to Coppock, the contestant, and made a quit claim deed therefor. Coppock went upon the land, made his home thereon and made some additional improvements. Miller having gone away Titsworth contested his entry on the ground of abandonment; the entry was canceled in 1886, and Titsworth made a homestead entry for the land.

This entry Coppock contests upon the ground that it was fraudulent in its inception. He averred in his affidavit of contest that he was the owner of the improvements on the land worth \$2000; that he had resided there about two years; that the improvements had been made since August 13, 1870, the date of withdrawal under the railroad grant; that Titsworth's entry was based upon the claim made by Miller that at the date of withdrawal the land was settled upon by a qualified entryman; and he says this claim was false. A hearing was ordered upon this affidavit and the local officers recommended the cancellation of Titsworth's entry, from which he appealed, and you reversed said decision and dismissed the contest of Coppock, as aforesaid, from which judgment he appealed.

On the day that Coppock filed his affidavit of contest he filed an application to purchase and another affidavit alleging that he and his grantor had improved said land with a view to purchasing it of the

railroad company when it should come into market, or if the company's title should fail then he expected to purchase under the act of January 13, 1881 (21 Stat., 315); that he had exhausted his right of pre-emption or to make homestead or timber culture entry.

On the trial of the case there was introduced in evidence a circular letter of the Northern Pacific Railroad Company of date 1871, which in substance, was a proposition to the public to make settlement on its land. It stated substantially that the company only obtains title as successive twenty-five mile sections of the road are completed; that the odd numbered sections being withdrawn from sale, persons could settle upon them and make improvements, and that when they were brought into market such settler should have a preference right of purchase at prices for like lands in the vicinity, to be appraised regardless of the improvements. The company required such settler to give notice to its land commissioner, and to agree to buy the land when the same should be open to sale, &c.

There is no evidence that Coppock gave the notice or entered into any agreement with the company. On September 29, 1890 (26 Stat., 496) the forfeiture act took effect, and this tract with other lands became a part of the public domain.

When Titsworth's entry was made the land was withdrawn from entry or settlement as government land.

Coppock claims that having exhausted his right to acquire government land by entry he made his settlement to procure title by purchase of the company, or to purchase of the government under the act of January 13, 1881, *supra*.

The act mentioned provides that the settler must have made valuable improvements on the land; and that he must have settled "with the permission or license of the railroad company;" his settlement must have been with the expectation of purchasing of the company, and his application to purchase of the government under said act must be made not later than three months after restoration of the land to the public domain. The applicant must also show that he cannot acquire title under the pre-emption, homestead, or timber-culture law. See Benjamin H. Eaton (8 L. D., 344).

In the case at bar the applicant made his application to purchase before the forfeiture act was passed, to wit: November 20, 1886, and it was pending when the forfeiture took effect.

The company being out of the case the rights of Titsworth only are to be considered as against Coppock's claim. It is quite clear that this land was not excepted from the withdrawal by any settlement. Johnson who, it appears, was first to settle upon the land knew of the company's rights and applied to purchase. Miller was called upon when he applied to make homestead entry, for proof that the tract had been occupied by a settler, at the time the grant took effect. He says in his testimony that he found upon inquiry that he could not prove it and he

did not try but simply resided there until he could sell his improvements. He afterwards heard that his attorneys in some way had secured the entry. They wanted \$150. He never paid it and never saw the homestead papers.

The homestead entry was improperly allowed. Coppock says he did not claim any title through the purchase of Miller but he bought the improvements to get him off the land. He (Coppock) knew he could not acquire title under the land laws as he had exhausted his rights.

Your decision is therefore reversed, Titsworth's entry canceled, and Coppock will be allowed to purchase if he still desires to do so.

PRACTICE—REVIEW—RULE 72.

GROTHJAN *v.* JOHNSON.

Rule 72 of practice is not applicable to proceedings before the Department, but is limited to cases in the General Land Office.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 19, 1892.

I have before me a motion, filed by the attorneys for Louise C. Grothjan, for review of the departmental decision dated March 31st, 1892, in the case of said Grothjan *v.* Joseph L. Johnson, involving the SW. $\frac{1}{4}$ of Sec. 14, T. 9 S., R. 5 W., Boise City, Idaho.

The motion contains two grounds upon which the Department is asked to reconsider and reverse its decision above referred to. The first ground of the motion specifies several alleged errors, all of which relate to the facts as found by the Department in its decision. At the request of counsel representing the motion, their argument filed in the case upon the merits, after the decision was rendered, has been carefully examined in connection with the motion under consideration.

The first ground of the motion does not present anything new in the way of law or fact and is not sufficient to warrant a review of the decision complained of. *Pike v. Atkinson* (12 L. D., 226); *Ary v. Iddings* (13 L. D., 506); *Stone v. Cowles* (14 L. D., 90).

The second ground of the motion asks that a rehearing be ordered under the discretionary power reserved by Rule 72, Rules of Practice. In support of this ground, several affidavits are filed going to the merits of the case. They are not filed as newly discovered evidence, but some of them are claimed to be such. It is claimed that there has been a mis-trial, or at least that Grothjan has been the victim of "an ignorant and incompetent attorney if not worse."

Rule 72 of the Rules of Practice provides that:

When a contest has been closed before the local land officers and their report forwarded to the General Land Office, no additional evidence will be admitted in the

case, unless offered under stipulation of the parties to the record, except where such evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

From the language used it is quite evident that this rule does not apply to proceedings before this Department but is confined to the Commissioner of the General Land Office. See *Witter v. Ostroski* (11 L. D., 260); *Conn v. Carrigan* (11 L. D., 553); *Gibson v. Van Gilder* (9 L. D., 626).

The affidavits filed in support of this ground of the motion do not show any newly discovered evidence, nor is any error in the trial of the case, by which the complainant is deprived of any substantial right made to appear, therefore no sufficient reason is shown for a rehearing. *Forbes v. Cole* (13 L. D., 726).

The motion is therefore denied.

PRACTICE—REVIEW—MINERAL LAND.

JOHNS v. MARSH ET AL.

Concurring decisions of the local office, General Land Office, and the Department, will not be disturbed on motion for review, on the ground that the decision is not supported by the evidence, where the testimony is of such character that reasonable minds might differ as to the conclusion that should be drawn therefrom; and this rule is not limited to cases where the testimony is submitted before the local officers.

The mineral character of land is established by proof of the existence of mineral in paying quantities, and actual mining operations are not requisite to such conclusion.

On proof of the mineral character of a tract and allowance of mineral entry therefor, the burden of proof is upon one who asserts the non-mineral character of the land, even though it was originally returned as agricultural.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 20, 1892.

The attorneys for Enoch Johns have filed a motion asking for a review of departmental decision of October 19, 1891, in the case of said *Johns v. George F. Marsh et al.* involving the NE. $\frac{1}{4}$ of Sec. 19, T. 3 N., R. 7 W., Helena, Montana, land district.

This land is within the limits of the grant to the Northern Pacific Railroad Company with which company Johns entered into a contract to purchase said tract in pursuance of which a deed was executed November 8, 1886, purporting to convey it to him. On June 18, 1885, George F. Marsh and Henry Cannon were permitted to make mineral entry for said land. In April, 1887, Johns filed a protest against said entry, alleging that the land is non-mineral in character. A hearing was had; as a result of which the local officers found in favor of the mineral claimants. Upon appeal to your office that decision was re-

versed, but upon motion for review a different conclusion was reached and the decision of the local officers was concurred in and affirmed. It is the decision of this Department affirming your later decision that is brought in question by the motion now under consideration.

The alleged errors in said decision upon which it is sought to have it revoked, are formulated in the motion for review as follows:

There is no conflict in the evidence in the case, but there is *no evidence at all* in the record which proves the mineral character of the land in controversy as required by law and departmental construction.

(2) There is no conflict of evidence as to the character of the land, for the reason that, all the evidence of mineral claimants, if there was none for the contestant, utterly fails to prove its mineral character.

(3) Your conclusion that 'because of conflict of evidence as to the presence of minerals on the claim, the concurring decisions of the local office and the Commissioner should, under the repeated and established rulings be accepted by the Department,' is for these reasons erroneous.

(4) Said 'repeated and established rulings' referred to are not applicable to this case, for the additional reason, that the grounds of such rulings are the same as they are in the courts, viz., that the jury heard the evidence of the witnesses, saw them face to face, witnessed their manner of testifying, knew their reputations for truth, etc., and after a verdict by such tribunal on the evidence, and the overruling of a motion for a new trial, by the trial judge who also saw the witnesses and heard the evidence, an appellate court would not disturb the finding of facts, if there was any evidence to support the finding. Whereas, in this case, the evidence was taken before a commissioner nearly a hundred miles from the local office, and not before them, and they passed upon the written evidence just as it is presented to you. The Commissioner of course did the same.

(5) Said rulings are not applicable for the additional reason that the first decision of the Commissioner in the case was against the mineral claimants, and the concurring decision referred to was based upon an erroneous theory of the law as to the presumptions arising from the return of the Deputy U. S. Surveyor.

(6) They are not applicable because there is no evidence whatever in the record which even tends to prove the mineral character of the land, as that fact is required by law and the Department to be shown.

The first three assignments of error which are to the same effect although slightly different in wording, will be considered and disposed of together. In the argument made in support of this motion it is contended that taking the evidence submitted by the entrymen it does not show this land to be mineral within the rules laid down by the supreme court and by this Department.

As showing the rule laid down by the supreme court, the case of *Davis v. Weibbold* (139 U. S., 507), is cited and the following is quoted therefrom :

Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear.

See to this purport the following decisions of the Interior Department: Magalia Gold Mining Co. v. Ferguson, 6 Land Dec., 218; Nicholas Abercrombie, 6 Id., 393; John Downs, 7 Id., 71; Cutting v. Reininghaus, 7 Id., 265; Creswell Mining Co. v. Johnson, 8 Id., 440; Thomas J. Laney, 9 Id., 83.

The supreme court here states the rule that has obtained in this Department and approves it as the correct rule. A quotation is also given in the argument filed here from the case of Savage v. Boynton (12 L. D., 612), as giving the latest expression of this Department upon this question, as follows:

It has been repeatedly held by this Department that the proof of the mineral character of land must be specific and show actual production of mineral therefrom; that it is not enough to show lands in the neighborhood or adjoining lands are mineral in character, or that the lands in question may hereafter be found to be mineral, Kings County v. Alexander *et al.* (5 L. D., 126), and Dughi v. Harkins (2 L. D., 721), and the same is the case in relation to coal lands; the proof must show satisfactorily the coal character and not be based upon a theory.

That these quotations embody substantially the true rule to be followed in determining the character of land is admitted by counsel for the mineral applicants. While these quotations may be said to substantially give the rule in such cases, it is perhaps more clearly and succinctly stated in later decisions of the Department. Thus in Royal K. Placer (13 L. D., 86) it is said:

From this examination I have concluded there is no legal necessity for changing the attitude of the Department on this question; and that, where the issue is made in any case, it must appear as a fact that mineral can be secured with profit. This fact of course may be shown, as other facts, by any competent evidence.

And in Winters *et al.* v. Bliss (14 L. D., 59), in regard to the rulings of the Department on this question it is said:

They are that mineral patents should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it, is established as a present fact.

It is not necessary that to meet the requirements there should be upon the land a mine in working order, from which gold is being actually produced; it is sufficient if it be shown by satisfactory proof that mineral exists in paying quantities and such proof will usually be based on mining operations, or exploration. In the present case it has not been shown that any mining has been carried on on this land. The evidence consists of the testimony of persons, most of them claiming to be expert miners, who went upon this land and panned out small quantities of earth. The preponderance thereof shows that the land bears gold and taking the testimony of the witnesses for the mineral claimants alone, it sustains the conclusion that it is there in paying quantities. Some of these witnesses express a doubt if water could be secured with a sufficient fall to successfully work this ground, while others state positively that it could be worked. Taking the testimony submitted by the mineral claimants, it seems to justify the further conclusion that

said ground may be worked by the usual methods. The position taken by the protestant that there is no conflict in the evidence because there is no evidence showing the mineral character of the land can not be sustained. The witnesses for the protestant state that their examinations fail to disclose any gold and that it would be almost impossible to carry on mining operations there even if gold were present. An effort was made to show that the ground upon which the experiments of the witnesses for mineral claimants were made, had been carried onto this tract or that the gold had been put there for the purpose of being found by them, that is, that the ground had been "salted" but was not successful. These witnesses state positively that the soil they examined was virgin soil and that they were careful to procure it in such a way as to avoid the possibility of it having been tampered with. There is certainly a conflict in the evidence, both as to the presence of gold on the tract and as to the practicability of extracting it by the ordinary methods of mining; and the conflict is such that fair minds might differ as to the proper conclusion to be reached therefrom. Therefore if the rule that where the evidence is of that character, the concurring decisions of the local officers, your office, and this Department will not be disturbed upon a motion for review, based upon the allegation that the decision is not supported by the evidence, is to obtain in this case, this motion can not be allowed.

It is contended in support of this motion that said rule does not apply in this case, and the reasons therefor are set forth in the assignments of errors numbered four and five, quoted above. Counsel assert that the grounds for this rule are the same as for the similar rule applied by the appellate courts, that a judgment of the trial court upon the verdict of the jury will not be disturbed as to the finding of facts when there is any evidence to support it. If this were true, then the rule spoken of would apply only in those cases where the testimony was submitted before the local officers; but that distinction has not been made, the rule having been applied without regard to what officer the witnesses appeared before to testify. The existence of said rule as recognized by this Department has a somewhat different basis. The procedure in cases concerning the public domain, wherein hearings are had, contemplates a judgment by the local officers, by your office, and by the Secretary. Certainly the findings of the local officers, a duly constituted tribunal for the adjudication of such cases, are entitled to consideration in all cases and to special respect when the witnesses appear and testify before them. When their findings are concurred in by your office, after a consideration of the evidence, that fact will be taken into consideration when the case comes before this Department for examination and although not conclusive upon this office, will be given great weight. When, however, this Department after an examination of the evidence has concurred in the finding of fact that conclusion will not usually be disturbed. All will admit the soundness of the rule

that a finding as to the facts in a case which has been concurred in by three separate tribunals will not be disturbed unless it be shown that it is clearly and decidedly against the weight of the evidence, and that substantial justice has not been done by the decision based upon such finding. The objection thus presented to the application of said rule to the case under consideration can not be sustained.

It is further contended, however, that said rule is not applicable here, because the concurring decision of your office "was based upon an erroneous theory of the law as to the presumptions arising from the return of the deputy United States surveyor." Upon the original survey this land was returned as agricultural in character; but upon the examination and survey thereof by the deputy mineral surveyor, it was returned as mineral in character and allowed to be entered as such. The allowance of this entry was an adjudication by the local officers that the land was mineral in character and overcame the original return of the surveyor-general. After said entry was allowed the land appeared on the records as mineral land and the burden of proof rested on one who sought to attack the record thus made. This is clearly stated in the case of *Walton v. Batten et al.* (14 L. D., 54).

Thus neither of the reasons given in support of the assertion that the rule that concurring decisions of the local officers and your office will not usually be disturbed as to the finding of facts, where the evidence is conflicting, can be sustained, but on the contrary, I must hold said rule was properly invoked when the case was considered here on appeal.

The sixth reason given in support of this motion, is the same in effect as the first three, and need not separately be discussed.

It is insisted that the same proof is required in this case to show the land excepted from the grant to the railroad, as would be to show these mineral claimants entitled to a patent, that is, that not only must it be shown that the land bears mineral in paying quantities, but also that mining operations have been carried on and improvements required by law have been made. This proposition is too broad and is not sustained by the authorities cited, viz: *Davis v. Weibbold, supra*, and *Commissioners of Kings Co. v. Alexander et al.* (5 L. D., 126). All that is required under those authorities, is that the mineral character of the land shall be satisfactorily shown. It is earnestly asserted that the evidence in the case shows fraud on the part of these claimants, in procuring their entry, and that therefore said entry should be canceled. The protest filed presented but one objection to the allowance of the entry in question, and raised but the single issue, namely, as to the character of the land. This issue has been tried and decided against the protestant.

The questions as to the sufficiency of the proof and the good faith of the entryman are between the claimants and the government, to be considered and determined hereafter as indicated both in the decision of your office January 27, 1890, and the departmental decision now

under consideration. I do not find any error in the disposition made as to that part of the case.

Since none of the reasons urged in support of said motion are sufficient to secure the action asked, the same must be and is hereby denied.

PRE-EMPTION ENTRY—CONTRACT—SECTION 2362 R. S.

MOLINARI v. SCOLARY.

A pre-emptor who enters into a written contract, prior to filing declaratory statement, by which he agrees to convey part of the land to another, on securing title thereto, is disqualified as a purchaser under the pre-emption law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 22, 1892.

By your decision of September 24, 1891, you dismissed the contest of Michael Molinari against the pre-emption cash entry of Philip A. Scolary, of May 9, 1888, for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 6, T. 14 S., R. 3 W., Los Angeles, California, and he has appealed from your judgment.

The contest affidavit, which is in the nature of a written and verified protest, alleges that the said Scolary in his final proof falsely and fraudulently testified that he "had made no contract in any way or manner whatever by which the title to the within tract of land or any portion of it would inure to the benefit of any other person or persons whomsoever," when in truth and in fact he knew that he had, prior to the making of the said cash entry, entered into the following contract in writing, which is in the words and figures as follows, to wit:

This agreement, made this 28th day of September, 1887, between Joseph Ghisletta, of the county of San Diego, in the State of California, the party of the first part, and P. A. Scolary and C. Tonini, of the same place, parties of the second part,

Witnesseth, that for the consideration hereinafter mentioned, the said party of the first part hereby agrees to abandon his claim to the SW. and SE. and NE. quarters of the NW. $\frac{1}{4}$ of Sec. 6, township 14 S. of Range 3 W., San Bernardino Meridian, comprising one hundred and twenty acres of land in the said county and state.

In consideration of the above abandonment the said parties of the second part hereby promise and agree to cultivate and plant in grape vines forty or more acres of said land, and take proper care of and keep in good condition said vineyard, for the term of four years, and immediately after said abandonment said parties of the second part are to file in the land office their application for said land, and as soon thereafter as possible they are to commence the cultivation of said vineyard.

At the end of the said term of four years, they are to convey to the said party of the first part by a good and sufficient deed one half of said one hundred and twenty acres.

The ten acres now occupied by the said party of the first part as an orchard are to be included in his sixty acres.

The springs of water on said one hundred and twenty acre tract are to be the common property of the parties hereto, both before and after said deed is executed. And it is further understood that in addition to having an equal right to the use of said

springs, the said party of the first part shall have the right to dig and use a well on whatever part of said one hundred and twenty acre tract he may choose for the purpose.

The said parties of the second part are to perfect their title to said one hundred and twenty acre tract as soon as practicable; and as soon thereafter as possible they are to file this agreement for record, in the records of said county of San Diego.

Hearing was ordered on said protest, and the testimony taken, January 23, and 24, 1889, before the county clerk of San Diego county. At the trial, the contract, set forth in the protest, was not produced, nor was there a properly certified copy of the same. It appears from the evidence that the original contract had, some time prior to the hearing, been given to the prosecuting attorney as a basis for criminal proceedings against Scolary on the charge of perjury, and was in his hands or the hands of the court when the testimony was submitted in this case.

Ghisletta, one of the parties to the alleged contract, testified that he entered into a contract with Tonini and Scolary, and gave the substance of the same, which agreed substantially with the copy set out in the protest.

H. H. Dougherty, a notary public, also testified that he drew a contract, which was signed and acknowledged by these parties, September 28, 1887, and left with him as custodian, until called for by the officers of the court. He stated that Scolary signed it as a party of the second part, and that he paid him for drawing the instrument. He nowhere states in his testimony that the contract set out in the protest is a correct copy of the instrument signed by Scolary, nor does he state the substance of the contract. He states that after signing the same and leaving it with him as custodian, Scolary several times came to him and wanted to get the contract, saying he wanted to put it in the bank, but he refused to let him have it, because when he was made custodian of it, it was agreed by all parties that it should not be given to any one of them, unless they all came to him and agreed to its being so given up.

Molinari, the protestant, was sworn and testified, that he had a conversation with Scolary, in which he said:

They made an agreement between him and Mr. Ghisletta for one hundred and twenty acres of land, that Scolary was to improve it, and then, between that time, during that time, he told me he went to a notary public, and tried to get the instrument, the contract, and have it destroyed.

All the parties to this transaction are foreigners, and speak the Italian language.

This is the material part of the testimony for protestant. After it had been introduced, his counsel asked that the original instrument be obtained from the United States court commissioner, or from the record where it was retained, and forwarded to the land department to be used in this case. That request does not seem to have been complied

with, for the instrument is not found in the record before me, nor any certified copy of it.

When the evidence on the part of contestant was all in, the taking of testimony was continued until the next day, when neither the contestant nor his counsel appeared, but the defendant and Tonini, his alleged partner in the contract, were sworn, and both testified that Scolary signed an instrument of *some kind* (the one left with Dougherty) as a witness, and not as a *party*; that Tonini was the party to the contract with Ghisletta, and that Scolary was only a witness thereto and had no other interest in it; that Tonini had exhausted his land privileges, and so Scolary filed for the land in question, and never made any agreement of any kind with Ghisletta by which his entry was to inure to his benefit, etc.

The foregoing is the material substance of the testimony, upon which you, in your said decision, found that the contest charge had not been proved, and dismissed the same. You hold, also, that even though—

Scolary had been a principal party to said contract, which is not proved by the testimony, he could not be held to have committed any fraud on the government, because, at the date thereof, September 28, 1887, he had no entry or filing for any land, and the contract, which was merely executory, and no conveyance or agreement to convey any land in which Scolary had any interest at the date thereof, was void for want of consideration, and, if he had entered into such contract after filing, it would have been void, as being contrary to the policy of the law, and could not have been enforced.

I can not concur either in your finding of facts or conclusions of law. The contract or what purports to be a copy of it is in evidence, and, although it is not properly certified to be a true copy of the original, it was read in evidence by counsel for Molinari and it is before me in the record.

Therein, Scolary is described as a "party of the second part," and signs the instrument as a party thereto. Dougherty, the draughtsman and custodian of the paper, swears that Scolary signed it as a party and paid him for drawing it, and that he fully understood the terms of it.

Against this evidence is the testimony of Scolary himself and Tonini, to the effect that Scolary was not a party thereto, but signed only as a witness. They were not cross-examined, for their testimony was taken on the last day, when neither Molinari nor his attorney was present.

In a court of law this testimony would not be allowed, for it contradicts the plain terms of a written instrument, in which Scolary is described as a party, and which he signs as a party thereto. Moreover, all the circumstances, even his own conduct, seem to contradict his testimony. Why should he disclose so much interest in obtaining this contract from Dougherty after he had filed for the land, if he was only a witness and not a party to it? Dougherty says he came several times to him, trying to obtain the paper to put it in a bank. Molinari says that he told him that he wanted to get it to destroy it. He does

not deny trying to obtain the paper, but says he wished to see it, because he had been told that he had signed it as a party, which would get him into trouble of some kind.

What motive could Dougherty have had, when he drew the instrument, in representing him as a party to the agreement, when he was in fact only a witness? Evidently none, or, at least, none is disclosed in the record. On the other hand, Scolary, when he found himself threatened with a prosecution for perjury for having subscribed to an affidavit that he had never "directly or indirectly made any agreement or contract . . . by which the title he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself," had a very strong motive for making it appear that he was a witness and not a party to this agreement, and, in my judgment, the facts all point to the conclusion that he meant to make it so appear, at all hazards in order to protect his entry.

The evidence is sufficient to satisfy my mind beyond a reasonable doubt that Scolary, when he filed his declaratory statement for this land, had entered into a written agreement with Ghisletta to convey to him one half of the land when he could legally do so. But you hold that, even though this is sufficiently shown, such a contract is not in the way of his entry, because the contract could not be enforced, it being contrary to the "policy of the law."

Section 2362 of the Revised Statutes requires the applicant to enter land under the pre-emption law to make oath that—

He has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same.

It is not necessary to inquire whether such a contract is contrary to the "policy of the law," for it is contrary to the express provision of the statute. It being a contract in violation of the statute, no argument is necessary to show that it could not be enforced. But does it follow that, because it is void and can not be enforced, it is therefore no bar to an entry? I think not. Such a construction would, in my judgment, nullify and render of no effect the provision of section 2262, *supra*. That section prohibits the making of such a contract, by requiring the applicant to make oath that he has not entered into any such a contract or agreement.

The contract is void, then, by reason of the express inhibition of the statute, and your construction of the law is to the effect that, because the statute prohibits such a contract, it is therefore illegal, and an applicant to enter land may deliberately become a party to an agreement prohibited by law, and escape all liability therefor, because it is contrary to the statute. In other words, he has violated the statute in

making this agreement; but because he has violated it, no liability can attach to him. This will not do. He cannot be permitted to take advantage of his own wrong and in violation of law, reap the benefits of the act granting an entry only to those who comply with its terms.

While a party entering into an agreement such as this could not enforce it at law, or be adjudged to perform it in equity, yet he might of his own volition carry it out, and it is this mischief that the statute is designed to remedy.

It was contemplated by Congress that no man should procure more than one hundred and sixty acres of public land under the pre-emption law, and to hold that a pre-emptor, or any number of them, may with impunity enter into an agreement to convey all or any portion of their entry to a stranger, would be to evade this wise provision of law, by enabling one man to procure large tracts of government land in violation of the spirit and intent of the statute.

The only decision of this Department that I find which authorizes your conclusions is the case of *Aldrich v. Anderson*, 2 L. D., 71, cited in 3 L. D., 284, which is practically, though not in terms, overruled by the case of *La Bolt v. Robinson*, 3 L. D., 488. It not being in harmony with the uniform rulings of this Department, and at variance with the terms of the act as I understand it, I am unwilling to follow it.

I am not, however, entirely satisfied with the evidence introduced at the hearing. What purports to be the contract between Ghisletta, Tonini, and Scolary, was read by contestant's counsel, but it was not certified, nor shown to be a true copy of the original agreement. Moreover, it did not accurately describe the land entered. The original contract is shown to have last been in the hands of the United States circuit court commissioner, and should be easily obtained, or its loss accounted for.

That all the facts and the best evidence obtainable may be procured, and this transaction probed to the bottom, you will direct a special agent of your office to fully investigate the matter and report thereon, when you will further adjudicate the question in issue according to the views herein contained. In the meantime, Scolary's entry will be suspended.

TOWNSITE ENTRY—COUNTY JUDGE.

WOODRUFF TOWNSITE.

A probate judge in the Territory of Utah is the judge of a county court, and as such county judge is the proper officer to perfect a town site entry for an unincorporated town in said Territory.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 22, 1892.

On the 12th of September, 1891, you rendered a decision in this case, in which you held for cancellation the cash entry made by Stephen V. Frazier, probate judge of Rich county, Utah Territory, in trust for the

benefit of the inhabitants of the town of Woodruff, in said county, of the S. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of Sec. 16, T. 9 N., R. 7 W., Salt Lake land district, Utah, as a townsite. An appeal from said decision brings the case to the Department.

The declaratory statement in this case was filed by George A. Peart, who was the immediate predecessor of Stephen V. Frazier as probate judge of Rich county. This statement was filed May 2, 1887, and it was therein stated that the land was taken "in trust for the occupants and inhabitants of the town of Woodruff, Rich county, Utah."

Due notice was given by publication, that final proof would be made before the local officers, on the 20th of November, 1888. Prior to that time, to wit, on the 25th of September, 1888, Stephen V. Frazier was commissioned as probate judge of Rich county, he having been previously appointed by the President and confirmed by the Senate.

On the day appointed for that purpose, final proof was made, the testimony being furnished by Judge Frazier and two witnesses. Both the witnesses made oath that they were well acquainted with the land in question, and had been since the year 1870. After describing the land by its legal subdivisions, they both say:

That said tracts were selected as a townsite for the town of Woodruff, in the month of May, in the year 1870; that the town was laid off into blocks, lots, streets, and alleys in the year 1870, and resurveyed in 1871; that said land is in every respect non-mineral in character and better fitted for agricultural than mineral purposes; that the inhabitants of said town number two hundred and fifty; that the town improvements consist of seven streets eight rods wide and one mile in length, running through the town from east to west, and seven streets eight rods wide and one mile in length, running from north to south, at right angles with the other streets; eight main canals running from one half mile to one and a half miles in length, from three to five or six feet wide, and averaging two feet in depth; besides these a public building for school purposes, and the private dwellings, fences, and other improvements of the inhabitants; that the value of the town improvements are about three thousand dollars; that affiant is in no way interested in the matter, concerning this entry, other than as a citizen of said town and an occupant of part of said land.

Judge Frazier made oath to the same facts, some of his statements, being upon information and belief. He also testified that he was the probate judge of Rich county, and the successor in office of George A. Peart, who made the filing in question as judge of the county court of Rich county, the probate judge being designated as such for the purposes of the townsite act. He further testified that the inhabitants of said townsite had purchased the other quarter of said section sixteen from the original entryman, and that the value of the town improvements was about fifteen thousand dollars, the major part thereof being upon the quarter section purchased from said original entryman. That he was the duly authorized officer to make said townsite entry, under the laws of the United States and of the Territory of Utah, said town being unincorporated.

Upon this proof, and the payment of twelve hundred dollars, final certificate and receipt were issued to Judge Frazier on the 20th of

November, 1888, for the land in question, "in trust for the benefit of the inhabitants of Woodruff."

It also appears that the government survey of said land was commenced on the 25th of June, 1870, and finished on the 5th of July, of that year. That the inhabitants of Woodruff informed the government surveyors that they had staked out their town, and the surveyors told them they would respect their location. The approved township plat was filed in the local land office on the 25th of January, 1871, and soon thereafter the lines of said town were adjusted to the government lines.

In your decision you quote quite largely from the Revised Statutes, the acts of Congress, and the compiled laws of Utah, and conclude that the jurisdiction in townsite matters, heretofore exercised by probate judges in the Territory of Utah, had been annulled, and that it could only be exercised thereafter by the district courts of said Territory. You therefore held the entry of the townsite of Woodruff for cancellation, and directed that "should another attempt be made to cover said land with a townsite entry, while the town of Woodruff remains unincorporated, the application must be made by the judge of the district court for the judicial district in which said town is situated."

In the appeal filed by Judge Frazier from your decision, "on behalf of the settlers of Woodruff," it is claimed that you misinterpret and misconstrue the law in force in relation to townsite entries in the Territory of Utah.

To correctly determine this question it will be necessary to examine the several provisions of law relating thereto. Section 2387 of the Revised Statutes provides as follows:

Whenever any portion of the public lands have been or may be settled upon and occupied as a townsit, not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court, for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

In the Territory of Utah it appears that they have no "judge of the county court," elected or appointed as such, but in the Compiled Laws of Utah, edition of 1888, Vol. 2, page 144, it is provided as follows:

That when the corporate authorities of any town or city, or the probate judge of any county in this Territory (who for the purpose of this act and of receiving and executing the trust declared by the act of Congress hereinafter mentioned,) shall be deemed and is hereby designated as the judge of the county court for such county in which any town or city may be situated, shall have entered at the proper land office, the land or any part of the land settled and occupied as the site of such town, pursuant to and by virtue of the provisions of the Act of Congress, entitled 'An Act for the relief of the inhabitants of cities and towns, upon the public lands,' 'approved March 2d, 1867,' and any amendments that may be made thereto, etc.

The language of the Revised Statutes is, that selection for townsites, where the town is unincorporated, shall be made by "the judge of the county court for the county in which such town is situated." The compiled laws of Utah provide that for the purpose of making such selections, the probate judge of any county "shall be deemed and is hereby designated as the judge of the county court for such county." The Utah law does not provide that the probate judge shall make such selection. It could not well do so, as Congress had already designated an officer to execute such trust, but the Territorial legislature might very properly create the officer on whom Congress had conferred the trust. This it did, by making the probate judge *ex officio* judge of the county court. These are separate and distinct offices, although held by the same person, and I think no subsequent legislation by Congress, limiting the jurisdiction of probate judges as such, would affect his status or jurisdiction as judge of the county court.

Your decision seems to be based largely upon the twelfth section of what is known as the Edmunds-Tucker Act (24 Stat., 635), which reads as follows:

That the laws enacted by the Legislative Assembly of the Territory of Utah, conferring jurisdiction upon probate courts, or the judges thereof, or any of them in said Territory, other than in respect of deceased persons, and in respect of the guardianship of the persons and property of infants, and in respect of the persons and property of persons not of sound mind, are hereby disapproved and annulled; and no probate court, or judge of probate shall exercise any jurisdiction other than in respect of the matters aforesaid, except as a member of a county court, and every such jurisdiction so by force of this act withdrawn from the said probate courts of judges shall be had and exercised by the district courts of said Territory respectively.

This section does not attempt to limit or restrict the jurisdiction of a probate judge when acting as a judge of the county court, but it expressly excepts his acts as a member of a county court from such restriction. Neither does it attempt by express terms to repeal section 2387, of the Revised Statutes. Repeals by implication are not favored in the law and construing these acts together, each may stand and become effective. I do not think, therefore, that any jurisdiction conferred upon a probate judge, while acting in the capacity of "the judge of the county court," was taken from him and conferred upon the judge of the district court, by section twelve of the Edmunds-Tucker Act.

On page 295 of volume 1, of the Compiled Laws of Utah, edition of 1888, it is provided that "each county shall have a county court, consisting of the probate judge of such county, and three selectmen." Hence, I conclude that the probate judges in Utah Territory are now the judges of the county courts in their respective counties, and the proper officers as such judges of the county courts, to execute the trust relative to townsite entries conferred by section 2387 of the Revised Statutes.

It follows, therefore, that the entry for the townsite of Woodruff was

made by the proper officer, and that you erred in holding such entry for cancellation, and in stating that

should another attempt be made to cover said land with a townsite entry, while the town of Woodruff remains unincorporated, the application must be made by the judge of the district court for the judicial district in which said town is situated.

Other questions are discussed by you, such as the number of acres included in the townsite, and the number of inhabitants occupying the same, but I think these questions have long since been settled by the Department. The law does not prescribe that any number of inhabitants is necessary to make a townsite entry. See Revised Statutes, section 2389, paragraph 9, of subdivision 3, of circular of November 5, 1886, 5 L. D., 265, and case of *Coyne v. Townsite of Crook et al.* (6 L. D., 675). The Coyne case also held that

the law does not prescribe the number of acres that may be taken as the site of a town containing less than one hundred inhabitants. In such cases the extent of acreage is a matter of executive discretion, and is restricted to the land actually occupied for town purposes, by legal subdivisions.

In the case of the Townsite of Concordia *v. Liuney et al.* (3 C. L. O., 50), decided by Secretary Chandler in 1876, questions somewhat similar to some of those in this case, were involved. That was an incorporated town, but lands purchased by private parties were included in the plat with that for which entry was made, and all incorporated as one city. After commenting on the circumstance, and the fact that the stores and shops were mostly upon the lands purchased by private parties, the Secretary said "this, in my opinion, does not affect the rights of the occupants under the circumstances of this case." After referring to the improvements which had been made, in the matter of laying out and grading streets, etc., the Secretary said:

The fact that people do not actually reside upon each quarter-quarter section or fractional legal subdivision, in the view I take of the law, does not affect their rights to the quantity of land which the law permits them to enter for the purposes of a townsite. The quantity of land is to be determined by the number of occupants, not by the location of their residences upon it.

The plat filed with the papers in the case at bar shows that not only every quarter-quarter section is settled upon, but that every lot into which the town is laid out, had one or more family upon it. It is true that these lots are larger than is usual in the case of ordinary town or city lots, ranging from one and a quarter to ten acres in size, but the families who occupy them are also larger, in one instance the family being composed of a man, three wives, and eleven children.

The final proof submitted by Judge Frazier showed the townsite of Woodruff had two hundred and fifty inhabitants. Upon this showing, under section 2389, the judge of the county court might enter six hundred and forty acres. Affidavits filed subsequent to the making of such proof, show that some of the inhabitants of the town reside upon that portion of land added to the townsite by purchase from the original

entryman, but that the whole number in the town had considerably increased since final proof, and was constantly increasing.

From all the facts in the case, I do not find that the number of inhabitants was too small for the number of acres included in the town-site, and for the reasons already stated the decision appealed from is reversed.

OKLAHOMA TOWN SITE—RESIDENCE.

BERRY *v.* CORETTE.

The claimant of a town lot is not required to maintain an actual personal residence as in case of a homestead, it is sufficient if he makes a settlement and improvements thereon, though the improvements be occupied by another as the tenant of the claimant.

Acting Secretary Chandler to the Commissioner of the General Land Office,
August 23, 1892.

I have considered the case of Robert C. Berry *v.* Ed. Corette of Norman, Oklahoma Territory, involving title to lot No. 13, block 5, in said town.

The contest in the case was heard by the "Townsite Trustees Board No. 4," at Noble, Oklahoma, who decided in favor of Corette, upon which a motion for a rehearing was filed, supported by affidavits, letters and other evidence. This motion was overruled and an appeal taken, no notice of the appeal appears to have been served, but upon an examination in the case, you found such error of law that you felt it your duty under rule 48, rules of practice, to consider the case, and upon a review thereof, reversed the trustees and awarded the lot to Berry, from which decision Corette appealed.

The motion for a rehearing should have been granted for several reasons: first because of the admission of a mass of incompetent testimony offered by Corette and considered by the trustees over the objection of Berry's counsel; secondly, on the ground of newly discovered evidence, which, had it been presented at the hearing, would have shown that Corette was acting for, and under the advice of, one Ragsdale, who was furnishing the money, and who was rendered incompetent to make entry of the lot by his disregard and violation of the law and the President's proclamation. This testimony, it appears quite clearly, could not, with any reasonable diligence, have been obtained in time for the hearing. Had it been presented, it would, unless overcome by rebutting evidence, have changed the finding of the trustees.

The record and testimony in the case shows that on the afternoon of April 22, 1889, certain persons, who from aught that appears were qualified entrymen, met at a railroad station called Norman, in Oklahoma Territory, and proceeded to organize as a city government. They elected a mayor, councilmen, clerk and treasurer, and located a town-

site called Norman on a part of Sec. 30, T. 9 N., R. 2 W., in said Territory.

Afterward the officers so elected procured a survey of said land into lots, blocks, streets and alleys. They passed a series of "ordinances" for the government of said town, and particularly relating to the lots so laid out. Among other things it was provided that occupants of lots should register at the mayor's office and the mayor should give a certificate of registration for the lot or lots located upon. Certain registration fees of \$5, \$4 and \$3, according to the street on which the lot faced, were fixed to cover the expenses of surveying, etc., and certain improvements were to be made within sixty days, or the registration was forfeited, but an occupant could re-register by repaying the fee, and thus secure sixty days further time to make improvements. The mayor and clerk were allowed 25 cents on each registration in addition to the price of the lot. They passed an ordinance against "jumping" lots, by which it was made a misdemeanor for any person to go upon a lot to make settlement or improvement where any other person had registered, and for a violation of this ordinance the party violating was liable to a fine of not less than \$5 or more than \$100, and he was to be imprisoned at hard labor or in close confinement until the fine and costs were paid.

It is sufficient to say that all of this was without any warrant of law, and the testimony shows that "indignation" meetings were held denouncing it, but these came to naught, and the mayor and council continued to control the town, although some of the residents refused to register or recognize what is called the "self-constituted" authority.

This town was not incorporated, and up to this time there had been no territorial legislature, and there is nothing to show that there was a Judge of any county court.

The act of Congress of March 2, 1889, (25 Stat., 980-1005), Sec. 13, provides that—

The Secretary of the Interior may, after said proclamation and not before, permit entry of said lands for townsites under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes, but no such entry shall embrace more than one-half section of land.

Under these sections, where the town is incorporated, the corporate authorities thereof may make entry, and where the town is not incorporated the judge of the county court for the county in which the land is situated may do so. The entry is made for the land settled upon and occupied, and when entered, it is held in trust for the several use and benefit of the occupants thereof; the execution of this trust, the disposal of the lots and all matters pertaining thereto are to be conducted under such regulations as may be prescribed by the legislature of the State or Territory; so it will seem that all the action of these people was utterly void, but they had issued what they called a registration certificate to many of the occupants and had collected the fees, and, so

far as appears, had fairly conducted the matter, notwithstanding the refusal of certain parties to recognize this authority.

The act of Congress of May 14, 1890, (26 Stat., 109) entitled "An act to provide for townsite entries of land in what is known as 'Oklahoma' and for other purposes" provided in the second section—

That in the execution of such trust, and for the purpose of the conveyance of title by said trustees any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite, the subject of the entry here under shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there has been an adverse claim to said property, such certificates shall only be *prima facie* evidence of the claim of occupancy of the holder.

There is a proviso that nothing herein shall make valid any claim now invalid, or that of any person who entered the territory in violation of law and the President's proclamation. The trustees referred to in this section are those appointed by the Secretary of the Interior, as provided in the first section of the act.

It will therefore be seen that the trustees appointed by the Secretary might recognize the "registration certificates" issued by the mayor of Norman as *prima facie* evidence of the occupancy of Corette, but they were not bound to award him the lot in the face of the testimony showing that Berry was in the actual occupation thereof and improving the same, and of right entitled thereto.

The testimony herein shows that one Thomas E. Berry went on the 13th or 11th of July, 1889, upon the lot in controversy which was then vacant, and built a house worth about \$112. It appears that the mayor became aware that he had gone into the territory too soon, and he was ordered to remove the improvement and vacate the lot. Thereupon he telegraphed his brother, Robert C., that if he would go to Norman and take the property and occupy the lot, he could have the house at cost, and Robert accepted the proposition and went to living in the house. It appears that he went there about the 8th or 9th of August, 1889, and lived on the lot about a month when he brought his wife there and they lived in the house on the lot for some time. The date when he moved away is not given. On October 1, 1890, he applied to the trustees (Board No. 4) for a deed to the lot, setting forth his ownership of the improvements and his occupation of the lot by himself and tenants continuously since, and charging that Corette's claim was based on a certificate procured by fraud, etc.

It appears by the record in the case that on December 2, 1889, the mayor, clerk and treasurer of Norman issued a certificate to J. M. Ragsdale and Ed. Corette for this lot, and on the back of this paper is an assignment to Corette of Ragsdale's interests therein. The testimony shows that there was a building owned by a banking firm of which Ragsdale was president and Corette was cashier which stood mostly on the adjoining lot, but was partly on this lot, being across the line. This

building was not erected until after Robert C. Berry was living in the house on the lot.

The testimony shows that Ragsdale was in the territory in violation of law and the President's proclamation. There is no testimony showing that Robert C. Berry was in the territory too soon, or that there was any collusion between him and his brother, Thomas; on the contrary, Thomas was acting for himself, and it was not until he received notice from the mayor that he decided to turn the property over to his brother because he knew he could not hold it, if contested. Robert C. was the owner of the improvement on the lot and was occupying it by a tenant when he applied to the board for a title. He had moved his family off the lot, but had a tenant in the building at the date of his application.

I do not find that a person must actually live upon a lot as upon a homestead. It is sufficient if he makes a settlement and improvements thereon, though the improvements be occupied by another. Such tenant occupies for him, the owner. This proposition is clearly laid down by the Court in the case of *Winfield Town Company v. Enoch Maris et al.* (11 Kansas, 128), wherein it is said that—

A man may occupy a costly store house as tenant of one who has erected it at great expense. Strictly speaking, such a man is an occupant, but his occupancy would everywhere be considered the possession and occupancy of his landlord.

And the court adds:

The object of the law was to give the owners of lots a good title to their property. Opinion of Attorney General, 1 Lester, 431.

Reviewing the entire case, I do not find that you erred in considering it under rule forty-eight, and I find no reason for disturbing your conclusions, reversing the action of the board of trustees. The judgment appealed from is therefore affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

STOOP *v.* OMAN.

The expiration of the statutory life of a homestead entry, or the entryman's non-compliance with law in the matter of residence or cultivation constitute no bar to the right of purchase under section 2, act of June 15, 1880.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 23, 1892.

Joseph E. Stoop appeals from your decision of September 17, 1891, rejecting his application to contest the homestead entry of John Oman for the SW. $\frac{1}{4}$ of Sec. 14, T. 23 N., R. 37 E., Spokane Falls land district, Washington.

The defendant it appears made said entry October 22, 1879, and on

December 8, 1883, applied to purchase the land embraced therein under the act of June 15, 1880 (21 Stat., 237), and that under date of January 11, 1884, you considered and allowed Oman's application to purchase.

Some seven years after date of said entry, attention was called to the fact that apparently Oman had failed to take any steps to perfect title as allowed by you, therefore, you directed the local officers to call upon the homesteader to show cause why his entry should not be canceled.

Under date of August 11, 1891, the local officers in response to your call transmitted another application by Oman to purchase said land under the act before mentioned, and also submitted for your consideration the affidavit of said applicant duly corroborated explaining his failure to complete title as originally allowed.

While the last application of Oman was pending in your office, Joseph E. Stoop filed application to contest the said entry, alleging that Oman had failed to reside upon and cultivate the land as required by law; that he had several years before been allowed to purchase the land under the act of 1880, but had failed to do so; that he had sold the land, and furthermore, that prior to making said entry Oman had exhausted his homestead right by making an entry under the homestead law in California. September 17, 1891, you rejected the application to contest and allowed the defendant to perfect title by purchase; whereupon the plaintiff appeals alleging in substance that it was error to allow the defendant to purchase the land under said act of 1880, where more than seven years had elapsed from date of entry, and where the entryman had transferred his interest to another. As you have, in your decision, detailed at considerable length all the facts and circumstances attending this case, I deem it necessary to refer to only the principal points in question.

It appears that sometime in 1883, the defendant appeared at the local office and tendered to the receiver \$400, in payment for the land under the act of 1880; that at that time one Glasscock made oath that said defendant had exhausted his homestead right in making an entry in California; that the receiver then returned the money and submitted the application to you for determination; that you authorized the entryman to make the purchase and that when so notified he borrowed the money (\$400,) of David M. Simmons; that he and Simmons went to the local land office to make the purchase, but arriving there after the office had been closed for the day, they placed the money in the hands of an attorney with instructions to make payment for said land, procure the duplicate receipt therefor and forward the same to Simmons.

A short time after this transaction, at the request of Simmons, the defendant executed to him a deed for the land in controversy to be held as security for the payment of the loan, and thus the matter stood; the defendant residing upon and improving the land in the full belief that the money had been paid and receipt sent to said Simmons, until he received notice from the local officers that payment had not been

made when he again made application to be allowed to purchase the land.

No evidence of any character has been submitted that controverts in any manner the sworn testimony of the defendant and his witness, in explanation of his failure to purchase the land as allowed by your letter of January 11, 1884, nor is there any cause to doubt that the deed given by the defendant to Simmons was for any other purpose than to secure the repayment of the loan of \$400; furthermore, it will be observed that when the plaintiff made application to contest, it was subsequent to the filing of the second application to purchase and therefore the right of the contestant could not attach while the application to purchase was pending.

Again, the right to purchase under said act of 1880, is not dependent in any manner on residence upon and cultivation of the land nor is it subject to any other restrictions than are imposed in ordinary cash entry. John R. Choate (7 L. D., 281); Alonzo Swink (*ibid*, 342).

It will also be observed that there is nothing in said act that specifies or in any wise limits the time within which the entryman shall make purchase under its provisions. It may be made at any time, even after the cancellation of the entry for expiration of the statutory period, where no adverse legal right has intervened. *MacBride v. Stockwell* (11 L. D., 416).

From the foregoing, I am of the opinion that the application of the defendant to purchase the land embraced by his homestead entry should be allowed and the application of the plaintiff to contest said entry should be rejected.

Your decision is, therefore, affirmed.

HOMESTEAD—RESIDENCE—TOWNSHIP PLAT.

BELEY *v.* COOK.

The suspension of the township plat, pending the settlement of a private claim, excuses a homesteader, during the period of suspension, from establishing residence under an entry allowed prior to the order of suspension.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 23, 1892.

The land involved in this appeal is lots 3 and 4, Sec. 12, Tp. 1 S., R. 2 W., San Francisco, California land district.

The record shows that Henry Cook made homestead entry for said tract August 6, 1878. The plat of said township was suspended by you and the land withdrawn from entry and disposal October 24, 1878, as being included in the San Ramon private grant. February 23, 1882 said order was revoked, but on March 9, 1882, it was again revived

and remained so until April 16, 1883, when it was finally revoked, and the land made subject to entry.

On May 21, 1883, Julius A. Beley filed an uncorroborated affidavit of contest against said entry alleging that the claimant

does not now and never did reside upon said lots That said Henry Cook never settled upon or resided upon said lots but has always lived and made his home upon section one in said township with his family.

Personal service of notice of contest was made upon Cook on May 22, 1883, and on June 18, following he applied to purchase the land under section 2 of the act of June 15, 1880 (21 Stat., 237), which was rejected by the local officers on the ground that the plat of survey of said township had not been on file ninety days at date of tender, and because said entry had been attacked by Beley. Cook appealed from this decision. Beley filed a formal protest against Cook's purchase who made a second application to purchase under the said act, July 17, 1883, which was after the expiration of the ninety days from date of reinstatement of the township. This was also rejected and payment refused because the first application was then pending, and because there was a case pending to cancel his entry. Cook appealed from this decision also.

By letter of February 25, 1884, you held that the homestead entry of Cook was properly made; that he had the right to purchase under said act, and dismissed Beley's protest. Under the authority of this decision the district land officers, on March 4, 1884, allowed Cook to make cash entry of said land. Beley appealed from this judgment and the Department by decision of August 12, 1886, reversed your judgment and ordered that you suspend Cook's application to purchase and his cash entry and allow Beley to proceed with his contest.

In the meantime in pursuance of the notice of contest a hearing was held before the local officers on July 12, 1883, at which both parties appeared with their counsel and offered their evidence on the issue raised by the affidavit of contest. The register and receiver, on August 17, 1883, rendered a decision on the testimony taken at that time, the conclusion of which is:

The only question we feel called upon to decide is as to whether Cook abandoned the land for more than six months subsequent to his entry, and as the fact is clearly proven, we are of the opinion that his homestead entry should be canceled.

Cook's attorney acknowledged receipt of notice of this decision on the day of its rendition. There was no appeal taken.

By letter "C" of August 27, 1886, you forwarded departmental decision of August 12, to the local officers with this instruction:

Mr. Beley's protest is returned and you are directed to order a hearing in the case. You will conduct the proceedings in accordance with the rules of practice in due time make the proper report.

Pursuant to this order the parties were notified and a hearing had

before the local officers April 25, 1887. Cook on that day presented a "protest" against any hearing under the affidavit of contest alleging, substantially, that the contest was prematurely brought.

Two witnesses were sworn and examined at this time by contestant, when it was stipulated between counsel for the parties that the testimony taken at the hearing in 1883 should be made and considered the same as though taken then. As a result of this hearing the local officers found that the charges of abandonment had been fully sustained and recommended the cancellation of Cook's entry. Cook appealed and you by letter of September 26, 1891, reversed their decision on the merits of the case and also decided that the contest was prematurely brought, for the reason that six months had not intervened between the date of Cook's entry and the service of notice of the contest.

Beley appealed, and in his numerous specifications of error objects to your findings of fact and conclusions of law especially in holding that Cook's failure to comply with the law during the period of the suspension of the township plat was justifiable.

In your decision of September 26, 1891, you state:

It having been found that the land in question was involved in the contest case of Joseph Naphtaly v. L. L. Bregard *et al.*, then pending before the Secretary, the record and all the papers in this case were forwarded to the Secretary July 19, 1889. That case was decided June 23, 1891, and the papers returned to this office. August 20, 1891, Naphtaly filed in your office a duly executed disclaimer of any and all interest in and to the land in question (Lots 3 and 4) and the same was considered upon the merits.

It seems to me that the question at issue here is as to whether or not the contest was prematurely initiated and if it be decided in the affirmative that disposes of the case. It will be noticed that Cook's entry was made August 6, 1878. Two months and eighteen days after the entry it was suspended and remained so until April 16, 1883, with the exception of fourteen days in 1882. The notice of contest was served on Cook, May 22, 1883. It will thus be seen that but four months and nine days, during which the land was not under suspension, intervened from date of entry to initiation of contest. The homestead entryman is allowed six months from date of entry in which to establish his residence, and the question now to be considered is whether during the period of suspension he is excused from this requirement of the homestead law. In your decision last cited, you hold that he is.

The case at bar presents a much stronger reason why the entryman should be excused from a full compliance with the law, than the authorities cited and relied on by you. Here the entry was suspended because of conflict with a private grant then in course of adjudication. If, as a result of that trial, the land had been decreed the property of the claimant under the private grant there was certainly no possibility of the entryman getting the land as public land, and whatever improvements he placed there, would by operation of law, revert to the

successful claimant under the private grant. There is no way by which the government can protect the settler when it becomes divested of its title to the land, as it would be if it were decided in favor of the private grant, and he would necessarily have to forfeit his home and improvements. So that it seems to me that it would be unreasonable to require the entryman in this case to comply with the requirements of the homestead law during the time the entry was suspended, and that his failure to establish a *bona fide* residence on the land prior to the initiation of the contest was excusable. Hence, this contest was prematurely brought, as only four months and nine days of time during which the land was not under suspension had elapsed from date of entry to the date of service of notice of contest. The contest should, therefore, be dismissed.

No objection is made by the appellant here by reason of your overlooking the judgment of the local officers of August 17, 1883, wherein they decided in favor of the contestant, and I might therefore conclude that he is satisfied to have the case considered on the merits as presented by the whole record. In view of the conclusion I have arrived at however, this judgment would be of no binding force because the local officers would have no power to adjudicate the question raised by the affidavit of contest, until the expiration of six months from date of entry.

Your judgment is therefore affirmed.

PRE-EMPTION ENTRY—ADDITIONAL HOMESTEAD.

SMAR v. ANDERSON.

Failure to make proof and payment for "offered" land within the statutory period defeats the pre-emptive right, in the presence of an adverse claim, even though the failure may be due to an erroneous statement, in the receipt issued by the local office, to the effect that the land in question was "unoffered."

An additional homestead entry under the act of March 3, 1879, is no bar to a subsequent additional entry under section 5, act of March 2, 1889, provided the total area of land taken under the original and additional entries does not exceed one hundred and sixty acres.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 24, 1892.

This case involves the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 11, T. 24 N., R. 2 E., Seattle, Washington. Said tract was embraced in the pre-emption declaratory statement filed by Henry Smar, October 25, alleging settlement October 18, 1888, upon the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 11.

By an error of the local office it was stated in the receipt issued to Smar (the land being treated as unoffered when in fact it was offered) that his filing would expire "on July 18, 1891," when by the provisions

of section 2264 R. S., it expired within twelve months from the date of his settlement, to wit, October 18, 1889.

Relying on his certificate Smar failed to make the requisite proof and payment within the time provided by law for offered land. The land being thus apparently vacant and by the terms of the statute, section 2264, *supra*, "subject to the entry of any other purchaser" Andreas Anderson on December 31, 1889, was permitted to make additional homestead entry for said tract, under section 5, of the act of March 2, 1889 (25 Stat., 854), with other lands. He had, November 18, 1882, made final homestead entry for 80.50 acres of land in Sec. 10, adjoining the tract in controversy.

As soon as Smar learned of Anderson's entry and on January 13, 1890, he filed an application for a hearing, alleging that his improvements were upon said forty; that since his settlement he had resided thereon continuously, and that his failure to make proof within the statutory period was the result of his being, as stated, erroneously informed at the local office. This application being transmitted to you for your action, was denied by your letter of February 12, 1890. Service of this letter was February 29, 1890, admitted by Smar's attorney and no appeal taken.

On March 26, 1890, Smar presented his homestead application for the land embraced in his said filing, which was rejected for conflict with Anderson's said additional entry.

On July 19, 1890, Smar again made homestead application for the land last referred to. This application was accompanied by his corroborated affidavit, setting out that his improvements on the forty in question were worth over \$2000; that at the date of his additional entry, Anderson had notice of his occupancy and improvement thereof; that the records of the local office show that prior to making said entry he (Anderson) "also made additional homestead entry" (under act March 3, 1879 (20 Stat., 472), "for lot 4, Sec. 10, Tp. 24 N., R. 2 E., on the day of 188 , which was canceled by voluntary relinquishment on December 30, 1889;" that he thus exhausted his right to make the entry in question that the name of said entryman was not Anderson but Holt; that he (Anderson) was dead and that his estate was being administered under the name of Holt. Smar accordingly, again asked a hearing "to determine the rights of the parties." On the same day the local office rejected this second application for conflict with the Anderson entry.

No appeal was taken by him from the rejection of either of said homestead applications and they were not forwarded by the local officers until March 24, 1891.

On February 4, 1891, he made a third homestead application for the land covered by his filing. He also accompanied this application by his affidavit repeating the matters heretofore outlined, and making the further statement that "said Holt alias Anderson is now dead, having

been killed by an officer of the custom service of the United States, in attempting to arrest him as a smuggler." He also, in said affidavit, asked that you order a hearing "to determine the validity" of Anderson's said additional entry.

This application was transmitted to you, whereupon by letter dated March 9, 1891, you, because of his failure to appeal from your decision of February 12, 1890, and because his said accompanying affidavit was not corroborated, rejected the same. You also denied the right of appeal from this action but directed that the case be held open for twenty days to enable Smar to apply for *certiorari*. He took no action concerning this decision but same day March 9, 1891, made an affidavit before the receiver setting out that until about February 7, 1891, he had been without notice of your decision of February 12, 1890, and asking that "he now be granted a right of appeal from said decision."

Notwithstanding this affidavit, he, a few days later, to wit, March 14, 1891, filed a paper setting out that he

waives the right of appeal from decision of the Hon. Commissioner of February 12, 1890, and withdraws the application for hearing therein mentioned, and asks that his application to transmute filed in said land office on February 4, 1891, with the accompanying papers be substituted therefor, and that his said application to transmute be given due consideration by said Hon. Commissioner of the General Land Office.

By letter dated April 3, and received at your office April 11, 1891, the register transmitted a petition by Smar asking a reconsideration of your decision of March 9, 1891.

Without considering this petition you rendered a decision dated April 13, 1891, wherein you find in effect that he is concluded by his laches, that his application for hearing must therefore be denied, and that his application to transmute must be rejected "because of the intervention of the entry of Anderson."

On June 8, 1891, he filed an appeal from this last decision.

Pending said appeal, resident counsel filed August 25, 1891, a motion asking that "you review your decision of March 24, 1891, (meaning no doubt your decision of April 13, 1891) and give Mr. Smar an opportunity to prove the truth of his allegations." This motion you transmitted without action, with the record in his appeal. Neither of said motions is accompanied by an affidavit showing it to have been filed in good faith and not for the purpose of delay. They are therefore defective under rule 78, of practice. James Ross (11 L. D., 623). In addition to this, neither discloses any sufficient warrant for review, nor was either of them served upon the opposite party.

Upon the merits of the case I can see no reason for disturbing your decision.

It is possibly true that Smar's default in making proof was brought about by the erroneous receipt issued to him from the local office, but this could not *per se* give him any rights against the entry of Anderson,

if regularly and properly made. Nor could Smar's continued occupancy and improvement preclude such entry as by reason of his said default in making proof and payment, the land at the date thereof was "subject to the entry of any other purchaser." Section 2264, *supra*. Nor did Anderson (whose certificate of citizenship is with the record) by making his entry under the act of 1879, *supra*, exhaust his right to enter under the fifth section of the act of 1889, *supra*, as the total area of his original and said additional entries, did not equal one hundred and sixty acres. See the analogous case of John Fitzpatrick (14 L. D., 277).

The only material charge that is laid by Smar against the validity of Anderson's entry is that it was made under a false name. This charge was as stated made in Smar's affidavit filed with his homestead application presented July 19, 1890. In rejecting said application the matters so alleged by Smar were necessarily considered. This action became final by Smar's failure to appeal therefrom, and he can not therefore be permitted, as he seeks to do in his application of February 4, 1891, to again lay the same charge.

Upon the whole record, I must, in view of the matters hereinbefore set out, conclude that Smar, because of his default in proof and payment within the statutory period, has no right by reason of residence and improvement, as against the entry of Anderson; that failing to preserve his rights by appeal he can not now be heard to renew his allegations of contest against said entry, and that the same being *prima facie* valid is a bar to an entry of said forty by Smar under the homestead laws.

Your decision is accordingly, affirmed.

HOMESTEAD—ADJOINING FARM—ADDITIONAL ENTRY.

JOHN B. DOYLE.

Section 2289 R. S., as amended by the act of March 3, 1891, does not authorize an adjoining farm entry based upon a pending original homestead entry of an adjacent tract.

The right to make additional homestead entry of contiguous land under section 5, act of March 2, 1889, exists only where the original entry is made prior to the passage of said act.

First Assistant Secretary Chandler, to the Commissioner of the General Land Office, August 25, 1892.

On May 28, 1891, John B. Doyle, applied to make additional homestead entry for lot 8, Sec. 3, T. 12 N., R. 5 W., Oklahoma City, Oklahoma. This application was, as shown by endorsement, rejected by the local officers "for the reason that the law opening said lands for settlement makes no provision for additional homestead entries."

Doyle appealed; whereupon by decision dated August 5, 1891, you affirmed the ruling below. From this decision he appeals here.

The tract in question contains 10.40 acres which are contiguous to lots 8 and 9, Sec. 4, of said township containing 69.24 acres embraced in an original homestead entry made by Doyle April 29, 1889.

You hold, in effect, that as Doyle's claim to the 69.24 acres was based simply upon his original homestead entry, he was not the owner thereof within the purview of section 2289 Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095); that he consequently could not make the adjoining farm entry, contemplated in said section and that his present application must accordingly be denied.

Counsel for Doyle urge in effect that the intention of Congress being as indicated by recent legislation "to give to each settler a full one hundred and sixty acres of land" his pending application should be allowed under the acts of March 2, 1889, (25 Stat., 854), and March 3, 1891 (26 Stat., 1095).

In support of this it is urged that section 5 of the act of 1891, *supra*, is "designed to afford the same opportunity to settlers" as the fifth section of the said act of March 2, 1889. While the fifth section of the act of 1891, *supra*, amends section 2289, it makes no change in that part thereof which provides for adjoining entry and makes no reference to the said act of March 2, 1889. Moreover, the said fifth section of the act last referred to, whereby the homestead settler is allowed to make under certain conditions, additional entry of land contiguous to his original entry, obtains only where such original entry was made prior to the passage of the act. Doyle's original entry being made April 29, 1889, he is not a "homestead settler who has *heretofore* entered less than one quarter section" and consequently is not qualified to make the entry contemplated by said fifth section. The act of March 2, 1889, (25 Stat., 980), whereby this and other land in Oklahoma was opened to settlement provided for its disposal "to actual settlers under the homestead laws only." As Doyle for stated reasons is not entitled to make additional entry under the said fifth section of the act of 1889, the only remaining question is whether or not his application can be allowed under section 2289, *supra*, and section 5, of the act of March 3, 1891, *supra*, which provide that "every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

By existing regulations the applicant for such entry was required to show *inter alia* that he had not acquired the land embraced in his original farm under the homestead law. See General Circular issued January 1, 1889, page 20, also that issued February 6, 1892, page 17. Doyle's original entry having been made under said law, it follows that his present application must be denied. Your decision is affirmed.

PRACTICE—AMENDMENT—NOTICE—CONTINUANCE.

HITTLE v. RHEA.

New service of notice is not required where the contestant is permitted to amend the charge against the entry, but a continuance of proceedings in such case may be allowed in the discretion of the local office.

*Acting Secretary Chandler to the Commissioner of the General Land Office,
August 25, 1892.*

January 19, 1885, W. H. Rhea made timber-culture entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 18, T. 26 S., R. 15 W., Larned, Kansas.

December 12, 1888, M. N. Hittle filed an affidavit of contest against the same, alleging failure to comply with the law during the second and third years. Notice was served on Rhea, and hearing was set for January 28, 1889, at which time the attorney for defendant appeared and moved to dismiss the contest, because the affidavit was made upon information, and because, further, the charges were not sufficiently specific to form a proper basis for contest.

On said motion the register held as follows:

The plaintiff required to be more specific in the allegations in the contest affidavit. Plaintiff allowed to amend. Motion sustained as to the 2d and 3d count, and overruled as to the first.

On the same day the plaintiff filed an amended affidavit in conformity with the ruling of the register, and the case was continued until the next day, January 29, when attorney for defendant again appeared and insisted that the defendant was not in court, because he had received no notice of contest under the amended charge, and claimed that he was entitled to thirty days notice thereunder.

The register held that no new notice was required, and thereupon the case was continued until the next day (January 30), when plaintiff introduced his witnesses to prove default upon the part of defendant in planting trees, etc. The defendant did not appear in person, but was represented by counsel, who cross-questioned the plaintiff's witnesses, but all the time insisted that the defendant was not properly in court, and protested against any proceedings on account thereof. No witnesses were introduced by defendant.

August 7, 1889, the register and receiver rendered a joint opinion sustaining the contest and recommending that Rhea's entry be canceled. Rhea appealed, and by your letter of September 24, 1891, now before me, you affirmed the action of the local officers, and he now further prosecutes his appeal to this Department.

The evidence, I think, fairly sustains your judgment, but the point chiefly relied on by the defendant is that it was error to hold the defendant to trial, without giving him thirty days notice under the amended affidavit.

The motion to dismiss the contest for insufficiency of the affidavit was in the nature of a demurrer to the petition in a court of law. It is the universal practice, so far as my observation and research have extended, when a demurrer is sustained to a bill or petition, to allow the plaintiff to amend the same but no new service of process is ever required to be served on the defendant. He has been once properly brought into court, and thereafter he is regarded as having notice of all subsequent proceedings in open court. See *McFarland v. Jackson*, 10 L. D., 405.

Had the defendant attacked the process for some defect therein or in the service thereof, and that motion had been sustained, a new notice and service would have been proper because the first being faulty he was not properly in court, and the register and receiver would not have had jurisdiction of the person of the defendant, and he might insist that he be legally notified. But he was properly in court, probably upon a defective pleading or charge, and your action was therefore right in holding that he was not entitled to another notice. It was a matter of discretion to allow a continuance upon an amendment of the affidavit, which it appears was exercised on behalf of the defendant. If he had any defense or testimony to offer in support of his entry, he should have offered it on the adjourned day. Having failed to offer proof he must stand by the record made.

Your judgment is affirmed.

PROCEEDINGS BY THE GOVERNMENT—NOTICE—MORTGAGEE.

UNITED STATES *v.* NEWMAN ET AL.

Due notice of all action should be given a mortgagee, where the record of proceedings in the local office discloses the fact of such interest, and in the absence of such notice the right of said mortgagee to be heard is not defeated by a judgment of cancellation.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 26, 1892.

On January 20, 1890, your judgments cancelling the following pre-emption cash entries made in the McCook, Nebraska, land office were affirmed by the separate judgments of this Department. (Press copy-book L. and R. No. 238 p. 315.)

(1) Cash entry No. 191, of Albert E. Newman, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 24, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 25, T. 6 N., R. 39 W. On July 16, 1890, William Gleason filed homestead entry No. 9647, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 24, of said tract, and Edward Fitzgerald filed pre-emption declaratory statement No. 7049, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 25, of said tract.

[Description of fourteen other canceled entries omitted.]

In 1884, and after final proof was made and a certificate issued on each of these entries, The Harlem Cattle Company became the owner of all these tracts by purchase from the entrymen.

On June 24, 1886, it gave to the Kit Carter Cattle Company a trust deed to all of said land to secure the payment of \$20,000 that day borrowed from said Kit Carter Cattle Company. The trust deed was duly executed by the officers of the Harlem Cattle Company, and was recorded in Chase county Nebraska, in which all of these lands are situated.

On July 31, 1886, on the report of a special agent, you held all these entries for cancellation. Thereupon the Harlem Cattle Company, as transferee, asked for and obtained a hearing to sustain the legality of said entries. The hearing was held on February 9, 1887, before the local land officers. Notice was obtained on the entrymen by publication, but none of them appeared at the trial. The Harlem Cattle Company introduced in evidence a certified abstract of title in each of the fourteen cases, which gave a history of the title of each tract, and showed that the Harlem Cattle Company was the owner of all the land, and that the Kit Carter Cattle Company had a mortgage thereon for \$20,000. After considering the evidence submitted the register and receiver recommended the entries for cancellation, and on October 8, 1888, you affirmed their action, and on appeal this Department concurred therein by its judgments of January 20, 1890, and the entries were canceled on February 18, 1890.

Isham R. Darnell, manager for the Kit Carter Cattle Company, then filed a motion for a rehearing, and asked that the entries be reinstated; also averring that there was a complete defense to the charges of fraud against the several entrymen. It also alleged facts tending to show that the Harlem Cattle Company, instead of defending the entries in question against the charges of fraud preferred by the special agent, had really assisted the government, and had not even attempted to procure the attendance at the trial of any of the entrymen, and that its failure to defend the validity of the entries was due to its desire to destroy its own title, in order to escape the payment of the mortgage.

It is also claimed in the motion for rehearing, which was denied by the Department March 17, 1892, that at the trial in February, 1887, Charles E. Stevens and Henry Hudson, two of the principal witnesses for the government, were actually in the employ of the Harlem Cattle Company, and that while said witnesses were receiving three dollars per day from the United States, the manager of the Harlem Cattle Company paid their board at the Commercial Hotel in McCook, and that Frank Gilley was brought to the trial to testify for the entrymen, but at the bidding of the manager of the Harlem Cattle Company he gave evidence against the entries, etc.; that it was not the purpose of

the Harlem Cattle Company to defend said entries; that its manager, McGillen, procured a relinquishment to the tract most valuable on account of improvements thereon (that of Thomas Cooper) and applied to enter the tract in his own name, and that long before these entries were cancelled McGillen filed applications for himself and others in his employ to enter all the lands, and when entries were not cancelled, protests were instituted in the name of McGillen, Cassidy and others.

All of this was set forth to show that the transferee assisted the government in the attack on these entries with a view of defeating the mortgagees.

The Department refused to order a hearing in the interest of the mortgagee for the reason that one of the affidavits setting up these facts was made by one Hays, who, it appears, had given testimony in the trial to the contrary of that sworn to in his affidavit. It was also held that the mortgagee, not having filed a notice of its interests in the tracts, in the local office, could not be heard to complain of the want of notice of the judgment cancelling the entries.

The motion for rehearing was denied on March 17, 1892.

I am now in receipt of a motion to review said judgment. It is contended that these cases "were tried and said entries cancelled without authority, for the reason that the interest of the Kit Carter Cattle Company was known to the local officers and the special agent of the government, and no notice of the proceedings were given to said cattle company, and all proceedings without such notice were absolutely void." There is also filed as a part of the motion an affidavit, which is as follows:

Sterling P. Hart, of lawful age, being first duly sworn upon oath, deposes and says, That he was register of the U. S. land office at McCook, Nebraska, from November 1, 1886 until February 28, 1891, and during that time I had action (actual) official supervision and control of the affairs of the register's office. At the time affiant assumed control of said office there were matters pending against a large number of cash entries, to which tracts W. J. McGillen manager of the Harlem Cattle Company, claimed ownership on behalf of said corporation. One George B. Coburn then special agent for the Gen'l. Land Office, was in charge of said cases on behalf of the government. The Harlem Cattle Co. intervened and asked for a hearing in all cases where the land was claimed by them. Affiant has been shown departmental letter of date March 17, 1892, and has examined the cases and entries therein enumerated and set out and remembers that said entries were among the ones claimed by the Harlem Co. at that time. Hearings were had in all of said cases before the office while affiant was the register and affiant had general supervision of said hearings. Affiant further states that the local land office was informed of the mortgage lien given by the Harlem Cattle Company to the Kit Carter Cattle Co. upon these tracts and other lands, to secure the payment of \$20,000 by W. J. McGillin who notified said office and in his evidence in the case of the United States v. Albert C. Newman so testified in February 1887. Geo. B. Coburn, special agent of the Interior Department, conducted the case on behalf of the government.

The Kit Carter Cattle Co., mortgagees, were not notified of said hearings to cancel said entries and were not made a party thereto. Neither was it notified of any of the decisions rendered in said case.

It has been ascertained from the records and hearings had that the several abstracts of title introduced at the trial as evidence disclose the fact that the Kit Carter Cattle Company held a mortgage on the tract for \$20,000.

This company never received any notice of the finding of the register and receiver on the evidence, nor of the judgment of your office cancelling the entries, nor of the judgment of the Department affirming your action, although in the departmental decision of January 20, 1890, the local officers were directed to notify all interested parties.

In the case of *Flemming v. Bowe* (on review) 13 L. D., 78, it is said—

It appears in the evidence submitted at the trial before the local officers on the contest of Flemming, that testimony was introduced showing that the entrymen had conveyed this tract to Norris before the initiation of said contest, and that he had conveyed the same to Lahman who then was the owner thereof, and the public records of the county where the hearing was had disclosed these transfers. After these facts were brought to the knowledge of the register and receiver, the transferees were entitled to a notice of the decision in said case. Lahman was then the actual party in interest, and as such was entitled to notice of all the decisions had in said case. It is not shown that he or any of said transferees or mortgagees ever received any notice of the decision of your office in said case or of the decision of this Department of December 2, 1890.

I conclude that the present owner of the equitable title to this tract, as well as the mortgagees, were entitled to a notice of said departmental decision (notice to the attorney of the entrymen was not notice to them) and that they have received no notice of said decision.

It was also said in said case (syllabus) that "notice of a decision should be given a transferee where the fact of transfer is disclosed by the evidence submitted at the trial; and in the absence of such notice the decision does not become final as to said transferee."

I am of the opinion that the Kit Carter Cattle Company was entitled to a notice of the finding of the register and receiver recommending these entries for cancellation, and that it has been entitled to notice of all the judgments since pronounced, and, receiving none, it cannot be held bound by the judgment cancelling these entries, and the judgment canceling the same did not dispose of the company's rights. It is true that the company had no further or different right than that of the entrymen themselves, but, as the interested party, and in view of the fact that the transferee neglected to defend the entries, but seems to have acted in a hostile manner towards them, it was the actual party in interest and should have been allowed its day in court to show that the entries were valid.

A transferee, when his interest is made known, has always been allowed to show that the entryman has complied with the law, and in a case like this I think that the mortgagee may properly be deemed the party in interest and should be given all the rights of a transferee.

The mortgagee is asking that the entries be re-instated, and that he be allowed a hearing to prove the validity of said entries.

I think the departmental holding on March 17, 1892, to the effect that

the mortgagee was not entitled to notice, was erroneous, for the filing in evidence of the certified abstracts at the trial before the register and receiver in 1887 was sufficient notice to the local office of the interest of the mortgagee. See case of *Fleming v. Bowe* (13 L. D., 78); *McLeod v. Bruce et al.* (14 L. D., 85.)

Since the judgments of cancellation were rendered other parties have entered these tracts or made filings thereon, as shown by the statement of facts heretofore given.

You will serve a notice on these parties to show cause within a reasonable time to be fixed by you, why the judgments of cancellation made January 20, 1890, may not be set aside, the entries and filings on these lands be canceled and the old entries be re-instated.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

IRA M. BOND.

The actual date of the receiver's receipt fixes the commencement of the period within which action must be taken to defeat confirmation under the proviso to section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 26, 1892.

The land involved in this case is described as the SE. $\frac{1}{4}$ of Sec. 32, and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 33, T. 25 S., R. 8 E., Las Cruces land district, New Mexico.

It appears that on January 6, 1881, Ira M. Bond made desert land entry for said tract, and on January 5, 1884, submitted final proof, and tendered payment for the land. The local officers approved the proof as to the SE. $\frac{1}{4}$, Sec. 32, but rejected it as to the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 33, on account of conflict with the grant of the Texas Pacific Railroad Company, whereupon the claimant appealed from their action, alleging, *inter alia*, that the railroad company having failed to comply with the law granting the lands, all right thereto had been forfeited by said company.

Under date of April 20, 1885, you directed the local officers to accept the final proof and issue the final papers in the case, as the grant to said railroad had been declared forfeited; therefore on April 6, 1886, said officers accepted payment for all of the land in question, and issued the final receipt and certificate therefor.

Subsequently, on the report of a special agent, the entry was held for cancellation, and a hearing ordered at the request of the claimant was held at the local office February 26, 1889, upon which the local officers recommended the cancellation of the entry.

April 20, 1891, before any action had been taken by you in the matter of the hearing, the entryman filed in your office a motion to have

said entry confirmed under the act of March 3, 1891, alleging, in substance, that as the railroad grant had been forfeited and you directed the issue of final papers on the entry April 20, 1885, that more than two years had intervened between the last mentioned date and the report of the special agent, dated October 14, 1889, and therefore that the entry came within the purview of the proviso in section seven, of said act and is confirmed thereby.

Under date of October 19, 1891, you denied the motion of Bond to approve the entry, as confirmed under said proviso, and affirmed the action of the local officers in holding that the entry should be canceled.

The claimant appealed, alleging in substance that it was error to hold that final certificate and receipt issued April 6, 1886, did not relate back to January 5, 1884, the date of presenting final proof, and thereby showing an intervening lapse of two years, between the last-mentioned date and the date of the protest against said entry and that it was error to hold that the testimony taken at the hearing showed the land to be non-desert in character and had not been reclaimed.

The proviso referred to, section seven, act of March 3, 1891, provides:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered and the same shall be issued to him.

It will be observed that the law is very specific in fixing the date of the receipt as the time when the period of two years commences to run and that no contest, protest, or inquiries into the legalities or merits of a case is provided for or permitted after a final receipt has been issued two years. Furthermore, there is no authority in said act or in any other statute, that authorizes or allows the changing or altering of the date in a final receipt for the purpose of bringing an entry under the proviso aforesaid, nor can this Department in the exercise of its supervisory powers enter into the merits of the case and permit such a proceeding.

The final papers in the entry in question were issued as aforesaid April 6, 1886, and on November 12, 1887, within two years therefrom the entry was held for cancellation on the report of a special agent.

It does not appear that it was through any fault of the entryman that the final receipt was not issued at an earlier period, in fact at that time, being prior to the act of 1891, it was immaterial, now, however, the date of the receipt is material, yet it cannot alter the conditions existing when the same was issued.

The evidence submitted at the hearing shows that a large proportion of the land is covered by timber of good, fair size, and furthermore, that the land adjoining thereto, owned by one of the witnesses, has grown good agricultural crops for several years without artificial irri-

gation and the witnesses testify further, that in their belief the same could be raised on the land in controversy. It is also shown that the claimant owns no water rights nor has he any improvements or ditches on the land and that the land is unquestionably non-desert land. Your decision is therefore affirmed.

PRE-EMPTION ENTRY—MARRIED WOMAN.

LIZZIE CHITTENDEN.

A pre-emption entry made in good faith by a married woman may be referred to the board of equitable adjudication, where it appears that she had fully complied with the law in the matters of settlement, residence and improvement, prior to and up to the time of her marriage, and the local officers, with full knowledge of the facts, accepted her proof and payment and issued final certificate thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 26, 1892.

I have considered the appeal of Lizzie Chittenden, formerly Lizzie Rigby, from your decision of January 8, 1891, holding for cancellation her pre-emption cash entry for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 7, T. 25 S., R. 31 E., Visalia, California, land district.

The record shows that on the 28th day of July, 1885, Lizzie Rigby, then a widow with a family consisting of four children, filed her pre-emption declaratory statement for said land, alleging settlement thereon July 10, 1885.

After duly advertising she made final proof on the 28th day of May, 1888, which was accepted by the local officers on the 31st day of May, 1888, and payment for the tract received, and receivers' receipt issued on that date.

By letter of January 8, 1891, you held her cash entry for cancellation for the reason that at the date of such entry she was a married woman; from which decision she appeals.

Her final proof appears to be regular in all respects. It shows actual settlement on the tract in July, 1885, and continuous residence up to date of proof; that she built a dwelling house twelve by twelve with an addition fourteen by eighteen feet; chicken house, out-buildings; eighty acres fenced with wire, and four acres fenced with pickets, about twenty acres of the land broken and cultivated to crops. These improvements are shown to be of the value of more than \$600. It also shows she had on the tract plows and other farming implements, two horses, cow and calf, chickens, etc., and that her house was well furnished.

On the 26th day of November, 1885, she was married to a man by the name of Chittenden and he appears to have made his home on the

tract, although he has worked most of the time at a railroad station some miles from the tract.

There is no adverse claim; her entry was made in good faith; she had fully complied with the law in making her settlement, residence and improvements thereon, prior to and up to the time of her marriage; the local officers with a full knowledge of the facts, accepted proof and payment for the land and issued final certificate therefor. Under these circumstances the entry may be referred to the Board of Equitable Adjudication. Emma McClurg (10 L. D., 629); Margaret B. Bailey (11 L. D., 366).

This entry is accordingly so referred.

The decision appealed from is to this extent modified.

PRE-EMPTION ENTRY—SETTLEMENT.

FULLER *v.* CLIBON.

Placing building material on public land, with a *bona fide* intention of erecting a house therefrom, is an act of settlement that will be protected if followed up with reasonable diligence by the actual construction of the house.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 27, 1892.

I have considered the case of Kate Fuller *v.* Anna B. Clibon on appeal by the former from your decision of July 14, 1891, dismissing her protest against the final proof of the latter for the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 8, T. 9 S., R. 64 W., Denver, Colorado, land district.

On May 15, 1888, Anna B. Clibon filed her declaratory statement for the land, alleging settlement on the 10th of said month. On September 25, 1888, Kate Fuller filed her declaratory statement alleging settlement on the 21st of said month. On April 4, 1889, Clibon, upon due notice offered final proof. Fuller appeared and filed her protest against the same, alleging (1) that Miss Clibon had made no settlement upon the land before filing, nor at any time before the settlement by the protestant; (2) that if she did settle on the land, she did not follow up the settlement by improvements within a reasonable time; (3) that she has not resided upon or cultivated the land as required by law; (4) that she had not until about two months before offering proof a habitable house on the land; (5) she was not, as affiant believes, twenty-one years old when she filed for the land.

Upon this protest being filed a hearing was allowed. The final proof witnesses were cross-examined and witnesses were called by the protestant, and upon the case presented the local officers sustained the protest, rejected the final proof, and recommended the cancellation of Miss Clibon's filing. From this she appealed, and upon a review of

the record and testimony you reversed their decision, from which Mrs. Fuller appealed.

The testimony in the case shows substantially the following facts:

On May 10, 1888, Miss Clibon and her father went upon this land; her father went to the timber and cut four logs or poles and brought them onto the tract and laid them in the form of a square with a stone under each corner. This they called a "foundation" for a house. They then went away and the "foundation" remained until about the 25th of September following. After placing the foundation on the land Miss Clibon filed her declaratory statement, as stated above. She was unmarried, and the proof shows that she was twenty-one years of age and qualified to pre-empt the land. She lived with her father on an adjoining tract, and was a carpet weaver.

On September 24, or 25, Mrs. Fuller and her brother went upon the land and took the logs or poles and stones that had been placed there by Clibon and moved them a short distance and laid them again in square form and called this a "foundation" for a house for Mrs. Fuller. They placed a notice on these logs of their settlement, and they returned to Elizabeth where the brother, Carson, clerked in a hotel. It appears that immediately thereafter Miss Clibon put a notice on the same logs that she claimed the land, and soon thereafter began the erection of a house on the tract. On Saturday, September 29, Mrs. Fuller sent some lumber on the tract for a house, and on Monday, October 1, her brother went there with some men to erect it. They found that Miss Clibon had put up a log house, "chinked and daubed," board roof, etc., and that she was living in the house; she has maintained continuous residence ever since.

Mrs. Fuller's house was so far completed by the 5th of October that she slept in it over night, and on the 9th following she moved into it and has maintained continuous residence.

Each claimant has a fairly good house, each has a well of water, stable, chicken house, some fencing and some breaking; in fact, much unnecessary time was spent in the trial over the value of the improvements of the claimants. The difference in value is so small that it is wholly immaterial. Each has a filing and each has, now, settlement and ample improvements. The question when settlement was made by each is important.

The Department in a long line of decisions has adhered to the rule that to make a settlement a person must go upon the land claimed, and do some act connecting himself with the particular tract claimed, and the act must be equivalent to an announcement of intention to claim the land, from which act the public generally may have notice of the claim. See Samuel M. Frank (2 L. D., 628). Parties, however, from time to time, have claimed that certain acts done by them were sufficient, and through a series of decisions the Department has been compelled to hold that certain acts were not sufficient to be considered a

settlement, as, driving stakes to indicate the site of a house (2 L. D., 184), "picking" a small patch of ground and erecting a cross (3 L. D., 162), going onto the land and erecting a board thereon with statement of his claim, etc., (2 L. D., 621); and in *Barrott v. Linney* (2 L. D., 26) it was found that Linney went upon the land "and placed there a few timbers loosely outlining a house he did not establish his residence on the land but shortly thereafter went to Rocky Canon, etc.," and it was said in this decision that Linney had never been in possession of the land. In *Witter v. Rowe* (3 L. D., 449) it was said—

From the evidence offered to establish the alleged settlement of Mrs. Witter, it appears that she went upon the land about May 20, 1883, and directed in person the laying of a foundation for a house from a few logs or poles that had been left on the land by a former settler, such foundation being made by simply arranging in the form of a square the said material. No further acts of settlement on the part of Mrs. Witter appear to have been performed on the land prior to Rowes' (homestead) entry, nor is any reason furnished to account for such fact.

Upon this evidence the land was awarded to Rowe.

It is shown that a small piece—one or two acres—of this land in controversy was inclosed in the field of Miss Clibon's father and cultivated by him. She says she got the corn to feed her cows, but this is not cultivation that can help her settlement, as it was no notice to any one that she was improving or cultivating the land—in fact, she was not.

It is shown that she had some logs on the land in the latter part of September, which were placed there to build a house. The two witnesses testify to this and fix the number at about two wagon loads, and they say they are satisfied the logs were used in her building.

I do not consider that the act of either claimant in laying the "foundation" mentioned was "a settlement in person" on the land, as contemplated by section 2259. To go out upon the prairie and lay four poles, which a man can carry, in a square form and go away and leave them to be hidden by the grass and weeds is not an act such as attaches one to the tract of land, nor does it give notice to persons passing or going upon the land that any one had made personal settlement thereon, within the meaning of the pre-emption law. Mrs. Fuller and her brother found this "foundation" evidently because she was looking for it, she having notice of a filing on the land, and she says of this "foundation"—"it was all covered with sand. I had to dig it out from under the sand to get the logs." The mere moving of this pretence of a foundation to a new place was no more an act of settlement than was the first act.

It is not intended to be said that where a party goes upon land and actually commences building a house in good faith that the laying of the foundation may not be, if properly followed up, an act of settlement, but in the case at bar the laying of these poles was a mere pretence to hold the land to make an excuse for a filing. Neither party used the poles, as they were worthless, and Miss Clibon did not build her house near where she had laid this "foundation," while Mrs. Fuller, who had

the "foundation" did not build on it. The placing of material on land with *bona fide* intention of erecting a house therefrom is an act of settlement, and if followed up with reasonable diligence by the actual building of the house, will be protected, as of the date such lumber was so placed; but a few worthless poles not intended for a house, whether carried onto the land or found on it and carried from one point to another, is no such act as can be considered, so it remains to determine which of these claimants has the prior and superior right by some act of settlement.

The exact date when Miss Clibon placed the logs on the land is not given, but it appears to have been prior to the arrival of the lumber of Mrs. Fuller, which was on Saturday, September 29. She says she did not send the lumber till her filing came from the land office. When her men went to build the house, they found Miss Clibon's house completed, and they found her "keeping house" in it. Mrs. Fuller, who was contesting an adjoining claim, says she crossed the land a few days after she laid the foundation and she saw no house, but when she was there next Anna Clibon was living on the land.

It is claimed that Clibon had not followed up her filing by making improvements and cultivations within reasonable time; if this be admitted, the preponderance of the evidence shows that she had logs on the land to build her house, and logs of which it was actually built, before any act of Mrs. Fuller which gave her any valid adverse claim. So she had as between her and the government cured her default.

From these considerations your judgment is affirmed, and the protest dismissed.

DESERT LAND CONTEST—SUSPENDED ENTRY.

ADAMS v. FARRINGTON.

During the pendency of a departmental order suspending an entry the local office has no jurisdiction to entertain contest proceedings against such entry, and the subsequent approval of such action by the General Land Office, after the revocation of said order, will not give effect to such proceedings.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 27, 1892.

On the 2d of April, 1877, E. D. Farrington made desert land entry for the NE. $\frac{1}{4}$ of Sec. 32, T. 30 S., R. 27 E., M. D. M., Visalia land district, California, which entry, together with all others of like character in said land district, was suspended by the Department on the 28th of September, 1877, and was not released from suspension until January 12, 1891.

On the 22d of April, 1886, John Adams filed a homestead application to enter said land, which was rejected by the local officers on account of the pending claim of Farrington. Adams thereupon initia-

ated contest against Farrington, alleging failure upon his part to comply with the law, and also the non-desert character of the land.

Notice issued for a hearing to take place September 23, 1886, on which day an alias notice issued for December 6, 1886, which was served upon Farrington September 28. At the hearing Farrington made default and Adams submitted his testimony. On the 28th of December, 1886, the local officers rendered a decision in which they recommended the cancellation of Farrington's entry. In forwarding the papers in the case to your office, the local officers reported that Farrington had not appealed from their decision.

Prior to this time, E. R. Augell had filed application to make timber-culture entry for the land, which the local officers had rejected on account of Farrington's entry, from which action on their part he appealed to your office. The papers in both these cases were transmitted to the Department for its information in connection with the case of *United States v. J. B. Haggan* (12 L. D., 34).

Decision was rendered in that case on the 12th of January, 1891. In that decision the order of suspension of said entries was revoked, and it was stated that

The time between the date when said order of suspension became effective, and the date of the notice of its revocation will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

In that decision it was also said:

Upon the record presented, it will be quite impracticable to determine the validity of the other entries suspended under said order. Indeed, the record does not show that the entrymen have been duly notified, or that any hearings have been had upon their particular entries. Before any of the other entries can be canceled, hearings must be had and proof submitted by the United States or contestant, showing the invalidity of each entry. The LeCocq cases (2 L. D., 784); Henry Cliff (3 L. D., 216); George T. Burns (4 L. D., 62); John W. Hoffman (5 L. D., 2).

On the 14th of February, 1891, you rendered a decision in the case of *Adams v. Farrington*, and also upon the appeal of Angell from the decision of the local officers in rejecting his timber-culture application. In the case of Angell you affirmed the action of the local officers. In reference to the case of *Adams v. Farrington*, you informed the local officers that their action in allowing the contest of Adams to proceed, while Farrington's entry was suspended by order of the Department, was error, but you add:

The order of suspension, however, having been revoked by the Honorable Secretary of the Interior, in his decision of January 12, 1891, and in view of the fact, that the record before me is regular in all other respects, and clearly proves the invalidity of the entry involved, your decision is affirmed, desert land entry No. 72 canceled, and the case of *Adams v. Farrington*, closed.

From that decision you awarded to Angell the right of appeal, but not to Farrington. The latter, however, filed with the register and

receiver an appeal, which they forwarded to your office on the 3d of June, 1891.

On the 7th of July, 1891, you advised the local officers that Fanning having failed to appeal from their decision, he was barred the right of appeal from yours of February 14, 1891, which closed the case. You informed them that his appeal would not be received and transmitted, and directed them to notify him to that effect, and that he would be allowed twenty days within which to apply for a writ of *certiorari*.

Such application was made, and on the 4th of December, 1891, the Department directed you to certify to it "the proceedings in the case, and in the meantime suspend all action relative to said entry until further advised." You complied with that direction on the 22d of said month, and the case is accordingly before me for consideration. The notice of appeal specifies the following as the errors committed by you:

1. The Hon. Commissioner erred in affirming the decision of the register and receiver and in canceling said desert land entry No. 72, because neither the register and receiver nor the Hon. Commissioner had jurisdiction of the person of the claimant nor of the subject matter of the contest for the reason that the said entry had been suspended by order of the Secretary of the Interior September, 1877, and proceedings on behalf of the United States were at all times thereafter and until February 12, 1891, pending against said entry, and while the same were pending the register and receiver had no jurisdiction to receive or entertain any contest by an individual, nor to issue notice or citation to claimant upon any such contest, nor to hear or determine such contest.

2. The Hon. Commissioner erred in affirming the decision of the register and receiver and in canceling said entry because it does not appear from the affidavits by and on behalf of contestant nor from the evidence submitted on behalf of contestants that the land embraced in said desert land entry was not desert land at the time said entry was made in the year 1877.

3. The Hon. Commissioner erred in affirming the decision of the register and receiver and in canceling said entry because such action on the part of the Hon. Commissioner is contrary to the directions and orders of the Secretary of the Interior contained in his decision of January 12, 1891, in the matter of the three hundred and thirty-seven suspended desert land entries in the Visalia land district, wherein and whereby the Hon. Commissioner is directed and instructed to return all applications to contest (including appellant's case, as he is advised and claims) to the register and receiver for appropriate action.

The relief demanded, is that your decision be reversed, and that you be directed and instructed to return and transmit the entire record in the case to the register and receiver for appropriate action.

In deciding the case of *United States v. Haggins, supra*, after stating that "before any of the other entries can be canceled, hearings must be had and proof submitted by the United States or contestant, showing the invalidity of each entry", it was added:

I see no objection, however, to passing upon the contests initiated prior to said order of suspension, where hearings were held and evidence submitted by the respective parties, and also allowing the parties, who have filed applications to contest, to proceed with their contests where the grounds thereof are the invalidity of said entries.

This language was used in the decision which revoked the order of suspension of these entries. It in effect said that since such suspension had been revoked there could be no objection to passing upon the cases which had been initiated, and the evidence submitted by the respective parties, *prior* to such suspension, nor to proceeding with cases which had been initiated subsequent to such suspension, where the ground of the contest was the invalidity of the entry. It is not intimated in the language quoted, nor in the decision cited, that either the local officers or your office, would have jurisdiction to proceed in a case by ordering a hearing and rendering a judgment where the contest was initiated *after* the entry was suspended and while the order of suspension remained in force. During this time the question was between the government and the entryman, and no individual could come in and usurp the place of the government in the proceeding, and thus secure for himself preference rights.

It seems unnecessary to cite authorities upon the proposition that the application of Adams to contest the entry of Farrington was improperly allowed. In the case of George F. Stearns (8 L. D., 573), it was distinctly said:

An application to contest an entry should not be allowed, pending proceedings instituted against the same by the government.

See also Drury *v.* Shetterly (9 L. D., 211); Arthur B. Cornish (9 L. D., 569); and Canning *v.* Fail (10 L. D., 657). What the local authorities should have done, when Adams applied to contest the entry, is stated in United States *v.* Scott Rhea (8 L. D., 578), in these words:

An application to contest an entry filed pending proceedings against the same by the government, should be received and held subject to the final determination of such proceedings.

All these entries having been suspended by the Department, jurisdiction over the cases and over the land was removed from the local office and from your office, as effectually as if the cases were pending before the Department upon appeals from judgments rendered therein by such offices. In Iddings *v.* Burns (4 L. D., 559), it was said:

It has been held that when an appeal is taken from your decision your office loses jurisdiction over the case, John M. Walker (5 L. D., 504), and also over the land involved therein. Stroud *v.* De Wolf (4 L. D., 394). The same rule governs cases on appeal from the local office.

My conclusion is, that the local officers acquired no jurisdiction whatever by their proceedings upon the contest application of Adams. I deem it unnecessary to cite authorities in support of the proposition that where jurisdiction is wanting no default is possible upon the parties litigant. It follows, therefore, that Farrington lost no rights by not appearing at the hearing appointed by the local officers, and in not appealing from the judgment rendered by them. Their whole action in the case was a nullity, and your affirmance of their judgment did not render valid that which was void from the beginning.

All proceedings in the case, since the filing of the affidavit of contest, are therefore set aside, and you will return the whole record, to the local officers, and direct them to appoint a hearing, give due notice thereof to the parties in interest, and adjudicate the case upon its merits. At such hearing the suggestion contained in the Haggin decision, in the paragraph at the top of page forty-two of 12 L. D., will be adhered to.

PRACTICE—PUBLICATION OF NOTICE—AFFIDAVIT.

BRADFORD *v.* ALESHIRE.

An order for publication of notice may be properly made on due showing of the necessity therefor, and the affidavit in such case may be made by any person who possesses the requisite information.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 27, 1892.

On the 20th of July, 1892, I directed that you certify to the Department the record in this case for its consideration, you having denied to Mrs. Bradford the right of appeal from your decision therein, rendered on the 13th of February, 1892, claiming that such decision was interlocutory, and not appealable.

On the 3d of August, 1892, you complied with my direction, and the record of the case is now before me. From it I learn that David Aleshire made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 9, T. 10 S., R. 1 E., New Orleans land district, Louisiana, on the 1st of April, 1887.

This entry was contested by Bradford, her contest affidavit being filed on the 1st of July, 1891, and on the 8th of that month an order for the service of notice of contest upon Aleshire by publication was made by the local officers, it having been shown to their satisfaction that personal service could not be made. The testimony was directed to be taken before M. J. Andrus, notary public, at Crowley, Louisiana, on the 18th day of August, 1891, and returned to the local office on or before the 22d of that month. This notice was first published on the 11th of July, 1891, on which date a copy was mailed in registered letter to Aleshire, at St. Paul, Nebraska, and there received by him on the 10th of that month, according to the return registry card. Due proof is made of the publication of the notice, according to law, and of the posting of a copy thereof upon the land in question, and in the local office.

Aleshire did not appear, but made default at the hearing at which time Bradford submitted her testimony before the commissioner, which was duly forwarded to the local office. Before a decision was rendered by the local officers, a motion was made before them on behalf of Aleshire, to dismiss the contest on the ground

that he has not received a due and legal notice of the alleged contest; that there is no evidence in the record of the service of notice on the contestee herein, and that

the purported notice by publication is defective, insufficient, and illegal, nor have the conditions precedent thereto been fulfilled.

Objection was also made that the affidavit of contest was defective, in that it alleged that Aleshire had failed to comply with the timber culture law, specifying the particulars of such failure, but did not allege that he had failed to cause the work to be done by others.

In deciding this motion the local officers said:

Inasmuch as the affidavit asking for publication of the notice of hearing is not sworn to by contestant, but by her attorney, we are of the opinion that contestee's objections are well taken, and should stand, and the motion to dismiss is hereby sustained. The case is therefore dismissed without prejudice to the rights of contestant of applying for a new hearing within thirty days from receipt hereof.

From that decision an appeal was taken to your office, where the same was affirmed on the 13th of February, 1892. In rendering judgment in the case you said:

In all cases as the basis of an order for publication, an affidavit is required by the contestant, and such affidavit can be made by the contestant only. The rules in regard to obtaining notice by publication are construed strictly, and I find the notice defective for want of an affidavit made by the proper party, it having been made by contestant's attorney. Your action is therefore affirmed, etc., etc.

An appeal being taken from that decision, you dismissed the same. It is now before me, together with the record of the case, in response to a writ of certiorari. The principal question presented for consideration is as to the sufficiency of the affidavit for an order directing the service of notice of contest upon the claimant by publication. This affidavit was made by the attorney for the contestant, and not by the contestant herself. It stated that the affiant had made diligent search and inquiry for David Aleshire in the vicinity of the land in contest, and particularly in the town where said land was situated and where said Aleshire once visited, and found that it was generally asserted and believed that the claimant Aleshire is a resident of the State of Nebraska, and only made a temporary stay in the State of Louisiana, and that personal service can not be made, and service by publication is necessary.

The truth of the statements contained in this affidavit is not questioned, neither is there any question raised but that the case is one in which an order for the service of the notice of contest by publication should have been made, Aleshire not being a resident of the State of Louisiana, but of Nebraska.

If the party to be served is a resident of the State or Territory where the land is situated, the service must be personal, if the party can be found. If he can not be found, service may be by publication, but before an order to that effect can be made, it must be shown that due diligence has been used and that personal service can not be made. What efforts to get personal service have been made must also be stated. Where the party to be served is not a resident of the State or Territory,

that fact must be made to appear, before the order will issue. After that fact is established, it would be idle to require proof of efforts to make personal service within the State.

It is true that rule 11 of the rules of practice requires certain facts to be shown "by affidavit of the contestant," as the basis of an order for publication, but I think a proper construction of that rule or requirement is, that the contestant must show such facts "by affidavit," and that the affidavit may be made by any person or persons who possess the required information. Very frequently the attorney would be more likely to be possessed of this knowledge than his client especially when, as in this case, the client is a woman. Then, too, in a case where an officer should be employed to make such service, and should fail, I think the rule would be complied with when such officer's affidavit should be presented, stating what efforts had been made by him to secure personal service, and the reasons why such service had not been made. His statements would be based on personal knowledge, while if the affidavit was made by the contestant, the facts must necessarily be alleged on information and belief.

I have no hesitation in saying that in my opinion an order for the service of notice of contest upon a claimant by publication, may be made when the proper proof to entitle a contestant to such order is presented to the local officers, and that such facts need not necessarily be shown by the affidavit of the contestant.

That this proof may be made by the attorney for the contestant was held in the case of *Anderson v. Tannehill et al.* (10 L. D., 388). In that case the first ground of error enumerated by the counsel for the appellant was:

That the local office lost jurisdiction of the case when it made an order for publication of notice of hearing to be held September 8, 1888, for the reason that no affidavit was filed showing effort to make personal service upon entryman.

The Department, in deciding that point said:

Upon examination of the record I do not find the allegation of fact in the first of the above propositions to be sustained, for I find an affidavit of contestant's attorney, dated July 25, 1887, showing such efforts to make personal service of notice as would fully justify an order of publication.

In the case at bar it is not claimed that Aleshire was a resident of the State of Louisiana at the time of the initiation of contest, or at any time thereafter. The notice mailed in registered letter, and directed to him at St. Paul, Nebraska, was received by him more than thirty days before the day fixed for the trial. He has made an affidavit in the case and written several letters in relation to it, addressed to your office, all of which are dated at St. Paul, Nebraska. I think, therefore, that the order for the service of notice of contest upon him by publication was properly made, and as the record shows that it was duly published and posted, and mailed, as required by law, that he received a due and legal notice of the contest.

At the trial, the evidence submitted clearly established the fact that the entryman has not complied with the requirements of the law under which his entry was made nor caused the same to be done.

My conclusion therefore is, that the decision appealed from should be reversed, and the timber culture entry of Aleshire should be canceled. It is so ordered.

HOMESTEAD—SECOND ENTRY—MILITARY SERVICE.

LEWIS JONES.

A homesteader in making proof under a second entry, allowed in accordance with the proviso of section 2, act of March 2, 1889, is entitled to credit for such portion of his military service as was not applied to his first entry.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 29, 1892.

On the 2d of November, 1891, you informed the local officers at Wa-Keeney, Kansas, that the final proof made by Lewis Jones on the 4th of August, 1891, for the SW. $\frac{1}{4}$ of Sec. 34, T. 13 S., R. 24 W., in said land district, had been rejected by you as being prematurely made. The case is before me upon an appeal from such decision by you.

From the record of the case, I learn that Jones established his residence on the land in question on the 27th of February, 1889, and filed his pre-emption declaratory statement therefor on the 27th of March, of that year. On the 2d of June, 1891, he made homestead entry for the tract, under the second section of the act of March 2, 1889 (25 Stat., 854). The proviso to said section reads as follows:

That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims under the homestead laws notwithstanding they may have heretofore had the benefit of such law, but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

Jones enlisted in the military service of the United States, as a volunteer, at Jefferson, Wisconsin, on the 23d of April, 1861, and remained continuously in the service until the 14th of September, 1865, when he was mustered out at New Orleans, Louisiana. He was mustered in as a corporal, and mustered out as a captain. His term of service covered a period of four years and nearly five months.

Section 2305 of the Revised Statutes reads as follows:

The time which the homestead settler has served in the army, navy, or marine corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and

cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

At the time Jones made his final proof for the land in question, he had resided upon and cultivated it for a period of two years, three months and five days. As part of his proof he established the fact of his service in the army, for the length of time already stated. Final certificate was issued to him on the 4th of August, 1891, and on the 13th of that month he obtained from Burge and Dewey a loan of two hundred and fifty dollars, securing the same by a mortgage upon this land, executed by himself and wife.

When Jones made his final proof for this land, he testified that "he had never had credit for his military service on any homestead entry heretofore perfected." The records in the General Land Office show that Jones made homestead entry for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 3 S., R. 5 W., at Concordia, Kansas, on the 10th of March, 1876, and final proof thereon on the 11th of March, 1880, after a residence of four years, his military service being used to make up the other year. This entry was patented August 30, 1882.

Sometime after making final proof for his second homestead, Jones discovered that he had been credited with military service in case of his final proof on his first entry, and he at once wrote to Senator Plumb, stating the facts of the case, and his great regret that he had been so very careless and absent minded. He asked the Senator to call the attention of your office to the facts, and that patent should be withheld "until such time as I shall be entitled to one."

In your decision of the case, you allude to the two entries by Jones, and to the fact that he was credited with military service when he made final proof on his first entry, and you say:

Now as it is held by this office that a soldier of the late war of the rebellion, having exhausted his rights in regard to military service, can not again be permitted to receive the benefit of said service in making final proof, the proof in question is rejected as being prematurely made.

You directed the local officers to inform Jones of your decision, and that he will be required to yet reside upon the land two years, eight months and twenty-five days, when he will be required to submit supplemental proof, and a new final affidavit. The appeal from your decision is taken by Burge and Dewey, the mortgagees already mentioned.

Without any credit for military services, Jones would be required to reside upon his two homestead tracts ten years, to wit, five years on each, before he could be allowed to make final proof for them respectively. He resided upon the first four years, and upon the second two years, three months and five days, making a total actual residence of six years, three months and five days. He served in the army four years, four months and twenty-one days. This, added to his actual residence upon the land, makes a total of ten years, seven months and twenty-six days.

The section of the Revised Statutes quoted, provides that the time the homestead settler has served in the army shall be deducted from the time heretofore required to perfect title, but no patent should issue without a residence upon the land for at least a year. Jones resided upon and cultivated each of the tracts for more than a year, and the only question is, can the term of his military service be divided, and that part not necessary to make up his five years' residence on the first tract, be credited to him upon his second entry?

I know of nothing in the statutes, or in the decisions of the Department, to prevent this being done. It certainly can not be said that Jones *exhausted* his military credit, of nearly four years and a half, when he used one year of it in making proof upon his first homestead entry. To deprive him of all benefit to be derived from the balance of his military service, would be doing that which I am confident Congress did not intend, when it passed the law deducting the time of his service from the time heretofore required to perfect title.

In the case of William E. Erwin (14 L. D., 604), it was held that—

A pre-emptor who transmutes his claim to a homestead entry under the proviso to section 2, act of March 2, 1889, is entitled to credit for military service, in making proof of residence, although credit therefor was allowed under a former homestead entry.

It is not necessary to go to the extent indicated in that decision, to find in favor of Jones in the case before me. By giving him credit for military services which had not been used in making up a five years' residence upon a former entry, he was entitled to make final proof for the land in question when he did. It follows, therefore, that such proof was not prematurely made. The decision appealed from is reversed, his entry will remain intact, and in due time patent will issue for the land, if no other objection exists.

PRACTICE—APPEAL—CERTIORARI.

CAMERON v. McDUGAL.*

The absolute denial of an application to contest an entry is a final decision from which an appeal will properly lie.

Secretary Noble to the Commissioner of the General Land Office, May 4, 1892.

This petition is filed by John W. Cameron, praying that the record in the matter of the application of John W. Cameron to contest the pre-emption entry of Isaac W. McDougal, for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 29, T. 29 N., R. 5 E., Seattle, Washington, may be certified to the Department.

* Not reported in Vol. XIV.

The petition and exhibits present the following case:

On November 18, 1891, John W. Cameron filed his application to be allowed to contest the pre-emption entry of Isaac W. McDougal, for the tract above described, upon which final proof had been made and certificate issued. In his affidavit the contestant swears that from information and belief Isaac W. McDougal made a false and fraudulent entry of said land, in this that he did not make a legal settlement, residence, or occupation of said land from the filing of the declaratory statement up to the date of proof, or at any other time. Further allegations were made, which, if true, would show that the entry of said McDougal was false and fraudulent in every particular. This affidavit was corroborated by three witnesses, who swore that they had read the foregoing affidavit, and knew from personal knowledge the statements therein made were true.

You refused to allow said contest, for the reason that two former contests were initiated against said entry, and in each instance the contestant failed to introduce any testimony in support of his allegations; that the reasons for such failure are indicated by facts set forth in four separate affidavits, which have been submitted in opposition to the application of Cameron; that the existence of a house upon the tract, McDougal's residence thereon, and his improvement and cultivation of the land are facts which appear to be fairly well established by said affidavits.

In view of the foregoing, you denied the application and refused to allow an appeal to be taken therefrom, but suspended further action for twenty days to allow Cameron to apply for certiorari under rules of practice 83 and 85.

The absolute denial of an application to contest an entry is a final decision from which an appeal will lie, and it was therefore error to deny to Cameron the right of appeal and to require him to proceed under rules 83 and 85 of Rules of Practice.

I can see no reason for refusing this application. If the facts stated in the affidavit of Cameron, as alleged in his petition, are true, the entry of McDougal was obtained upon false and fraudulent proof. The affidavit was made from information and belief, but the facts alleged in his affidavit were corroborated by witnesses who swear that they know from personal knowledge that the "statements" therein made are true. The mere fact that these allegations are denied by counter affidavits furnishes no ground for refusing to allow the contest. The prima facie showing is that the entry is subject to contest, and the contestant should have been allowed the opportunity to show it by proof.

Besides, with this petition is filed an affidavit made by Samuel S. Holland, Reuben Low, J. C. Douglass, and William Shearer, who swear that:

They are each personally and well acquainted with Isaac W. McDougal, who made pre-emption proof No. 13001, on December 24th, 1889, on the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of

Sec. 29, in township 29 north of range 5 east, in the county and State aforesaid, and with the said lands, and have known the said Isaac W. McDongal and said land ever since and prior to the 18th day of May, 1889, during and until the present time, and that we each of us state that we do know positively and of our own knowledge that the said Isaac W. McDongal never from the date of his said settlement on the said land, May the 18th, 1889, during and until the present time, ever resided on the land or in any manner substantially improved the same, and, further, that the said Isaac W. McDongal, since he made his said proof on said land, admitted to us and each one of us that he, the said Isaac W. McDongal, never at any time prior to or since his said proof ever resided on said land, or in any manner materially improved the same, and, further, that we have just heard the foregoing affidavit of John A. Cameron read, and that we are acquainted with all the matters and things as therein testified to by him, and know the same to be substantially true.

An appearance has been filed in this case by B. S. Groesup, attorney for W. J. Rucker and the Everett Land Company, who, he alleges, are the present owners of the property.

As no answer has been filed controverting the statement of fact upon which you acted in rendering your decision, I deem it unnecessary to send for the record.

It appearing from the petition and exhibits filed therewith that the application to contest was improperly denied, I direct that you will allow the application, and order a hearing to determine the truth of the allegations in said affidavit of contest, and notify all parties in interest.

NOTE.—A motion for the review of this decision was denied by Acting Secretary Chandler August 30, 1892.

CANAL—RIGHT OF WAY—UNSURVEYED LAND.

INYO CANAL COMPANY.

A map showing the location of a canal will not be approved under the act of March 3, 1891, where a portion of the line traverses unsurveyed land.

Secretary Noble to the Commissioner of the General Land Office, August 23, 1892.

I am in receipt of your letter of July 7, 1892, transmitting a certified copy of the articles of incorporation and proof of organization of the Inyo Canal Company of Ormsby county, Nevada, together with a duly certified copy of the laws of Nevada relating to incorporated companies, all of which are in duplicate. Accompanying the above is a map, in duplicate, of two canals called the "upper" canal and the "lower" canal. Said "upper" canal begins at a point in the east bank of the Owens river, from which the section corner to Secs. 2 and 3 T. 13 S., R. 35 E., M. D. B. and M., bears S. $24^{\circ} 45'$ E. 115.40 chains; thence said canal runs in a south-easterly direction to a point from which the quarter section corner between sections 29 and 32, T. 15 S., R. 37 E., M. D. B. and M., bears N. $42^{\circ} 53'$ W. 39.80 chains, the length of the said

canal being 31.04 miles. Said canal is sixty feet wide, 40.09 chains; thirty feet to the end of second division; twenty-six feet wide throughout the third division; twenty-four feet through the fourth division; and twenty-two feet through the remainder.

The "lower" canal begins at a point in the east bank of the middle stream of Owens river, from which the corner common to Secs. 13, 14, 23 and 24, T. 13 S., R. 35 E., bears N. $23^{\circ} 03'$ W. 24.30 chains, and running south-easterly 16.28 miles to a point in the "upper" canal, from which the quarter section corner between Secs. 26 and 27, T. 14 S., R. 36 E., bears N. $69^{\circ} 45'$ E. 35.70 chains. Said canal is completed.

The said "upper" canal is completed to the point of terminus above named, and the map contains what is called a "preliminary line" for the continuance of said canal from said terminal point to a point in Owens lake S. $32^{\circ} 45'$ E. 74.15 chains from the NW. corner of Sec. 15, T. 16 S., R. 37 E., M. D. B. and M., a distance of 6.40 miles, all of said lands being in Independence, California, land district.

The maps and accompanying papers are filed for the approval of the Secretary of the Interior, that said company may have the benefit of sections 18 to 21 inclusive of the act of March 3, 1891, (26 Stat., 1095). The 19th section of this act provides that the company "shall within twelve months after the location of ten miles of its canal, if the same be upon surveyed land, and if on unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register . . . map of its canal, ditch, reservoir," etc. The reason for this is quite apparent, and the Department has insisted on these surveys, showing the crossings of the government lines by the canal or ditch line, and the distance to the nearest established corner being given (in reservoirs the corner to be outside of the reservoir).

You say in your letter that this map "has been examined in connection with the lines of the public survey and found to agree therewith in the essential particulars." An inspection of the map shows that it has been made with care and apparent accuracy, but the section lines do not appear on the map coextensive with the canal, and upon an examination of the records of your office I find that the canal is not all on surveyed land, although you do not mention the fact. It appears from an inspection of the surveys in your office that the survey along the strip of country over which the "upper" canal passes stopped at the foot of the mountain range. This "upper" canal, starting about one and one-half miles outside of the surveyed land, enters the north side of section 2, T. 13 S., R. 35 E., and bearing southeast passes out of it onto unsurveyed land; it again enters the surveyed land at the NW. corner of section 1, of same township, and then continuing in surveyed land about five miles, it passes out and runs about a mile and a half, when it enters again near the NE. corner of section 9, T. 14, R. 36 E., so following the line of the canal, which curves to conform to the topography of the ground it passes out of, and again into, the surveyed land five or six times before reaching its terminus.

On the application of the Santa Cruz Water Storage Company, 13 L. D., 660, for a reservoir, a portion of which was on unsurveyed land, it was said, after quite a full discussion of the act of March 3, 1891,—“The authority thus given (authorizing approval) only extends to cases where the canal, ditch, or reservoir is located upon surveyed lands. . . . I find no authority for approving maps located upon unsurveyed lands.

And on March 21, 1892, instructions were issued to the same effect (14 L. D., 336).

In the case of the “Tintic Range” Railway Company, of Utah, a portion of the line being on surveyed and a portion on unsurveyed land, it was recommended that the map be approved for the portion lying within surveyed land. It was said “The affidavits and certificates attached treat these maps in their entirety from terminus to terminus, without regard to the class of land involved (so of the map of the “upper” canal). They are filed for the purpose of securing approval for the entire length. The act under which approval is requested, on the other hand, expressly deals with maps on but one class of lands, viz: surveyed land.” (15 L. D., 88.) The provisions of the two acts are identical, except in the number of miles to be located before filing.

The neglect of your office to state the material facts in connection with these applications, places increased labor on the clerical force of the Department, which should be performed by those having charge of the work in your office; besides, it delays the business of the Department.

The papers relating to the corporation organization, etc., appear to be in accordance with law and the regulations; they are approved and will be placed on file. The map is approved subject to all existing valid rights for the “lower” canal, and disapproved for the “upper” canal.

PRACTICE—NOTICE—RAILROAD GRANT—MINERAL LAND.

O'CONNOR ET AL. v. NORTHERN PACIFIC R. R. CO.

Where a railroad company designates an attorney upon whom all notices and papers relating to the grant shall be served, jurisdiction is not acquired, in proceedings involving title under the grant, in the absence of notice to said attorney, unless such notice is waived by the company.

Before a hearing is ordered to determine the mineral, or non-mineral, character of a tract of land in an odd numbered section within the primary limits of the grant, the company should be required to make an affirmative showing as to its agricultural character, where a showing to the contrary has been made by a mineral claimant.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 27, 1892.

I have considered the case of Thomas O'Connor et al. v. Northern Pacific Railroad Company, involving portions of certain odd-numbered sections in townships 8 north, ranges 3 and 4 west, Helena land district,

Montana, applied for as a placer mining claim, on appeal by the company from your decision of December 29, 1891, holding for cancellation its selection list No. 13, in so far as it conflicts with said placer claim.

The location of these lands with regard to the grant is not given in your opinion, but, upon inquiry, I learn they are within the primary limits of the grant as shown by the map of definite location, filed July 6, 1882.

The company listed the land December 9, 1886, but no patent has issued upon said list.

It appears that the mineral application was filed in the local office February 20, 1891, and same day rejected for conflict with the railroad list.

On the 24th of the same month, however, and presumably upon a new presentation, a hearing was ordered by the local officers to determine the character of the land.

Notice of this hearing was served upon Cullen, Sanders and Shelton, who accepted service signing as attorneys for the company.

Upon the day set for hearing, no appearance was made on behalf of the company, and upon the ex parte testimony the local officers found that the land was mineral in character, and therefore excepted from the grant.

Notice of this decision was given F. M. Dudley, who thereupon filed a motion to re-open the case, upon the ground that no proper notice had ever been given the company of the hearing, of which it was in ignorance until notified of the decision adverse to the grant.

In support of said motion it was shown that in 1889, and prior to the initiation of the present case, the local officers had been advised, by written notice, that F. M. Dudley, of St. Paul, Minnesota, had been designated as the attorney for the company, upon whom all notices and papers of every kind relating to the grant should be served.

This motion was overruled by the local officers, the reason given being that the firm of Cullen, Sanders and Shelton had accepted service in other cases, and had appeared and conducted the same without objection by the company; also that:

Under the statutes of Montana, a foreign corporation is required to file with the proper public official a designation of some resident of the State authorized to accept service, notice, etc., in actions brought in the State courts, to which such corporation is a party. Comp. Stats. Gen'l Laws, Sec. 442. While it is true the Department exacts service according to its rules, instead of those of a State, we can not but believe that upon the matter being presented to it as above, it will recognize the hardship of requiring settlers to go one thousand miles beyond State lines to serve notice on a corporation having scores of agents of various degrees of authority within the State, and demand for the settlers what the State demands for its citizens, viz: a residence attorney or agent.

Upon appeal, your office sustained the action of the local office, from which an appeal has been filed to this Department, upon the following grounds:

1. Error to rule that the notice of hearing served on Messrs. Cullen, Sanders and Shelton by the mineral applicants was a sufficient notice to the company.

2. Error in rendering a decision in the case upon the ex parte evidence adduced.
3. Error in not ruling that notice of the hearing was not served upon the proper representatives of the company, and in not returning the case for a new hearing after proper notice, as moved for by the company.

From a careful review of the matter, I am of the opinion that the appeal must be sustained.

While it appears that Cullen, Sanders and Shelton had appeared in some cases, yet it does not appear that they ever entered, or were authorized to enter, a general appearance for the company.

In the absence of a designation of a particular person, notice might be held to be sufficient, if given to any agent of the company resident in the State, but notice had been given of the designation of F. M. Dudley as attorney, to whom the local officers gave notice of their decision, and, in the absence of notice to him, unless waived by the company, I am of the opinion that no jurisdiction was acquired over it, and it can not be held to be bound by the testimony taken.

Your decision is reversed, and the case is therefore remanded for proceedings *de novo*.

It appears, however, from the showing already made, considering the testimony as affidavits, that the land is mineral in character, and therefore not such as contemplated by the grant.

In the present case there has been no such showing by the company as would bar the allowance of the application. Under the repeated rulings of this Department, the land, if mineral, no matter when the discovery is made, is excepted from the grant. At the time of listing the land there was no showing made by the company as to its non-mineral character, other than the statement that they "are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant," and before a hearing should be ordered there should be required an affirmative showing by the company that the land is non-mineral in character.

TIMBER CULTURE APPLICATION—NOTICE.

RHODES v. CROCKER.

Under the provisions of the act of May 26, 1890, amending section 2294 R. S., the preliminary affidavit required of a timber culture applicant cannot be made before a notary public.

No rights are acquired by an application to make timber-culture entry where the requisite preliminary affidavit does not accompany the same; and the right to make a new application is subject to any intervening adverse claim.

The time within which an appeal must be taken begins to run from the date of the receipt of notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 31, 1892.

On August 27, 1890, William T. Crocker made the usual timber-culture affidavit before C. L. Calvert, a notary public, and presented the

same, September 1, 1890, together with his application, to the register and receiver, to make timber-culture entry for the NE. $\frac{1}{4}$ Sec. 5, T. 34 S., R. 33 W., Garden City, Kansas.

His application was rejected,

for the reason affidavit was not sworn to before register or receiver of this office or before a U. S. district court or clerk of court of record of the county in which the land is situated, in accordance with act of Congress entitled "An act to amend Section 2294, and for other purposes," approved May 26, 1890, and Circular "C," General Land Office, dated June 25, 1890, and for the further reason the land is erroneously described.

He was given thirty days for appeal.

On September 9, 1890, Curtis H. Rhodes presented his timber-culture application for the same land, describing it, however, as lots 1 and 2, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section, being the proper description. Having made the proper showing, he executed the required affidavit before the clerk of the district court of Seward county, Kansas. His application was rejected, because of Crocker's pending right of appeal.

Crocker did not appeal, but, on October 2, 1890, he presented a new affidavit (sworn to before a clerk of court of record), and a new application to make timber-culture entry, this time properly describing the land. His application was accepted, and the entry placed of record, No. 12,164.

On October 6, 1890, Rhodes filed his appeal, alleging error in the rejection of his application and in the acceptance of that of Crocker, and on September 9, 1891, you sustained the action of the local officers, and he further prosecutes his appeal to this Department.

Attorney for Crocker has filed a motion to dismiss the appeal, because the same was filed "three days after the time for his appeal had expired."

The appeal was filed in the local office November 27, 1891. Notice of your decision of September 9, 1891, was mailed to Rhodes from the local office on September 16, 1891. He swears he did not receive the notice until September 30, 1891, and that was the first notice he had. The postmaster at Liberal, Kansas, (Emma Mills), also swears that she delivered to Rhodes a registered letter September 30, 1891, and that said letter was the only registered letter received by Rhodes in that month.

It is thus seen that from the receipt by Rhodes of the notice of your decision, until he filed his appeal therefrom (November 27, 1890), fifty-eight days elapsed. Since the period in which the appeal must be filed begins to run from the date of the receipt of the notice, the appeal appears to have been filed in time. The motion to dismiss is therefore overruled. See *Walker v. Mack*, 5 L. D., 183; *Robertson v. Ball et al.*, 10 L. D., 41.

It appears that one Elisha W. Barnes brought a contest against a timber-culture entry made by one Francis M. Bell for the land in ques-

tion. Upon this contest the entry was cancelled, July 28, 1890. Barnes filed his waiver of right of entry on September 1, 1890, and upon that date Crocker filed his timber-culture entry, as aforesaid. But this application could not be accepted, because he had not made the affidavit of qualifications in the manner prescribed by the act of May 26, 1890 (26 Stat., 121), amending section 2294 of the Revised Statutes.

The first section of the timber-culture act approved June 14, 1878 (20 Stat. 113), provided that:

The only persons who are authorized to make timber-culture entries are heads of families, or single persons who have attained the age of twenty-one years and are citizens of the United States, or have declared their intention to become such, and who have made no previous entry under the timber-culture laws.

Section 2294, as amended by the act of May 26, 1890, *supra*, provides as follows:

In any case in which the applicant for the benefit of the homestead, pre-emption, timber-culture, or desert-land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same with the fee and commissions to the register and receiver.

The qualifications required of a timber-culture applicant are set forth in said act of June 14, and the affidavit showing these qualifications must be made either before the register or receiver, or upon proper showing "before any commissioner of the United States Circuit Court or the clerk of a court of record for the county in which the land is situated."

An affidavit made before any officer not specially authorized could not be accepted, and no application to make such an entry can be received until the proper affidavit is filed.

The first application made by Crocker (September 1, 1890), not being accompanied by the affidavit which the law expressly requires, could not be accepted, and was therefore properly rejected by the local officers.

The principal inquiry is, whether or not Crocker obtained any rights by this application, and whether it reserved the land from other disposal.

It is said in the case *Pfaff v. Williams et al.* (4 L. D., 455), that:

A legal application to enter is while pending equivalent to an actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition until such time as it may be finally acted upon.

But Crocker's application, not being accompanied with the required affidavit of qualifications, was not a legal one. He had, however, his right of appeal for thirty days during that period, and eight days after the rejection, Rhodes filed his application, which was subject only to Crocker's rights under the latter's pending right of appeal. When Crocker's right of appeal had expired and he had filed a new applica-

tion, his first application was not a pending one, and Rhodes's rights immediately attached as of the date when his application was filed.

Crocker's application, made September 1, 1890, was rejected outright; and, while the reasons therefor appear to have been made known to Rhodes when the latter applied for the land eight days thereafter, yet it does not appear that his application had been noted on the tract books, wherever this case differs from the Patrick Kelly case (11 L.D., 326), cited by you.

Every application to enter lands is not equivalent to an actual entry, so far as the applicant's rights are concerned. It must be a legal one, and, when Crocker failed to show proper qualifications at the time he first applied, it was at his own peril. It could not be accepted, and the land, being public lands, was subject to the next legal applicant, which on this case was Rhodes.

The acceptance of Crocker's new application and new affidavit, on October 2, 1890, in the light of the facts here stated was error. The land, was then subject to Rhodes' prior application.

The act of March 3, 1891 (26 Stat., 1095), repealed the timber-culture law; but it was therein expressly provided that "this repeal shall not affect any valid rights heretofore accrued or accruing under said laws; but all bona fide claims lawfully initiated before the passage of this act may be perfected," etc.

Rhodes' rights having "accrued" before the passage of said act, his entry will be allowed as of the date of its presentation, and that of Crocker will be canceled.

The decision appealed from is accordingly reversed;

HOMESTEAD CONTEST—ABANDONMENT.

GRINNELL *v.* WRIGHT.

A contest against a homestead entry on the ground that neither the entryman nor his heirs have established a residence on the land must fail, where it appears that the entryman's default was due to sickness and poverty, and that after his death, the widow complied with the law in the matter of cultivation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 2, 1892.

On the 18th of April, 1882, Samuel G. Wright filed soldiers' declaratory statement for the NE. $\frac{1}{4}$ of Sec. 24, T. 139 N., R. 59 W., Fargo land district, North Dakota, and on the 11th of April, 1883, under the act of June 8, 1872 (17 Stat., 339), he filed the required affidavit, and made homestead entry for said land. He died on the 31st of January, 1884.

On the 14th of July, 1887, Abigail Grinnell filed an affidavit of contest against said entry alleging that Wright did not establish his residence upon said land prior to his death, and that neither his widow nor heirs ever established a residence on said tract at any time up to the date of such affidavit of contest.

The hearing which followed, resulted in a decision by the register

and receiver, on the 30th of March, 1888, in which they recommended that the entry be canceled. Upon appeal to your office, you affirmed that judgment on the 18th of April, 1890, and held the entry for cancellation.

On the 14th of June, 1890, an appeal to this Department from your decision was received at the local office, it having been served on the appellee on the 9th of that month. On the 2nd of August of that year, the attorney for the plaintiff filed a motion to dismiss said appeal, which, notwithstanding the case was then pending in this Department, and not in your office, you proceeded to consider and decide. This you had no authority to do, and your judgment upon the question, having been rendered in a case which was not then before you is a nullity, as being without jurisdiction. In such cases jurisdiction can neither be assumed by a court, nor conferred by stipulation of the parties in interest. I have therefore considered the plaintiff's motion to dismiss the defendant's appeal to this Department, and conclude that she was not misled, nor in any way injured by the failure of the defendant to give in her notice a description of the land involved, as she properly described the decision from which she appealed, giving its date, stating its conclusion, and giving the numbers of the entries affected thereby. The other omissions in the notice complained of are not such as could deprive the plaintiff of any rights, and her motion to dismiss the appeal is therefore denied, which leaves your decision of April 18, 1890, from which the appeal was taken, before me for consideration.

The establishment of residence within six months from date of home stead entry is not a specific statutory requirement, but a regulation of the Department, based on the provisions in section 2297, of the Revised Statutes, authorizing cancellation on proof of abandonment or change of residence for more than six months. *Nilson v. St. Paul, Minneapolis and Manitoba Railway Company* (6 L. D., 567).

In the case of an original applicant residence is required, and a failure to comply with the regulation of the Department in that respect, renders his entry subject to cancellation. The case of *Dorame v. Towers*, decided by Secretary Chandler, December 4, 1875 (2 C. L. O., 131), held, however, that the provisions of section 2291, Revised Statutes, were substantially complied with on the part of the widow and heirs, by continued cultivation of the tract, for the period prescribed by law. The case of *Dorame v. Towers* was cited and approved in *Stewart v. Jacobs* (1 L. D., 636), in *Cleary v. Smith* (3 L. D., 465), and in *Tauer v. Heirs of Walter A. Mann* (4 L. D., 433), while in *Lamb v. Ullery* (10 L. D., 528), all these cases cited, and many others holding the same doctrine are collated and commented upon, in connection with the sections of the statute relating to the subject.

In a very recent case, that of *Brown v. Naylor* (14 L. D., 141), it was held that a contest should be dismissed where a deceased homesteader had failed to establish his residence upon the land prior to his death,

but the law applicable to his widow and heirs had been fully complied with by them, after his decease. In that case, as in this, the contest affidavit charged abandonment, because the entryman had died before establishing his residence upon the land, for which he made entry, and his widow and heirs did not establish their residence upon it after his death. It was shown, however, in that case, as in this, that they complied with the law in the matter of cultivation, and the Department held that the default charged was thereby cured, and this being done before contest was initiated, it could not be maintained, and your judgment dismissing the same was affirmed.

In a case where a deceased homestead settler had served in the army, navy, or marine corps, his widow and heirs are entitled to the same deduction in making final proof which the entryman could have claimed had he lived. In the case at bar, the entryman had served in the army from 1863, to the close of the war in 1865. From the time of his death to the initiation of the contest, his widow cultivated the land, and that time, together with the time he served in the army, would more than complete the five years of residence or cultivation, required by the homestead law. The widow might therefore have made her final proof before the contest of Grinnell was instituted.

The entryman died within nine months after making homestead entry for the land. He was a poor man and in poor health, but within a few months after making his entry he had ten to fifteen acres of the land plowed and sown to wheat. He also had about one hundred and forty acres sown to wheat and oats upon another tract, upon which he was then living. All this grain was totally destroyed by a hail storm in the month of July, 1883. This destruction of his crops ruined him financially, and deprived him of the means which he had intended to use for the purchase of materials, and the erection of a house upon the land in question, and prevented him from moving thereto within six months after his entry, or previous to his death.

Sickness and poverty have been held sufficient to excuse the default of an entryman who fails to establish and maintain a residence upon the tract for which he makes entry, where his good faith is otherwise apparent. It was so held in the case of *Nilson v. St. Paul, Minneapolis and Manitoba Railway Company*, already cited. In this case, the good faith of Wright is not questioned, nor is the cultivation of the land by his widow, since his death, denied. Under all the circumstances of the case, I think the government is justified in excusing the entryman's default, which was cured, so far as the widow was required to cure the same, before the intervention of any adverse right.

The default of the entryman being excused on account of his sickness and want of means, and the widow having complied with the requirements of the law on her part, I think, in view of all the facts, circumstances, and equities of the case, and for the reasons herein stated, the decision appealed from should be and is hereby reversed.

VALENTINE SCRIP-LOCATION.

E. C. STIMSON.

A location of Valentine scrip on unsurveyed land when adjusted after survey is equivalent to a purchase, if the land is subject to such disposition, and the owner of the scrip can not thereafter change the location and use the scrip in the purchase of other land.

A locator can not compel the cancellation of a location, by failure to furnish the requisite non-mineral proof, and so receive the scrip, as the government may determine the character of the land without the aid of the locator.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 2, 1892.

I have considered the appeal of E. C. Stimson from your decision of May 18, 1891, refusing his application to withdraw and reclaim Valentine scrip, located upon surveyed land, May 8, 1888, but which at the date of the application had been surveyed and afterward adjusted to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 14, T. 8 S., R. 84 W., Glenwood Springs, Colorado.

This application was filed June 29, 1889, alleging—

That since the said location, said lands have been surveyed and platted by the United States, and that said scrip location has been connected with said survey, and is shown upon the plat, which is attached to the accompanying affidavit of Lee Hayes.

He also alleged that if he is required to adjust the location to the official survey, he will be compelled to lose forty acres of his location and to take about forty acres, which will be of no value to him, and which he does not want. He also alleged that he is informed the land is mineral.

You declined to consider the application until the township plat has been approved, from which action no appeal was taken.

On April 20, 1890, the approved township plat was filed in the local office, and Stimson, having failed to designate within the time allowed by the regulations the specific subdivisions embraced in his location, the local officers adjusted the location to the public surveys, designating the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 14, T. 8 S., R. 84 W., Colorado, and called upon Stimson to make non-mineral proof of each subdivision.

In response to said notice, he replied that he was unable to make the non-mineral proof called for, for the reason that he believed the land in said subdivision is mineral, and renewed his application to reclaim said scrip.

On May 19, 1891, you held that Stimson failed to show that the tracts are valuable for mineral, his allegation being based merely on information and belief, and you therefore declined to cancel said location and allow him to reclaim said scrip.

Said application was properly rejected.

After the land was surveyed, if it was of the character subject to purchase with said scrip, the location then existing conferred a vested right to the land, and was equivalent to a purchase. The location had then performed its office, and the owner of the scrip had no right, therefore, to change the location and to use the scrip in the purchase of other land.

The order requiring the locator to furnish evidence of the non-mineral character of the land is for the protection of the government, and the failure of the entryman to furnish such evidence will not inure to his benefit. He can not take advantage of his own act and thus compel the government to take back the land once purchased, in order that he may purchase with the same scrip more desirable land. If the government is satisfied that the land is not mineral, and is of the character subject to location and purchase with said scrip, it may so determine without the aid of the locator, and compel him to satisfy the scrip with the land so selected.

Your decision is affirmed.

BUILDING STONE—PLACER ENTRY.

MINNEKAHTA STONE MINE.

The act of August 4, 1892, authorizes a placer entry of land chiefly valuable for building stone.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 3, 1892.

May 2, 1892, Fred T. Evans made placer mineral entry No. 343 for the Minnekahta Stone Mine, embracing the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 7 S., R. 6 E., Rapid City, South Dakota, claiming the tract to be valuable for the deposit of stone used for building purposes.

On June 4, 1891, you held the entry for cancellation, citing as authority for so doing, the case of *Conlin v. Kelly* (12 L. D., 1), wherein it was held that land containing stone useful for general building purposes only is not subject to entry under the mining laws.

Evans has appealed from your judgment to this Department.

On August 4, 1892, an act was approved (Public No. 199) entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws." The first section of this act provides—

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of public schools or donated to any State shall not be subject to entry under this act.

Since said tract is not of the character covered by said proviso, it is subject to entry under the terms of said act. Your judgment is therefore reversed.

PRIVATE ENTRY—EQUITABLE ACTION.

J. M. McDONALD.

A subsisting private entry excludes the land covered thereby from appropriation under the homestead law, even though such entry may have been irregularly allowed.

A private cash entry, made in good faith, of unoffered land, may be properly submitted for equitable action.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 3, 1892.

I have considered the appeal of J. M. McDonald from your decision dated February 27, 1889, affirming the action of the local officers rejecting his homestead application, because the land applied for was covered by private cash entry No. 10,292, made by J. Alexander on October 1, 1888, Duluth, Minn.

The appellant alleges that it was error to reject said application because said private cash entry was of land that had never been duly offered at public auction, but was expressly excepted from the list proclaimed for sale under the President's proclamation No. 877, dated August 1, 1882, and has never been offered at public auction at any time. The record shows that said tract, with others, was included in said proclamation, but was reserved from the sale which took place December 4, 1882, and has never been offered for sale at public auction. Notwithstanding this fact, the local officers allowed said Alexander to purchase said tract, with others, at private sale, received payment, and issued cash certificate therefor, and said entry was of record when said McDonald applied to enter the land under the homestead law.

McDonald made no application to contest said private cash entry under the rules of practice. He tendered no affidavit, alleging the illegality of the private cash entry, asked for no hearing, claimed no settlement right on said land, but simply applied to enter the land already covered by cash entry, and his application was refused by the local officers because the land was included in said private cash entry, which was intact upon their records. There can be no doubt but that the land in question was public land at the date of said entry, and subject to disposal under some of the land laws of the United States, and that Alexander was not personally disqualified from making said entry. It is well settled that, under the practice of the Land Department, two entries of the same tract will not be allowed to remain of record at the same time. Henry Cliff (3 L. D., 216); Legan *v.* Thomas *et al.* (4 L. D., 441); Schrotberger *v.* Arnold (6 L. D., 425); Wright *v.*

Maher (*idem* 758); *Russell v. Gerold* (10 L. D., 18); *Melvin P. Yates* (11 L. D., 556); *Colonial Mortgage Co. v. Knight et al.* (13 L. D., 524).

It may be conceded that under the general laws and regulations for the disposal of the public lands "private entries are never permitted until after the lands have been exposed to public auction at a price for which they are afterward subject to entry." (Sections 2353, 2354, 2355, Revised Statutes U. S.; *Eldred v. Sexton* (19 Wall., 195).

While this is the general rule, yet it has some exceptions. Prior to 1846 it was found that many entries were allowed contrary to the rules and regulations of the Land Department, and by the act of Congress approved August 3, 1846 (9 Stat., 51), a board of equitable adjudication was established, which was continued by the act of March 3, 1853, said acts being now embraced in sections 2450 to 2457 of the Revised Statutes of the United States.

In the case of *Pecard v. Camens* (4 L. D., 152-156) it is said—

The necessity for this law was occasioned by the fact that through inadvertence or ignorance it was found that many instances occurred in which, without any fault of the purchaser, in the administration of the land laws, some essential step demanded by law or departmental regulation had not been observed, and Congress was frequently called upon by special acts to supply the broken thread in the title. To this board was committed the supplying of these broken threads, whenever the purchaser on his part had conformed to law and the neglect or breach had been on the part of the officers of the government.

In pursuance of the power vested in them by the act of 1846, the members of the board of equitable adjudication promulgated on October third, 1846, a system of rules for the administration of equity under the act, and provided for certain cases which should constitute the "first class," among which the 11th rule includes "All private sales of tracts which have not been previously offered at public sale, but where the entry appears to have been permitted by the land officers under the impression that the land was liable to private entry, and there is no reason to presume fraud or to believe that the purchase was made otherwise than in good faith.

See also *Frank v. Holston* (7 L. D., 218); *Irwin Eveleth* (8 L. D., 87); *St. Paul, Min. and Manitoba Ry. Co. v. Listoe* (9 L. D., 534).

Reference is also made to section 2271, R. S., which expressly denies the right of pre-emption "on a tract theretofore disposed of, when such disposal has not been confirmed by the Land Office, on account of any alleged defect therein." The same rule is equally applicable to homestead applications, for at the date thereof only such lands as were subject to pre-emption could be entered under the homestead laws. Sec. 2289, R. S.

There can be no serious question in my judgment that the Congress of the United States has the authority to pass laws regulating the disposal of the public domain, and may authorize a board to make regulations which shall govern the Commissioner of the General Land Office in his submission of defective entries to the board of equitable adjudication for its approval. Under the express provision of the law said rule 11 was promulgated on October 3, 1846, and has stood unchanged for almost half a century. There is no evidence of bad

faith on the part of said Alexander. The local officers received payment for said land, and there appears to be no good reason why his entry should not be submitted to the board of equitable adjudication if he should so desire.

It is therefore considered that the application of McDonald was rightly rejected, and your decision to that effect is therefore affirmed.

You will cause the claimant, Alexander, or his counsel, to be notified that in case he files a written application for the submission of his entry to the board of equitable adjudication for its consideration, the entry will be duly transmitted.

MINERAL LAND—SCHOOL LANDS IN NEVADA.

KEYSTONE LODE AND MILL SITE v. STATE OF NEVADA.

The act of Congress providing for the admission of Nevada as a State, and for a grant of school lands thereto, did not pass title to lands of known mineral character, although said grant does not in terms except such lands therefrom.

*Acting Secretary Chandler to the Commissioner of the General Land Office,
September 5, 1892.*

On October 1, 1888, mineral entry No. 370 was made by the Original Keystone Silver Mining Company upon the Keystone Lode and Millsite claim at Carson City, Nevada, in the Virginia mining district. The claim is located in sections 16 and 17, T. 17 N., R. 21 E., M. D. M. According to the survey approved by the surveyor general on August 31, 1867, the south half of said township was returned as mineral.

The act providing for the admission of Nevada into the Union as a State was approved March 21, 1864, (13 Stat., 30), and by proclamation of the president it was admitted as a State on October 31, 1864 (13 Stat., 749).

Section seven of the act providing for the admission of the State provides

That section numbers sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress other lands equivalent thereto in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools.

As above shown, the survey of township 17, Sec. 16, was approved August 31, 1867, and thereby section 16 became identified as passing to the State under the grant. The grant made no exception of mineral lands, yet it has been held in such grants that they will be construed as not granting mineral lands, because it is and has been the settled policy of the government to withhold mineral lands unless they are expressly granted.

In the case of Mining Co. v. Consolidated Mining Co. (102 U. S., 167) the supreme court said—

The grant of the sixteenth and thirty-sixth sections of public land to the State of California for school purposes, made by the act of March 3, 1853, was not intended to cover mineral lands. Such lands were by the settled policy of the general government excluded from all grants.

In 1874 the State sold and patented the land in said section 16. The lode locations upon which the application for patent is based were made in 1859.

On May 27, 1891, you considered the application for patent made by the mining company, and held that

the lode locations having been made November 21, 1859, long prior to the survey of said township, would seem to establish the mineral character of that part of said section 16 by the Keystone lode claim.

You found that the E. $\frac{1}{2}$ of section 17, in which the remainder of said lode and millsite is situated, is embraced in a selection of land by the Central Pacific Railroad Company, Carson City list No. 2, made March 23, 1877.

You did not pass upon the claims as to that part of the tract situated in section 17, but you required additional evidence of the incorporation of the Original Keystone Mining Company, and held that part of the millsite in conflict with section 16 for cancellation, and directed the local officers to give the State of Nevada thirty days notice in which to show cause why said mineral entry should not be passed to patent. Such a notice was given, and on July 30, 1891, J. E. Jones, the surveyor general and ex-officio land register and selecting agent of the State of Nevada, filed a paper in the local land office, showing that the W. $\frac{1}{2}$ of section 16 had been sold and patented by the State, and that the "State would maintain her title thereto, in behalf of her patentee," etc. It is noticeable in this connection that he does not in any way deny the existence of mineral in said tract.

On November 3, 1891, you considered the showing made, and held that—

If the land embraced in said claim was known to be mineral at that date, a valid discovery having been made thereon as the basis of said location, it would not have passed to the State of Nevada under the grant of the United States of sections 16 and 36, all known mineral land being reserved from such grant.

Inasmuch as the character of the land is not questioned by the State, it being presumably admitted to be mineral land, it is held that neither the State of Nevada nor her patentees are entitled to the land covered by said Keystone lode claim.

The State has appealed from your judgment to this Department, alleging substantially that the title of the United States to section 16 passed to the State because no exception was inserted in the granting act to the effect that mineral land should not pass thereunder; that the land is now in the hands of an innocent purchaser for value; that section 16 of township 17, being north of the centre of said township,

is not a part of the territory reported by the surveyor as containing gold and silver; that the Land Department has no power to cancel the title of the State under its grant for school purposes; that a court only can set aside or vacate such title, citing among other cases the case of *Hendy et al. v. Compton et al.* (9 L. D., 106).

Your judgment holding for cancellation so much of the millsite as is situated in section 16 is correct, for the moment it appears that the land is non mineral, the tract is shown to have passed to the State for the benefit of the common schools.

The locations upon which the mineral entry in question is based were made in 1859. The tract covered by the entry has always been regarded as valuable for minerals, and this proposition is not controverted by the representatives of the State of Nevada. It follows that the tract was mineral land when the school grant was made, and as such, title thereto did not pass to the State.

The contention made by the State that this Department is not clothed with authority to consider the character of the land now, or to patent the same under the mineral laws, but that the court only can set aside its title, is untenable. The State never had title to this tract, because it was a mine when the grant was made, and said grant to the State did not pass mineral lands. It is true that the State has sold the tract, but it cannot be contended that the purchaser got any better title than his grantor, which was no title at all. Of course, if this Department had passed on the character of the land and issued a certificate or government patent therefor, it might then be necessary to invoke the aid of a court to set aside said certification or patent. In the case cited by the State (9 L. D., 106) the lands involved had been certified by the Department under an application and selection for indemnity for a school section lost in California, and it was held that the court only could set aside the certification made; but in the case at bar, no certification has been made, and this application for mineral patent has brought in question for the first time the character of the tract involved. It must be held that that part of the entry situated in section 16, being mineral land, did not pass to the State as school land, and hence is subject to appropriation under the mineral law.

On June 16, 1880, (21 Stat., 287) Congress granted to the State of Nevada two millions acres of land in said State in lieu of the sixteenth and thirty-sixth sections of land theretofore granted to the State by the United States, provided, "That the title of the State and its grantees to such sixteenth and thirty-sixth sections as may have been sold or disposed of by said State prior to the passage of this act shall not be changed or vitiated in consequence of or by virtue of this act."

The grant was accepted by the State of Nevada, but before that time, to wit, in 1874, the W. $\frac{1}{2}$ of Sec. 16, a portion of which is now in question, had been sold by said State. The act of June 16, 1880, *supra*, provided that the title of the State and its grantees to sections 16 and

36 should not be changed where such tracts had been sold prior to its passage. This act can have no effect in the case at bar, because the tract included in this mineral application was never granted to the State. Hence the State never had any title to sell. It was mineral land, and, as such, did not pass to the State by the original grant of sections 16 and 36.

Your judgment is accordingly affirmed.

HOMESTEAD ENTRY—RELINQUISHMENT—WIDOW.

McGLASHAN *v.* ROCK.

The widow of a homesteader will not be permitted to assert a claim as such, where the entry is canceled on the relinquishment of an administrator, and she ratifies such action by acquiescence therin for a term of years, and during such period valuable adverse rights intervene.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 5, 1892.

I have considered the case of Mary McGlashan *v.* John J. Rock on appeal by the latter from your decision of September 19, 1891, reversing the decision of the local officers and cancelling his homestead entry for the SW $\frac{1}{4}$ of Sec. 22, T. 6 N., R. 4 W., Lincoln, Nebraska, land district.

The record shows that one John McGlashan filed soldier's homestead declaratory statement for this land September 13, 1872, and made soldier's homestead entry for it January 2, 1873. He died on December 26, 1876, without having filed proof on his entry. It appears that he enlisted in the United States army in 1861 for three years and was honorably discharged on account of injury received in the line of duty.

He lived a portion of the time on the land in controversy, and worked at different places in the vicinity, stopping a portion of the time at the house of R. B. Campbell, who lived a mile and a half from the tract. He died at Campbell's house. After his death Campbell wrote to William McGlashan, a son of the deceased, who lived in Iowa. He came to Nebraska and called upon Campbell. They went to the probate judge of the county in which the land is situate, and upon consultation Campbell was, upon the motion of said William McGlashan, appointed administrator of the estate of the deceased, William McGlashan going upon his bond with others.

It appears that there was some difficulty about finding both his soldier's discharge and his entry papers, and Campbell, having an opportunity to sell the relinquishment, sold the same for \$250 upon the order of the probate court that had appointed him. This sale was made about September 30, 1877, and the purchaser, one Coffey, made timber culture entry for the land. He made improvement thereon, and in

March, 1882, sold his improvements to John J. Rock, contestee, who made homestead entry for the tract upon filing the relinquishment of Coffey.

In the meantime, Campbell, as administrator, had closed up the business of the estate of the deceased, paid his debts, including last sickness and funeral expenses, and had sent the son, William, the balance of the money in his hands, amounting to \$90 or \$100. In March, 1887, Rock made final proof and received his final certificate.

In September, 1888, Mary McGlashan filed a petition in your office, in which she claimed to be the widow of John McGlashan, deceased; that she was entitled to his homestead; that she had been cheated and wronged out of it by misrepresentation, etc., and asked that Rock's entry be canceled and that the entry of the deceased be re-instated. Upon this petition a hearing was ordered, which was held in June, 1889. The local officers upon the case presented recommended that the entry of Rock be allowed to remain intact, etc.; from this action the contestant appealed, and you, on September 19, 1891, reversed their action and held the entry of Rock for cancellation, from which decision he appealed.

The testimony in the case consists of a copy of the discharge of John McGlashan, a copy of the record of the land office relating to his homestead entry, a copy of the probate court record, and the testimony of three witnesses. Some *ex parte* affidavits were offered in evidence, but as they were entirely *ex parte* they will not be considered. The hearing was set for June 10, 1889, and on that day, by stipulation of counsel for the parties, the hearing was continued until the 25th of said month, to give the contestant an opportunity to take depositions or produce witnesses. No depositions were taken or witnesses produced, but at the hearing McGlashan's attorney offered in evidence three or four affidavits made by her before the hearing was ordered; also some other *ex parte* affidavits, all of which were properly objected to and not considered by the local officers. It appears that you considered every thing sent up, and the first error assigned is that you considered these *ex parte* affidavits, which were all made before any hearing was ordered and taken without any notice to Rock, the present owner of the land.

This was clearly error, Rules 23 to 34, inclusive, of the Rules of Practice.

It is claimed by Mrs. McGlashan that during all the time McGlashan was in Nebraska he had a family living in Iowa. The testimony shows that he never had his family on the land in controversy; that he came there, made a "dug-out" and lived on the land a portion of the time, but he worked and lived around from place to place. Before he died he gave the address of his son William, that Mr. Campbell might write him of his, McGlashan's death; this was done, as heretofore stated.

The testimony of Mr. Campbell, with whom McGlashan lived a considerable portion of the time, and also Merriman, who knew him quite

well, shows that he never mentioned the fact that he had a family. This was probably to avoid a contest of his homestead, and, although his application filed in the land office showed that he was a married man, he kept the matter of having a family secret in the neighborhood of the land.

"In the absence of proof to the contrary the place where a married man's family resides must be deemed to be his residence." *Stroud v. De Wolf* (4 L. D., 394). This applies to a soldier's homestead as to any other, and the statute requires one year's actual residence upon the land; not a mere going upon it by the man, to remain away from his home and family, with intention of returning to his home as soon as title is acquired, but a *bona fide* residence with intention of making it his home.

The testimony shows that Campbell sold the improvements on the land, upon an order of the probate court, and filed a relinquishment of the entry. Counsel for Mrs. McGlashan indulges in quite severe and uncalled for language concerning Mr. Campbell and others in speaking of what he calls "corrupt" probate orders, and he uses the words "fraud," "falsehood," and like terms with a greater degree of freedom than is becoming his client's claim, in view of all the facts in the case. There is nothing in the case reflecting upon the integrity or honesty of Campbell. He and the probate judge acted in ignorance of the law, but it is quite apparent that they acted in good faith and without any intent to benefit themselves pecuniarily. It appears that Campbell sent the son \$90 or \$100, not having charged anything for care and nursing of the deceased during his last illness.

The family was notified of the death of the entryman, and of his homestead claim, early in 1877, but the widow did not visit the land nor have an agent, except her son, visit it, and he came only to dispose of the improvements. He did not improve or cultivate it, but allowed it to lie idle, unoccupied, uncultivated, and really abandoned. She did not offer to make proof or perfect the title to the land.

In October, 1878, Coffey went upon it under his timber-culture entry, and she had notice of the sale of the improvements and of the relinquishment, and the family accepted the excess of the money received from the sale, after paying the debts. Coffey improved the land and occupied it four years, and she gave no notice of any claim nor asserted any right. Coffey sold to Rock the improvements and filed his relinquishment, and Rock made extensive improvements on the tract, and after five years of undisturbed use and occupancy, made final proof, a year after this; for the first time, at the end of twelve years from her husband's death, she comes up with her claim that the original entry of her deceased husband was improperly relinquished, and illegally canceled. It is true that the law casts the homestead right upon the widow, and it is true that the homestead "shall not be subject to any tax, levy or sale," (Sec. 2311, R. S.) and the probate judge and the ad-

ministrator acted without warrant of law in filing the relinquishment, but in what position is the widow who has abandoned the homestead for twelve years, who knew that another was quietly, but openly, occupying, improving and cultivating the lands. She is certainly in no position to assert any claim.

I do not find, from the evidence, that she received the money for the improvements, and is thereby estopped to assert her claim, although there is some evidence tending to show that the family used it, but I do find that her *laches* have been such that it would be unconscionable to dispossess Rock and give her this property with all his improvements and the fruits of his toil. Bigelow on Fraud, in discussing *laches* and limitation states substantially that where a party is defrauded in a contract, delay in proceedings to rescind will not generally bar an action, unless such delay amounts to a *waiver*, and he says (p. 442) "Long acquiescence will raise a presumption of waiver; and this presumption will doubtless become conclusive, if in the meantime the situation of the property has been materially changed."

The case is quite similar to the case of *Orvis v. Banks* (2 L. D. 138), in which a relinquishment was improperly filed and the entry illegally canceled; but it was found that the widow—

made no attempt to take possession, nor had she ever visited the land, nor sent an agent upon it, nor attempted to fulfill a single requirement of the homestead law with respect to it since the death of her husband.

The husband's relinquishment was filed in 1877, after his death; the widow knew of the filing of the relinquishment, and she did not assert any claim until 1880. It was further said in the case—

Banks had settled on the tract, during which time (three years) she permitted him to proceed with his improvements * * * without opposition; and now at this late day she suddenly concludes to assert her interest in the land. This she cannot be permitted to do. Her silence during such a long period, with full knowledge of the facts, warrants the conclusion that her apparent acquiescence amounted to a ratification of the relinquishment.

Much more does the conduct of Mrs. McGlashan amount to a ratification, in that she gave the matter no attention for twelve years. She pleads poverty—so did Mrs. Orvis—and ignorance of law, but the latter is no excuse. It would be an idle thing to re-instate this old entry, "dug up from musty records," because this woman would be utterly unable to make final proof, after twelve years abandonment. In fact if her claim is true her husband never established his residence on the land, and could not have made valid final proof at any time.

Your decision is for these reasons reversed, the petition dismissed, and Rock's entry will remain intact.

EMPLOYÉ OF GENERAL LAND OFFICE—OKLAHOMA LAND.

WINANS *v.* BEIDLER.

Section 452 R. S., does not prohibit a homesteader from completing title, by due compliance with law, who after making his entry accepts and holds an appointment in the General Land Office that gives him no advantage over the general public in the matter of prosecuting his claim.

One who is lawfully within the Territory of Oklahoma prior to the date when the lands therein were opened to entry and settlement, but takes advantage of such presence to secure land in advance of others, is disqualified by statutory provision from perfecting title thereto.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1892.

I have considered the case of J. F. Winans *v.* George A. Beidler upon the appeal of the former from your decision of August 6, 1891, rejecting his homestead application, and holding his entry for cancellation, and allowing that of Beidler, for the NE. $\frac{1}{4}$ of Sec. 28, T. 12 N., R. 3 W., Oklahoma City, Oklahoma land district.

The record shows that on the 24th day of April, 1889, Beidler, by his attorney in fact Bluford Wilson, filed a soldier's declaratory statement for said tract, in the local land office.

On June 5, 1889 Winans made homestead entry for said land, subject to Beidler's rights under his soldier's declaratory statement.

On August 5, 1889, Winans filed his protest, against allowing Beidler to make homestead entry under his soldier's declaratory statement, alleging that:

George A. Biedler did violate the law by entering and occupying the lands described and opened to settlement by the President's proclamation of March 23, 1889, before 12 o'clock noon of the 22nd day of April, 1889; that the filing of said soldier's declaratory statement was fraudulent in character.

August 15, 1889, Beidler made homestead application for the tract under his declaratory statement; which the local officers rejected for the reasons alleged in the protest of Winans; Beidler appealed to you and asked for a hearing, which you ordered on the 27th day of December, 1889. At the time set for trial before the register and receiver both parties appeared and submitted an agreed statement of facts as to part of the issues, and afterwards Winans submitted his testimony.

From the testimony submitted the register and receiver decided that Beidler was not a qualified entryman, and that Winans' entry should remain intact.

Beidler appealed.

On the 6th day of August, 1891, you reversed the judgment of the local officers, sustained the entry of Beidler and held Winans' entry for cancellation. Winans appealed.

Beidler made a motion to dismiss Winans' appeal for the reason that, he is now and has been during the pendency of this contest before the register and receiver, and the Commissioner of the General Land Office, an employe of the General

Land Office, and he is, therefore, under section 452 of the Revised Statutes of the United States, and under circular instructions issued September 15th, 1890 * * * prohibited from entering, or becoming interested directly or indirectly in any of the public lands of the United States.

On the 28th day of December, 1891, said motion was denied by the Department (13 L. D., 732) without passing upon the question as to whether section 452 Revised Statutes applies to the case upon its merits or not. This question is now to be determined in order to pass upon the validity of Winans' entry.

Said section provides that:

The officers, clerks, and employees of the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

In the instructions of September 15, 1890 (11 L. D., 348) this section was quoted, and the case of *Herbert McMicken et al.* (10 L. D., 96) is referred to as a departmental interpretation of it. In that case the entrymen at the dates of their respective entries were employed in the office of the surveyor general of Washington Territory, in which the land in controversy was situated. In other words said entrymen after they were appointed and while acting as such employes undertook to acquire title to the public lands by making timber land entries. It was said, page 99, that by section 452 of the Revised Statutes, it was intended

to extend the disqualification to acquire public lands to officers, clerks, and employes in any of the branches or arms of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the *survey and sale* of public lands. Moreover, in construing a statute, it is proper to take into consideration the mischief it was passed to obviate. (Sedg. Stat. and Com. Law, 202) The object of section 452 was evidently to remove from the persons designated the temptation and the power by virtue of the opportunities afforded them by their employment to perpetrate frauds and obtain an undue advantage in securing public lands over the general public by means of their earlier and readier access to the records relating to the disposal of, and containing valuable information as to, such lands.

This construction is unquestionably correct as applied to the facts and record in that case, and if this case were similar in its facts, Winans would clearly be disqualified to acquire title under his entry. This, however, would not disqualify him from contesting Beidler's entry, for under Rule 1 of Rules of Practice contest may be initiated by an adverse party or "other person against a party to any entry, filing, or other claim, under laws of Congress relating to the public lands." While this would be a sufficient reason for denying the motion to dismiss the case, yet the leading question to be determined is whether under the facts and record presented Winans is qualified to pursue his entry to patent by a compliance with the law.

The facts are that Winans was appointed a copyist in the Recorder's Division of your office on the 18th day of October, 1889, over four months

after his entry was made; that he accepted the position and has continued to discharge the duties thereof up to the present time; that his family still reside in Oklahoma and that his home is still there. These facts are so palpably different from the facts in the McMicken *et al.* case, *supra*, that it is not deemed necessary to compare them. The position he holds cannot be said to give him any advantage, in finally securing the land, over the general public; his access to the records of the office can give him no information valuable to him pertaining to his entry or his rights to the tract; there is no opportunity afforded him to practice any fraud; he has nothing to do with the matter of adjudicating the question as to his compliance with the law when that question shall arise, indeed he may not hold the place he does, or any other place in the land department, when the time arrives to make final proof. In view of these facts I am of the opinion that section 452, *supra* does not apply to this case, for I do not believe that Congress intended, by the enactment of said section, to deprive any one of valuable property rights, theretofore lawfully vested in him, simply for the reason that, after such person had made settlement on public land, and made an entry, or application to enter such land under the homestead law, he received an appointment as a copyist in the General Land Office.

It follows that Winans is not disqualified under section 452 Revised Statutes to complete his entry, provided he shall comply with the requirements of the law as to residence payment and otherwise, and further provided that Beidler's entry shall be found to be invalid for any reason.

Beidler entered the Territory on the 11th day of April, 1889 under a commission and orders from the Post Office Department, as post master at Oklahoma City, and at once entered upon his duties as such officer, and has continued to hold that office. He made settlement on the tract in controversy prior to the entry of Winans, and continued to reside thereon, and has made improvements on it to the value of \$500. The question arises as to whether he is disqualified from acquiring any interest in the tract, by reason of being within the Territory before and at the date it was opened to settlement under the law and the President's proclamation, and whether he sought to take the advantage of his presence there to acquire the tract in dispute.

In order to correctly determine this question a brief reference to the authorities, and the facts in the case seem to be necessary.

In the case of the Townsite of Kingfisher *v.* Wood (11 L. D., 330) it was held that:

No permission or license to be within said Territory by virtue of special employment therein, can be granted as against the express terms of the statute, or used to defeat the equal operation thereof and the rights of others thereunder; and one who is permissibly within said Territory prior to the opening thereof, and seeks to take advantage of his presence therein has "entered and occupied" the same in violation of the statute, and is accordingly disqualified to enter any of said lands, or acquire any right thereto.

In *Guthrie Townsite v. Paine et al.* (12 L. D. 653) and the same on review (13 L. D., 562) the Wood case was re-affirmed.

In *Oklahoma City Townsite v. Thornton et al.* (13 L. D., 409) it was held that:

No person who entered within the limits of Oklahoma Territory prior to the time for the opening of the land therein to settlement, and remained therein up to and after the hour fixed for said opening, and who took advantage of his presence to enter upon and occupy land, shall be permitted to obtain title to the same, even though he was lawfully within the limits of said Territory prior to the hour of opening.

In the case of *Taft v. Chapin* (14 L. D. 593) it was held that:

One who is lawfully within the Territory of Oklahoma at the passage of the act of March 2, 1889, and so remains until the lands are open to settlement and entry, but does not take advantage of his presence, as against others, to enter upon and occupy land, is not, by such presence in said Territory, disqualified to enter land therein.

The facts in that case were that Chapin was living in the Territory, under the authority of a license, before and at the date of the passage of the act of March 2, 1889 (25 Stat., 1005), opening said Territory to settlement; his license did not expire until the 10th day of May, 1889. The Territory was opened to settlement April 22, 1889, at noon; the tract remained open to settlement and entry by any qualified person from noon on the 22nd day of April to the 1st day of June, when for the first time Chapin offered to file his homestead application. It thus clearly appeared that Chapin had not either taken, or sought to take, any advantage of his fellows by reason of his being in the Territory at the date of opening, and his entry was upheld for these reasons.

In the case at bar the facts are quite different. Beidler went into the Territory a few days before it was to be opened, armed with his commission as a United States officer—that of post master at Oklahoma City—under which he was authorized to enter the Territory, not for the purpose of taking up land under the homestead law, but for the purpose of discharging the duties of the federal office, which office he entered upon and has continued to discharge the duties of ever since.

The very day the Territory was opened, he executed a power of attorney, to a man who he knew was there in violation of the law and proclamation, authorizing him to file soldier's declaratory statement for him, which was done on the 24th day of April at the local office, by his attorney in fact; this filing was made for the very tract of land that Beidler states in his letter to you that: "When the proper time arrived on April 22nd, and the opportunity presented itself to me, I did go out into the country about a mile and one half, and did go upon and take possession of a soldier's homestead." Again in his letter addressed to the Post Master General he said:

Previous to the 22nd of April, the day set apart for taking up lands and lots in Oklahoma, I had not in my own mind determined to attempt to take up for myself a homestead, and when the day and hour of the 22nd arrived and the opportunity presented itself to me to do so, I did take advantage of such opportunity and took possession of a soldier's homestead three quarters of a mile from the city limits.

Copies of these letters were introduced in evidence at the hearing; he was present and had ample opportunity to explain any mistake they might have contained, as well as all the facts and circumstances connected with his entering upon the land in controversy, this he utterly failed to do, and when called on by Winans to testify as a witness, peremptorily refused to be sworn or to testify in the case.

Taking all of these facts and circumstances together, the only fair and reasonable inference that can be deduced from them, is that Beidler did take advantage of his being in the Territory prior to and on the day it was opened to settlement to enter upon, occupy, and claim the tract in controversy, and by so doing he is clearly disqualified, under the plain terms of the law from acquiring any right to it.

In view of the conclusion I reach it is not necessary to discuss the other questions presented by the record.

Your judgment is reversed and Beidler's filing will be canceled.

OKLAHOMA TOWNSITE—CERTIFICATE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 5, 1892.

H. C. ST. CLAIR, Esq.,
Chairman Board No. 3,
Hennessey, Oklahoma.

SIR: Replying to your letter of July 19, 1892, asking "whether or not certificates issued by the (Hennessey) Town Company and filed with an application for a deed is good and sufficient evidence to entitle them (the applicants) to a deed in place of the jumpers with the improvements aforesaid," I have to state that a townsite entry under the act of May 14, 1890 (26 Stat., 109), is made for the several use and benefit of the occupants of the land at the date of entry, the same as though the entry were made under the provisions of section 2387, Revised Statutes. In order therefore, to be a beneficiary of a trust created under the act of May 14, 1890, a party must either be an actual occupant of the townsite at the date of entry or a constructive occupant thereof under the second section of said act, which provides—

That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.

In accordance with this clear and explicit language of the statute, you should issue deeds where the proper showing is made that "a certificate, deed, or other paper evidence of title was issued by (a party or parties whose authority to issue the same was recognized by the people residing upon the townsite, and in case of) adverse claims you should hear and determine the rights of the respective claimants.

Respectfully,

I. R. CONWELL,
Acting Commissioner.

Approved,

GEO. CHANDLER,

Acting Secretary.

DESERT LAND ENTRY—NATURAL GROWTH OF TREES.

DILLON *v.* MOULTON.

Land that produces a natural growth of timber is not subject to desert entry, and it is immaterial whether such timber is of value or not.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 6, 1892.

On April 25, 1888, Edward F. Dillon filed a contest against the desert land entry of William D. Moulton, made July 3, 1877, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 33, T. 2 S., R. 5 E., Salt Lake City, Utah, charging that the entry was fraudulently made in this, that the land was not desert land within the meaning of the law, being partly covered with a heavy growth of timber, and that it produced an agricultural crop of hay without artificial irrigation.

The local officers found from the testimony offered at the hearing that the land is not desert land within the meaning of the act, and recommended the entry for cancellation.

You affirmed said decision, and claimant appealed to the Department.

The sole issue made by the contest is, whether the land is desert land within the meaning of the act.

The claimant alleges error in your decision in holding:

1st: That the land is naturally irrigated by springs upon the same.
2d: That the land is naturally watered from the river.
3d: That the land is naturally bottom land, when, in fact, that the majority is high land.

4th: That the land is timber land.

5th: That the land is of the kind that is excluded by the rules from desert land entries.

It is contended that, while the Provo river runs through a portion of the land, it is confined within its banks and does not change the character of the land; that, although there is a stunted growth of trees

along its banks, they add no value to the land, but are a detriment; that this growth is confined to the immediate banks of the river, and the rest of the land is only productive from artificial irrigation.

The third section of the act of March 3, 1877 (9 Stat., 377), provides that the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office. In pursuance of this authority, the regulations issued by your office have prescribed that:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

* * * * *

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

Tested by these rules, the evidence in this case shows beyond all doubt that the land in controversy is not desert land. It is immaterial whether the growth of timber is of value or not. The mere fact that there is a natural growth of timber on the tract will except it from the operation of the act.

One of the witnesses testified that there was considerable timber on the tract, consisting of cottonwood, alder, willow, &c.; that he cut two hundred and fifty cords of wood from the east forty, the size of the trees being from eight inches to two feet in diameter; that he also cut forty stable logs, fifty house logs, and about four hundred poles.

In the case of *Riggan v. Riley*, 5 L. D., 595, it was held that even if the land will not produce some agricultural crops without irrigation, yet, if the testimony shows that there are several acres of timber on the tract, it can not be entered under the desert land act.

The brother and business agent of the claimant testified that there were about ten acres of timber on the entire tract. Other witnesses testified that timber was growing all along the south side of the tract. It is clear from this testimony that there is a natural growth of timber on the tract, which is sufficient to except the tract from entry under the desert land law. *Houck v. Bettelyoun*, 7 L. D., 425.

The testimony also abundantly shows that there are springs upon the land, and that it lies along a water course which is subject to overflow, and that the land has produced hay without artificial irrigation.

Your decision, holding said entry for cancellation, is affirmed.

SCHOOL GRANT—MINERAL LANDS.

PEREIRA v. JACKS.

In determining whether land is excepted from the school grant to California on account of its mineral character, the status of the tract at date of survey is the subject of inquiry.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 8, 1892.

On October 10, 1890, Christina Jacks filed in the State surveyor general's office of the State of California, her application No. 10,505 to purchase the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 16, T. 27 S., R. 10 E., M. D. M. Said land had been returned by the United States surveyor general for California as mineral land.

The State surveyor general, by his letter to the register of the land office at San Francisco, California, dated October 10, 1890, requested that said land be withdrawn from sale at said local office pending an investigation as to its character, and that a time and place be appointed for a hearing to determine its character, inasmuch as the said applicant desired an opportunity to disprove its alleged mineral character.

In response to this request the said register, on October 24, 1890, issued a notice "to all whom it may concern" to appear before James Cass, a notary public, at Cayucos, San Luis Obispo county, California, on December 16, 1890, to offer proof as to the character of said land, and upon the testimony so taken a hearing was ordered at the local office on December 23, 1890. Said notice was duly published for six weeks in a newspaper published in said county. On the appointed day said Jacks appeared with her witnesses, and also Joseph Pereira, who had located a portion of said tract on November 24, 1890, as the Tablos mine. Upon the evidence submitted the local officers held on January 17, 1891, "that said land is valuable for its grazing qualities only," and they recommended "that the application of Miss Jacks to purchase said land be granted."

An appeal was duly taken by said Pereira, and on September 9, 1891, you affirmed the decision of the local officers, adjudging the land "to be more valuable for agricultural than for mining purposes," but further holding that "as to Jacks' application to purchase from the State, that is a matter over which this Department has no jurisdiction, and, therefore, would not presume to dictate as to whom the State should sell its lands."

An appeal by Pereira has brought the case to this Department.

By the seventh section of the act of March 3, 1853, (10 Stat., 244), sections sixteen and thirty-six of the public lands of California were granted to that State "for the purposes of public schools."

In the case of *Mining Company v. Consolidated Mining Company* (102 U. S., 167), this grant was held not to cover mineral lands, but

that such lands were, by the settled policy of the general government, excluded therefrom. In that case the court say (p. 175), "the land in controversy being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant."

The plat of survey of this land was approved by the United States surveyor general for California May 23, 1871.

The completion of the survey must be taken as the date when the grant of this land to the State as school land took effect, if it was then non-mineral land. *Cooper v. Roberts* (18 How., 173); *Silver Cliff v. Colorado* (Copp's Mineral Lands, 279); *Virginia Lode* (7 L. D., 459).

In the latter case it is said that the reason of the rule is that the survey "marks out and defines the lands subject to the State's grant." The real question at issue is, therefore, whether this land was or was not mineral land at the completion of the survey in 1871, having been returned as mineral by the United States surveyor general.

In the assignment of errors the following allegations, *inter alia*, set forth the grounds of appeal,—

That the records of the General Land Office show that in 1879 the State of California made the same request for the S. W. $\frac{1}{4}$ of this section, that the county clerk of San Luis Obispo county was appointed to take testimony. That after a thorough investigation, in which the testimony of experienced miners was given, and the quantity of quicksilver taken out was given, the land was declared by the register to be mineral in character. The proof was so conclusive that there was no appeal from this decision.

That the records of the land office also show that in 1887 an application was made to the register of the United States land office for a hearing to show that the S. W. $\frac{1}{4}$ of this section was non-mineral in character. Mr. M. D. Hyde was attorney for the applicant. This hearing the register refused to grant, and the Commissioner refused to order a hearing.

Attached to this appeal and marked exhibit "B" is a copy of the correspondence between the surveyor general of California, register of the U. S. land office and Commissioner of the General Land Office.

It will thus be seen that the United States land office authorities entirely refused to grant any hearing of the case in which the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ was involved, deeming the searching and thorough hearing had in 1879 conclusive, as to the mineral character of the land.

The exhibit referred to shows that on February 11, 1887, the State surveyor general of California presented an application to the local officers in which he claimed said southwest quarter "as school land inuring to the State in place" and stated that "application to purchase said land having been made to the State of California by Thomas Bingham, of Cambria, I hereby request that you will set a day for a hearing to determine the character of said land."

On March 3, 1887, the register of the local office replied, saying—

I have received the letter of the Com'r Gen'l Land Office dated 9 Feb'y 1882, (letter N) and I find that there was a trial ordered by the register and receiver of this district, before the county clerk of San Luis Obispo county on the 23d July, 1879, to prove the non-mineral character of this land, and that the register and receiver de-

cided on 14th Aug't that its proof had failed, and that the land "should still be reserved as mineral land." There was no appeal from this decision. Under this authority I decline any further consideration of the subject, and return herewith your letter of 11th ult.

Upon the receipt of this letter the Deputy State Surveyor General wrote a letter dated March 4, 1887, to the Commissioner of the General Land Office, stating the fact that his application to the local office for an investigation had been declined, saying—"We desire to submit to you that the failure of the State claimant for said land to make required proof in 1879 should be no bar to another State claimant being allowed to submit proofs at this time," and asked for proper instructions.

On April 26, 1887, the Assistant Commissioner of the General Land Office replied *inter alia*, as follows: "I have to advise you in reply that the matter is not regularly before me for action, and that I must decline to pass upon the questions involved, as now presented." No further action seems to have been then taken.

From this recital it appears that on July 23, 1879, a hearing was had to determine the character of the land, and that on August 14, 1879, the local officers decided that the return made by the surveyor general that this land was mineral was correct, and no appeal has been taken from this decision. It further appears that in 1887 a second application by the State of California for an investigation to determine the character of the land was denied by the local office March 3, 1887, on the express ground that the question had already been decided by the local officers in 1879. No appeal was taken from this second adverse decision, and on application to your office, any further action in the matter was declined.

In the present investigation the evidence submitted was directed to the character of the land as it existed at the date of the hearing, and not as it was when the grant to the State took effect in 1871. The evidence shows that the land had been formerly worked for quicksilver, but for two years before the hearing had been practically abandoned. There is nothing in the evidence which shows that the land was not mineral upon the completion of the survey, or what was then its character. The records show that at one time the State of California entered other land in lieu of the land in dispute, which entry was afterwards cancelled. This taking of indemnity land shows that the State then recognized the mineral character of this land. I am of the opinion that this land never passed to the State of California under the school section grant, which only covered land which was non-mineral at the date of the completion of its survey.

Your judgment is reversed.

HOMESTEAD ENTRY—STONE LANDS.**JAMISON v. HAYDEN.**

A homestead entry of land that has no value except for the stone it contains, and made with speculative intent to secure the quarries thereon, opened and developed by others, must be canceled for want of good faith on the part of the entryman.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 8, 1892.

On September 24, 1889, Thomas Jamison made a homestead entry for the SW. $\frac{1}{4}$ of sec. 6, T. 3 N., R. 70 W., Denver, Colorado. One hundred and twenty acres of the tract had previously been located by Hayden and members of his family as placer mining ground, containing building stone, and on January 10, 1890, Benjamin F. Hayden offered to file his mineral application for the land thus located. The register and receiver refused to receive the application, because of the entry of Jamison. Hayden then withdrew his mineral application and filed a contest against said entry, alleging—

That the said land is more valuable for mining than agricultural purposes; that said tract is not settled upon and cultivated by said party as required by law, and that said homestead entry was made after there was a placer mining location made on the same and said land was opened up in several places for stone quarrying purposes and building and flagging stone disclosed, and known to said Jamison.

Thereupon the local land officers issued a notice which was served on the entryman, summoning him to appear at their office on February 13, 1890, "to respond and furnish testimony concerning said alleged failure, etc."

On June 7, 1890, the local officers, after considering the case, held that—

no application for a hearing to determine the character of the land was then made, but an affidavit of contest against the homestead entry upon the land was filed containing allegations to the effect that the land was more valuable for mining than agricultural purposes. Abandonment of the land is not alleged.

There is nothing on file in this office to show that the contestant is entitled to consideration as a mineral claimant, proof of posting, certificate of location, etc., being absent. We are of the opinion that the case is not regularly before the office, and that no jurisdiction has been obtained in the matter. . . . The contest is therefore dismissed.

Hayden appealed to you, and after considering the case, on November 4, 1890, you reversed the judgment of the register, stating that—

I do not think the case should be thus summarily disposed of. The contestant did file an affidavit of contest, in which he alleged such matters as would be contained in a formal application for a hearing. It must have been considered by your office at the time as equivalent to an application for a hearing, for you issued notices to the parties to appear and offer testimony, which they did, and before your decision was rendered you received and doubtless considered arguments of counsel affecting the merits of the controversy.

You held that the tract was most valuable for its minerals, and that the homestead entry should be canceled. Jamison has appealed from

your judgment to this Department, alleging substantially that contestant was not entitled to have a hearing ordered on his charge against the entry, because his interest in the land was not shown; that the tract involved was subject to entry under the homestead law, notwithstanding the existence of certain stone quarries; that if a portion of the tract should be determined to be mineral land then a segregation should be made, etc.

Whether the mineral applicant's interest is shown by the record or not, his affidavit brought in question the character of the land, and the government, being an interested party, will treat this information at least as sufficient upon which to base an inquiry as to the character of the land. The filing of the affidavit was a protest against the appropriation of land under the homestead laws that was valuable for the stone it contained.

The hearing was attended by the entryman and his witnesses and from the evidence submitted, I conclude that the land has no value except for the stone it contains.

Stone quarries have been opened on the land in ten different places, and valuable flag and building stone found to exist. Thousands of dollars worth of stone has been shipped from these quarries at a profit. These quarries were known to exist when the homestead entry was made. Jamison had worked in them, and he knew that there was not a half acre on the whole claim that could be plowed, and that nothing could be raised on the ground even then without irrigation, which was practically impossible by reason of the elevation of the land above the water supply. It was claimed that the land had some value for grazing purposes, but the evidence shows that it is almost valueless for that purpose.

Without discussing the claims of the contestant to a right to take the greater portion of the tract under his placer location, I am convinced that the homestead entryman is not acting in good faith in the matter of his entry, and that he made it for the sole purpose of getting possession of these valuable stone quarries. It has been held that a homestead entry may be made for land that has on it a stone quarry (*Keller v. Bullington*, 11 L. D., 140), but in that case the land had an agricultural value also. In the case at bar Jamison knew that the land had no value other than for its stone, and I think he took it on speculation, hoping to secure the stone quarries. He knew that fine placer locations had been made on the land, and that it was largely in the possession of others. I am satisfied that he has not acted in good faith, and that his entry should be canceled.

This land may now be properly entered either as placer or as stone land under the act approved August 4, 1892, (Public No. 199), which extends the timber and stone act of June 3, 1878, to all the public land States, and provides that land valuable for the building stone it contains may be entered under the placer law.

Your judgment of November 4, 1890, is affirmed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES v. HINMAN ET AL.

A mortgagee is not entitled to the benefit of the confirmatory provisions of section 7, act of March 3, 1891, through a prior encumbrancer, where no privity exists between said parties.

A mortgagee cannot be considered a *bona fide* purchaser under said section where at the date of the mortgage the entry is held for cancellation on the report of a special agent.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 9, 1892.

On March 27, 1884, the pre-emption cash entry of Charles E. Hinman, for the SE. $\frac{1}{4}$, Sec. 35, T. 129 N., R. 56 W., Fargo, North Dakota, was held for cancellation upon the report of a special agent, and was finally canceled March 9, 1885. Upon application of claimant, the case was re-opened July 14, 1885, but action on the same was suspended until February 2, 1888, when, upon a second application of the entryman, the local officers were directed to proceed with the hearing on the charge of the special agent that the entry was illegal and fraudulent, which was had May 28, 1891.

At the hearing the entryman made default, the transferee alone appearing, and claimed that the entry is confirmed by the 7th section of the act of March 3, 1891.

From the testimony the local officers found that the entryman had not complied with the law, but held that the entry should be confirmed and patented under the 7th section of the act of March 3, 1891. You concurred in their finding that the entryman did not comply with the law as to settlement and improvement on the land, but reversed their decision holding that the entry was confirmed by the 7th section of the act aforesaid, and held the entry for cancellation. From this decision Julia P. Carrington, the transferee, appealed, alleging the following grounds of error:

1. That the Honorable Commissioner erred in reviewing and reversing the decision herein made by the Honorable register and receiver, when no appeal was taken from their decision.
2. The Honorable Commissioner erred in assuming and holding that appellant, as a bona fide purchaser of the mortgage in question, was not entitled to all the rights of the mortgagee from whom she purchased.
3. The Honorable Commissioner erred in assuming and holding in effect that the mortgage given on July 21, 1883, for \$250.00 and interest had been paid, and that its payment by Penney, with intent to secure a lien on said land, operated to defeat his lien.

The sole question presented by this appeal is, whether this entry was confirmed by the 7th section of the act of March 3, 1891, there being no exception taken to your decision that the entryman failed to com-

ply with the law as to settlement and improvement, which is clearly sustained by the evidence.

The facts upon which the mortgagee claims confirmation under the act aforesaid are as follows:

It appears from the record of deeds of Sargent county, North Dakota, that on July 21, 1883, Hinman, the entryman, and his wife, executed a mortgage to Laura M. Chamberlain upon the tract in controversy, the consideration being \$250.00; that on May 14, 1888, a release or satisfaction of said mortgage was executed by Laura M. Chamberlain to Hinman and wife, which was not placed of record until August 8, 1888. On the day last named, a mortgage was executed by Hinman and wife conveying the tract to T. E. Penney for \$495.00, which was then placed of record.

Penney, the second mortgagee, states in his affidavit that the satisfaction of the prior mortgage was delivered to him and filed for record the same time that his mortgage was executed, and "on delivery to him of such satisfaction he paid the prior mortgagee the amount due on said mortgage out of the \$495.00."

It also appears that on October 20, 1888, Julia P. Carrington, the transferee in this case, purchased the mortgage executed August 8, 1888, for the sum of \$495, the consideration named therein.

Under the facts stated, she claims that the payment of the amount due on the prior mortgage by the second mortgagee operated as an equitable assignment of such mortgage, and subrogated him to all the rights of the original mortgagee, and that the rights Penney thus acquired were transferred to her by the assignment of his mortgage.

The doctrine of subrogation has no application to the question presented by this appeal. While the payment of an amount due on a mortgage may operate as an equitable assignment of it and subrogate the payor to all the rights of the mortgagee as against the mortgager, the facts in this case show that Penney did not stand in any relation to either the parties or the premises that required such transaction to operate as an assignment in order to protect his interest. The payment of the second mortgage by Penney was for his own benefit, and was made not from his own funds, but from the proceeds of the sum loaned upon a mortgage made to Penney by the claimant. The prior mortgage was discharged and satisfied of record, in order that his own mortgage might have priority. His rights were not dependent upon it, and there was therefore no reason why the payment of it should operate as an equitable assignment to protect any rights he then had or acquired by the transaction. There was no privity between Penney and the prior mortgagee, and his rights can only take effect from the date of his mortgage. It was therefore not confirmed by the 7th section of the act aforesaid. Besides, at the date of his mortgage and when he first advanced any money upon the faith of the entry, it had been held for cancellation upon the report of a special agent, which was then pend-

ing and which was also pending when the mortgage was transferred to Julia P. Carrington.

Neither the mortgagee or his transferee could therefore be considered *bona fide* purchasers within meaning of the act.

Your decision is affirmed.

TIMBER LAND—ACT OF JUNE 3, 1878.

WARD *v.* MONTGOMERY.

Lands that have once been offered and subsequently raised to double minimum, and not re-offered, fall within the class of lands subject to entry under the timber land act, namely, "which have not been offered at public sale according to law."

The provisions of said act are applicable to unoffered land chiefly valuable for its timber, where said timber is so extensive and dense as to render the land as a whole, at the date of the sale, substantially unfit for cultivation.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 10, 1892.

I have considered the case of Rawzewed Ward *v.* Henry M. Montgomery on appeal by Ward from your decision dated August 19, 1891, affirming the action of the local officers at Vancouver, Washington, recommending that the timber land entry No. 3008 of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 9 N., R. 1 W., made by said Montgomery on March 21, 1889, should remain intact, and dismissing the claim of said Ward to said land under the pre-emption laws.

The record shows that Montgomery, on May 21, 1887, filed his timber application for said land, and on July 30, following offered his final proof in support thereof, which was rejected by the local officers "for failure to show that the land was not agricultural in character," which decision was affirmed by you, but was reversed by this Department on appeal February 27, 1889, (L. and R., Vol. 90, 316). In said departmental decision it was stated that "Montgomery's application should be allowed unless some other reason than the character of the land exists for refusing the same."

The papers were accordingly returned, and on March 21, 1889, final receipt was issued on said proof.

It further appears that on July 21, 1887, said Ward filed his pre-emption declaratory statement for said land, but failed to appear and contest the final proof of Montgomery, having received no special notice of the time and place of making the same. Afterwards, upon the application of Ward, alleging that said entry was illegal, a hearing was had at which both parties were present and offered evidence in support of their respective claims, and the local officers found in favor of Montgomery, as aforesaid.

Counsel for Ward filed a motion for review, alleging, among other things, that "the tract of land belonged to the class of lands denom-

inated 'offered lands,' and was therefore by the terms of the said act not subject to entry thereunder. See the act; also Hon. Commissioner's letter to S. A. J. A. Mundy, of 1887, file in the Vancouver L. O." This motion was overruled by the local officers, and Ward appealed, alleging that the local officers erred—(1) In holding that tract was subject to entry as timber land on account of its agricultural character. (2) In not holding that said entry was illegal because the land was at the date of Montgomery's application "offered land." (3) In holding the entry intact because the land when cleared will and does produce good crops. (4) In holding the entry intact because at the date of the entry Ward had improvements on the land and was actually residing thereon with his family. (5) In not holding that the entry was illegal, because the pre-emption filing of Ward was of record in the local office "fourteen days" prior to the date of said proof, and no special notice was served upon him of making said proof. (6) In refusing to grant the motion for review for the reasons stated in the motion, and also because the register did not read and consider the whole record in the case, but simply concurred in the opinion of the receiver.

You decided that the first three allegations of error were not well taken, because in said departmental decision it was held "that this particular tract was properly subject to sale under the act of June 3, 1878;" that it does not appear that there was any improvement or occupation of said tract at the date of Montgomery's said application; that the decision of the local officers was signed by each, and it is stated by them that "from the testimony submitted, which we have carefully examined and considered, we are of the opinion that the contestant, Ward, has failed to sustain his case, and that the entry of Montgomery should remain intact and the claim of Ward be dismissed;" that the allegations and testimony submitted at the hearing were fully considered in your letter of May 26, 1891, and that the appeal must be dismissed.

In his appeal from your decision he insists that it was error to hold that said departmental decision was a final adjudication that said tract was subject to said timber land entry; that said land was of the class denominated "offered lands" and hence under the express terms of said act was not subject to entry as timber land; that the testimony showed that the land when cleared will produce crops when cultivated in the ordinary manner, and for this reason was not subject to said entry; that said tract was not subject to said entry for the additional reason that the applicant had been residing thereon for fourteen days immediately prior to the allowance of said entry under his said filing, and no special notice was given him as required by the regulations of the Department in such cases (citing paragraph 14, of circular of May 21, 1887, 6 L. D., 114).

The only serious question presented by this record is whether the land was of the class denominated "offered lands" at the date of said entry, and on that account not subject to entry as timber land. This

question was not before the Department when Montgomery's said proof as to the character of said land was considered, and was not passed upon. From an inspection of your records it appears that said township was offered in 1863 and falls within the primary or granted limits of the grant to the Northern Pacific Railroad Company by the act of Congress approved July 2, 1864, (13 Stat., 365) and joint resolution of May 31, 1870, (16 Stat., 378) and by the terms of said grant it is declared that "the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale." The effect of this provision is to take said township out of the class of "offered lands" and prevent the tracts therein from being sold until duly offered. It does not appear that this tract was ever offered for sale at public auction at the enhanced price, and hence it falls within the class mentioned in the timber land act, namely, "which have not been offered at public sale according to law."

In the case of the United States *v.* Budd (43d Fed. Rep., 630) which involved a tract in section 30, in said township, and which had been patented under said act, it was contended in a suit by the United States to cancel the patent for said land that "the land had been, at a time prior to the date of the statute, offered for sale."

The court overruled this contention, saying—

In addition to the above considerations, I hold that there was in fact no such error committed in allowing Budd's application under this statute as counsel for the government have claimed. I think a reasonable construction of the statute would limit the application of the words, "and which have been offered at public sale according to law," to lands which at the date of the act belonged to the class of unoffered lands, as contradistinguished from what, in the practice of the land department, is known as "offered" lands; that is, lands which are subject to private cash entry at the minimum price. By the insertion of this clause in the statute no more was intended than to avoid the absurdity of making a law providing for the sale of land at the price of \$2.50 per acre, under prescribed limitations and restrictions, which, under existing laws, were already subject to sale at one-half that price, without the limitations and restrictions. So viewing the statute, as this particular tract of land had been withdrawn from sale at a time prior to the date of the statute, its *status* was at the date of that act that of unoffered lands, and if otherwise of the character described in section 1 was subject to sale under this statute, and the sale of it to Budd was lawful.

This case was appealed by the United States, and on March 28 last the decision of the court below sustaining the validity of said patent was sustained, (144 U. S., 154).

The question whether the tract in controversy was "offered" or unoffered land was not argued by the counsel for the United States, nor was it referred to by the court in its decision of the case. The court did, however, pass upon the question of the character of the lands within the meaning of the words, "valuable chiefly for timber but unfit for cultivation," and held that it included lands unfit for cultivation at the time of such sale. Mr. Justice Brewer, speaking for the court upon this question, which was concurred in by all the members of the court

(although there was a dissenting opinion upon another point) said (op. 167)—

If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be, but what is. Lands are not excluded from the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of this act. The significant word in the statute is "chiefly." Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.

The evidence is conflicting as to the character of the land, but tested by the rule laid down by the court in the Budd case (*supra*), there can be no question but that said land was "unfit for cultivation" at the date of the sale. The reference of Ward, in his motion for review, to the letter of your office to Special Agent Mundy, of 1887, on file in the Vancouver office, as showing that "offered lands" are not subject to entry under said timber land act is so indefinite that, as no day of the month is given or copy of said letter furnished, it has been impracticable to verify the same. I have, however, caused an examination of the letters of your office to said Mundy for 1887 to be made, and it appears that on December 22, 1887, you advised him that in response to his letter of November 24, 1887, "offered land is subject to entry under the same conditions as unoffered land under the act of June 3, 1878," and you inclose him a copy of your letter to United States Attorney White on the subject.

This advice appears to be in conflict with the express provisions of the law, as well as the previous rulings of the Department. See Circular of August 13, 1878 (2 C. L. L., 1456); Gen. Circulars, October 1, 1880, (id., 277) and March 1, 1884, (p. 32); Circular of May 21, 1887, (6 L. D., 114); Gen. Circular of February 6, 1892, (p. 35).

The fact that notice was not specially given to said Ward when said entry was allowed would not of itself render the entry illegal, since it appears that his improvements and filing were made after Montgomery had made his application for said land; and besides, from the evidence taken at the hearing, it is found that Montgomery was the prior legal applicant, and the land was subject to his said application at the date thereof.

Upon a careful examination of the whole matter it is considered that your conclusion is correct, and the same is accordingly affirmed.

FOREST RESERVATION—ACT OF MARCH 3, 1891.

INSTRUCTIONS.

A withdrawal of forest lands under section 24, act of March 3, 1891, does not remove such lands from the control of the Department; and for the execution of the provisions of the law, authorizing said withdrawal, the Department may make all necessary rules and regulations.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 10, 1892.

I am in receipt of your letter of August 31, 1892, submitting a clipping from the Devil's Lake Inter-Ocean, and request of the clerk of your office, detailed to examine the Turtle Mountain timber land reserve in North Dakota, asking that he be authorized to have copies of said article printed for distribution. You make no recommendation and give no expression of your views as to the necessity of complying with the request made, and I am without information highly necessary to action thereon. Any information that is to be given the public should, both as to form and matter, meet your approval and have your official sanction. I must decline to pass upon the matter as now submitted, and will return the papers for such action as may seem proper to you.

In said letter of August 31, you ask my opinion upon another matter, saying:

Section 24, of the act of March 3, 1891 (26 Stat., 1095) authorizes the President to establish forest reservations. And in view of the wording of said section, I respectfully request your opinion as to whether the President's proclamation makes the reservation absolute, and prevents the supervision of the Department and the promulgation and enforcement of rules and regulations respecting the same, without further legislation by Congress conferring such authority as was done in the case of the national parks in California by the acts of September 25 and October 1, 1890.

You do not say what occasion has arisen to make it necessary to determine this question, and I am left without the benefit of an expression of your views on the subject.

By the act of September 25, 1890 (26 Stat., 478) the land therein described was withdrawn from settlement or sale "and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people," and to accomplish that purpose the Secretary of the Interior was given full control over the park, with authority to make rules and regulations for the care and management of the same, and to lease small parcels of grounds at such places as should require the erection of buildings for the accommodation of visitors. The provisions of the act of October 1, 1890 (26 Stat., 650) are to the same effect, although the lands are set apart "as reserved forest lands" instead of for a public park and pleasure ground. Both of these acts provide for the improvements of the reservation to the extent of the proceeds of the leases and other revenues derived from any source in connection with the reservations. The act of March 3, 1891 (26 Stat.,

1095) makes no provision for leasing any portion of the grounds of any reservation that may be made thereunder, nor for the improvement thereof. The object seems to be the preservation of the timber simply, and not creation of a park or pleasure grounds. By this latter act no specific reservation is created, but the whole matter rests in the discretion of the President. The lands are not set apart for any specified purpose, nor dedicated to any certain use. The withdrawal may be but temporary, and the lines of any reservation made thereunder may be changed at the will of the executive. In other words, no intention of changing the control over such lands as may be included in the reservations which may be made under the provisions of this act is indicated. They still remain public domain of the United States in the sense that they are not disposed of or dedicated to any specific use, although for the time being withdrawn from the category of lands subject to appropriation under the laws providing for the disposal of the public domain. I think it clear that these lands remain under the control of this Department, and that there is authority to make all rules and regulations proper and necessary to carry into execution the provisions of the law authorizing the withdrawal of such lands and to the realization of the objects of that legislation.

Overruled,

HOMESTEAD—ADDITIONAL—ADJOINING FARM.

JOHN W. COOPER ET AL. 25 L.R. 113

The right to make additional homestead entry under section 6, act of March 2, 1889, is limited to cases where the original entry was made prior to the passage of said act.

An adjoining farm entry under section 2289 R. S., can not be made by one who derives title to the original farm through the provisions of the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 10, 1892.

This appeal is filed by John W. Cooper, transferee, from your decision of November 11, 1891, holding for cancellation additional homestead entry of Albert Cooper, for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 12, T. 31 N., R. 50 W., Chadron, Nebraska.

In this case original entry was made by Albert Cooper, July 11, 1889, of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 12, and, on July 23, 1891, he made additional entry of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section as additional to his original entry, under the act of March 2, 1889 (25 Stat., 854), and made final proof on the entire entry September 7, 1891, and final certificate issued for the NE. $\frac{1}{4}$ of said section.

You held the entry for cancellation, for the reason that the original entry having been made subsequent to the act of March 2, 1889, the claimant was not entitled to additional entry under said act, and his additional entry was held for cancellation, as well as the final certificate, to the extent of the additional entry.

From your decision John W. Cooper appeals, alleging that he purchased the land embraced in said final certificate from Albert Cooper, and received warranty deed to the same, dated September 9, 1891; that he purchased said property in good faith, and is now residing upon it as his home. He further states that of his own knowledge Albert Cooper continued to reside upon said tract of land with his family for the period of five years immediately prior to September 7, 1891, when he made final proof; that the tract covered by his entry No. 3525 (additional) lies immediately adjoining the land embraced in entry No. 2544 (original), and was entered by said Albert Cooper as an *adjoining farm entry* under section 2289 of the Revised Statutes.

Conceding that the allegations in said appeal are true, there is no error shown in your decision. The entry of Albert Cooper of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 12, as shown by the record, was made as additional to his original entry for the other three forties of the quarter section, under the 6th section of the act of March 2, 1889, which only applied to persons who had theretofore made original entry and have had final papers issued therefor. Circular of Instructions, 8 L. D., 314.

Your decision holding that the entryman was not entitled to make additional entry under the act of March 2, 1889, for the reason that his entry was made subsequent to the date of said act, was not error. But, if it be conceded that the entry was made as an adjoining farm entry under section 2289 of the Revised Statutes, it would have been illegal, for the reason that under said section the claimant must be the owner of the original land, and if his original entry had been perfected, it would still have been illegal, for the reason that "the land owned by a party seeking to make an adjoining farm entry must be owned otherwise than under the homestead law." (Thomas B. Hartzell, 5 L. D., 124.) In other words, the title to the original must not have been acquired under the homestead law.

It was not until the act of March 2, 1889, *supra*, that an adjoining farm entry was allowed as additional to a tract of land entered under the homestead law. By the 5th section of said act such entries were allowed to be made by persons who had "*heretofore* entered less than one quarter section of land," but the act also provided "that this section shall not apply to or for the benefit of any person who, at the date of making application for entry thereunder, does not own and occupy the lands covered by his original entry."

Your decision is therefore affirmed.

*Vacated, 53 I.D. 447; overruled so far as
GLEASON v. PENT. 59 I.D. 416, 452
in conflict*

Motion for the review of Departmental decision of April 12, 1892, 14 L. D., 375, denied by Acting Secretary Chandler, September 12, 1892.

INDIAN LANDS—ALLOTMENTS—MINORS.

INSTRUCTIONS.

There is no authority for the allowance of allotments in severalty to children of the Sac and Fox tribe of Missouri born after the completion of allotments to said tribe.

Acting Secretary Chandler to the Commissioner of Indian Affairs, September 9, 1892.

I acknowledge the receipt of your communication of 30th ultimo, in relation to the allotment of lands to children of the Sac and Fox tribe of Missouri Indians of the Pottawatomie and Great Nemaha Agency, Kansas, who have been born since the lands have been allotted to the tribe.

In response thereto, I transmit herewith an opinion of the Hon. Assistant Attorney General for the Department of the Interior, dated 9th instant, in which I concur, wherein it is held that under existing law the allotments to said children can not be permitted.

OPINION.

Assistant Attorney-General Shields to the Secretary of the Interior, September 9, 1892.

I have the honor to acknowledge the receipt by reference of Acting Secretary Chandler dated August 31, last, of a communication from the Acting Commissioner of Indian Affairs submitting for your consideration the question whether children of the Sac and Fox tribe of Missouri Indians, who were born after allotments were made to the different members of said tribe, are entitled to allotments of land in severalty under existing law.

In said communication it is stated that "the parents of said children are all allotted, and there is no question of any kind that can be raised against their right to receive allotments, except that they were not born when the other members of the tribe made their selections;" that there are about 2,000 acres of land suitable for grazing purposes belonging to the tribe, yet unallotted, and that if the lands are allotted to the children as requested, it will greatly tend towards settling the difficulties now existing in regard to the reservation, and be in accordance with the unanimous wish of the tribe; that the schedules of allotments made to said Indians were approved by you on March 26, 1892, and according to the report of the Indian Office dated March 22, 1892, there was a surplus of 1,615.61 acres; that in view of the provisions of section one of the act of February 28, 1891, (26 Stat., 749) and section five of the act of February 8, 1887, (24 Stat., 388) the acting Commissioner is in doubt whether it is permissible to make "allotments to children

born after allotments have been made to all the members of the tribe then in being;" that he sees no objection to such a course "if it can legally be done under the law."

By said reference my opinion is requested "on the question herein presented."

The question of the amount of surplus lands, after the allotments have once been made, cannot determine the issue. If the law allows a continuous allotment to children born after the allotments have once been made to all the members of the tribe, then there can be no surplus for purchase, so long as there are or may be children to take the same.

But I do not think such is the meaning of the law. By the second proviso to section five of said act of 1887 it is declared—

That at any time after the lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress.

* * * * *

And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

Section six of said act provides—

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

It would seem by the express terms of said section six that the Indians who have received allotments are citizens of the United States; and if so, by the proviso of the fifth section of said act of 1887, their children, born after the allotments under said act, are also citizens of

the United States and are not entitled as Indians to allotments of land in severalty.

The reasoning of my opinions given on June 25, 1890, (12 L. D., 168) upon the questions whether allotments could be made to children of the Peoria Indians, born after allotments had been made to all the members of the tribe then in being, under the provisions of the act of March 2, 1889, (25 Stat., 1013) and also to certain women claiming to be Indians and entitled to allotments under the act of March 3, 1891, (25 Stat., 989-1003—7 A. A. G. Op., p. 51) is equally applicable to the question before me.

I am of the opinion, and so advise you, that under existing law said request cannot be permitted.

PRACTICE—NOTICE—RULE 35.

LE CLAIRE *v.* BIEBER.

Thirty days notice of a hearing before the local office is sufficient though an earlier date is named in the notice for taking testimony elsewhere under rule 35 of practice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 13, 1892.

I have considered the case of Algeron F. Le Claire *v.* Margaret E. Suydam (nee Bieber) upon the appeal of the latter from your decision of October 3, 1891, holding for cancellation her homestead entry for the NW. 1 $\frac{1}{4}$ of Sec. 2, T. 125 N., R. 73 W., Aberdeen, South Dakota, land district.

The record shows that said Bieber made homestead entry for the tract in controversy on the 29th day of March, 1886. On October 14, 1890, Le Claire filed his affidavit of contest, charging abandonment. Notice of contest was issued on the 16th day of January, 1891, fixing the date of hearing before the local officers on the 17th day of March, 1891. On the 14th day of March, 1891, the contestant filed in the local office an application for a continuance on the ground that his witnesses resided near the land in contest, which is more than fifty miles from the local office, and at the same time he asked that a new notice of contest be given. The local officers granted the continuance and issued a new notice fixing the 7th day of May, 1891, for the parties to take their testimony before a notary public at Bowdle, South Dakota, and setting the 14th day of May, 1891, as the date for the hearing at the local office. Service of said notice was accepted by the entryman on the 10th day of April, 1891. Pursuant to the notice the contestant appeared before the notary at the time fixed. The notary continued the case until the next day—May 8—at which time the contestant submitted his testimony. The entryman made default. At the time set for trial before the local

officers they considered the case upon the testimony submitted and found for the contestant and recommended the entry for cancellation.

The entryman appealed.

On the 3d day of October, 1891, you affirmed the judgment of the register and receiver and held the entry for cancellation from which she appeals.

The only error appellant specifies is:—"That the Hon. Commissioner erred in sustaining the local office, and maintaining that notice within thirty days prior to final hearing was ample in said cause." This question was decided by the Department in the case of *McTighe v. Blanchard* (4 L. D., 540), adverse to the claim made in the appellant's argument. Counsel concedes that his contention is inconsistent with that case, and he asks that it be overruled. The reasons he urges in support of his contention, are not sound nor sufficient to warrant or call for overruling said case.

The decision appealed from is accordingly affirmed.

APPEAL—CERTIORARI—HOMESTEAD ENTRY—MINERAL LAND.

SPRATT *v.* EDWARDS.

Withdrawal of appeal from the action of the local officers leaves their decision final as to the facts, the same as though no appeal had been taken.

Certiorari will not be granted where the right of appeal is not asserted by the applicant, nor denied by the Commissioner.

An appeal will lie from the Commissioner's refusal to order a hearing.

The submission of final homestead proof will not preclude a hearing as to the subsequent discovery of mineral on the land involved, where final certificate is not issued, and the General Land Office requires new proof to be made.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 13, 1892.

On the 12th day of June, 1892, the attorney for Frank D. Spratt filed in the Department an application for certiorari in the case of said Spratt *et al. v.* John S. Edwards involving the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1, 2, and 3, of Sec. 26, T. 11 N., R. 2 W., Helena, Montana.

The application is based upon the grounds that:

The ground in controversy was duly located under requirements of the United States statutes and the laws of Montana in May, 1889, by the mineral claimants herein.

The said land having been returned as agricultural by the surveyor general, March 14, 1890, John S. Edwards made homestead entry No. 4578, covering said land. February 6, 1891, F. D. Spratt filed protest against the allowance of final proof upon said entry and thereupon a hearing was duly had and decision rendered by the local officers July 8th, 1891, adverse to the mineral claimants.

Appeal from said adverse decision was duly filed, but was subsequently withdrawn, and on February 2d, 1892, mineral claimants filed with the Hon. Commissioner their application for a re-hearing made under oath and upon the ground of newly discovered evidence.

In acting upon said application for a rehearing, the Hon. Commissioner, under

date of April 28, 1892, rendered a decision, a copy of which accompanies this petition. Said decision refuses to grant the rehearing prayed for and closes the case against the mineral claimants under Rule of Practice 48, leaving applicants no other recourse except under issuance of the writ hereby applied for.

The appellants having voluntarily withdrawn their appeal from the judgment of the register and receiver, their decision as to the facts in issue became final, the same in all respects as if no appeal had been taken, for by such withdrawal your appellate jurisdiction in the case ceased. See *Kendall v. Hall*, on review (13 L. D., 221). Thereafter there was no error in your treating it the same as if no appeal had been taken. There was no error or irregularity in your considering the case under rule 48, of the Rules of Practice. Inasmuch as your finding, that "none of the reasons mentioned in said rule for disturbing the same appearing," is not in any manner assailed or shown to be erroneous by the application under consideration, such finding is, therefore, conclusive upon the parties to the controversy.

An application for certiorari under Rule 84, of the Rules of Practice is required to fully and specifically set forth the grounds upon which it is made, and should state matters sufficient to bring it within some one or more of the rules applicable to such proceeding. The matters stated in this application are clearly insufficient to bring it within said rules. In the first place there was no effort to appeal from your decision denying the motion for rehearing, which you treated as a motion for a hearing, nor was applicant's right of appeal therefrom denied by you.

In the next place, treating the motion for a rehearing simply as an application for a hearing, the party would have the right to appeal from your refusal to order the hearing, and it appears that he lost that right to be heard on his appeal by reason of his failure to exercise his right of appeal. Under such circumstances, certiorari will not be granted. *Frary v. Frary et al.* (13 L. D., 478).

In your decision you say:

In the case at bar it is true that final certificate has not yet issued, but final proof was regularly submitted, and but for this proceeding final certificate would, in all probability, have issued in due course, hence the entryman's rights, would not be injuriously affected and evidence of the discovery of minerals subsequent thereto would not vitiate his entry.

I am not prepared to assent to this conclusion as applied to the facts in the case. This is a homestead and while the original application when allowed is termed an 'entry,' yet it is not such an 'entry' as can properly be said to amount to a sale until it is completed by compliance with the law on the part of the entryman and satisfactory proof thereof furnished by him, and the issuance to him by the local officers, of the final receipt, which amounts to a sale so far as the mineral character of the land is concerned in agricultural cases.

This is not in conflict with the doctrine announced in the case of *Harnish v. Wallace* (13 L. D., 108), referred to in your decision. That was a pre-emption case in which Harnish asked for a hearing upon the

allegation that the land was mineral in character, but his petition failed to allege that at the time of Wallace's entry, there were situated any "known mines or salines" on the land.

In *Colorado Coal and Iron Co. v. United States* (123 U. S., 307), it was said (page 328), respecting this question:

The question must be determined according to the facts in existence at the time of sale. If upon the premises at that time, there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them, acquired under the pre-emption act can not be successfully assailed. See also *Sullivan v. Iron Silver Mining Co.* (143 U. S., 431), and *Iron Silver Mining Co. v. Mike and Starr Gold and Silver Mining Co.* (143 U. S., 394).

In *Davis v. Weibold* (139 U. S., 507), the same doctrine is announced.

While in this case the finding of the register and receiver, that the land was not mineral in character, became final and conclusive upon the parties, it only became so up to the date of the trial. It had no relation to the discovery of minerals that might thereafter be made prior to the time the government parts with its title to the tract. It was found by you that Edwards had not cultivated the tract as required by law, and your judgment required him to make *new* proof within the lifetime of his entry. If it be true, that such valuable minerals have been discovered on the tract since the hearing, as will make its mineral character appear, I see no objection to the mineral claimants, or other proper party protesting the new proof, on that ground, when Edwards offers it, or upon his failure to offer new proof as required by your decision, to have an opportunity in a proper manner to show its mineral character. If new proof shall be offered and protested on the ground above indicated, the testimony should not be allowed to go back of the date of the trial already had. But if Edwards fails to offer such new proof, then the mineral character of the land should remain open and if these or other parties desire to show such character, they should be permitted to do so without reference to the time its mineral character may be discovered or become known, provided it is before the sale of the tract.

The application for *certiorari* is denied.

RAILROAD LANDS—TIMBER LAND ENTRY.

HARRY SAVAGE.

Railroad lands restored to the public domain by the forfeiture act of September 29, 1890, are not subject to timber land entry under the act of June 3, 1878.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 13, 1892.

On March 14, 1891, Harry Savage tendered his timber land application to purchase the SW. $\frac{1}{4}$ of Sec. 15, T. 2 S., R. 7 E., under the act of

June 3, 1878, (20 Stat., 89), at Oregon City, Oregon. It was rejected by the local officers because the land is within the limits of the grant to the Northern Pacific Railroad Company, forfeited by the act of September 29, 1890, (26 Stat., 496).

An appeal was taken, and by your letter of December 12, 1891, the action of the local officers was affirmed.

An appeal now brings the case before me.

The said forfeiture act declares certain railroad lands "to be a part of the public domain."

The act then provides what disposition of such forfeited lands shall be made. This disposition covers all of such lands, and by necessary implication excludes any other or different disposition of them than as so authorized. Timber land entries are not authorized by the act, and therefore cannot be authorized by the land department. Circular, 12 L. D., 3.

Your judgment is affirmed.

HOMESTEAD—TIMBER CULTURE ENTRY—SCHOOL LAND.

SIMPKINS v. HAYS.

The claim of one who settles upon and improves a tract of land, returned as part of a school section but ultimately held to be excepted from the school grant, and first applies to purchase from the State, and then seeks title under the homestead law on learning that the land belongs to the public domain, is not defeated by an intervening timber culture entry.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 14, 1892.

The land here in question is lots 1, 2, and 3, Sec. 16, T. 2 S., R. 6 W., S. B. M., Los Angeles land district, California, the plat of survey showing said lots having been approved February 21, 1887, a copy of which was filed in the local office February 4, 1888.

The remainder of said section is embraced in the Jurupa Rancho.

In list of August 13, 1868, the State made selection of a section of land in lieu of Sec. 16, T. "3" S., R. 6 W., S. B. M., but in the approved list of June 29, 1869, based upon said selection, Sec. 16, T. "2" S., R. 6 W., S. B. M., being the selection under consideration, was named as the basis, instead of that designated by the State.

The State, however, acquiesced in the action of this Department, by making other selections on April 26, 1875, in lieu of Sec. 16, T. "3" S., R. 6 W., which selections have also been approved, and she is therefore estopped from denying the regularity of the approval of June 29, 1869.

By said approval, the State was fully indemnified for the entire Sec. 16, T. 2 S., R. 6 W., which, under the plat of April 16, 1857, appeared to be all within the rancho.

Otis J. Simpkins, deceased, former husband of the present claimant, learned that a small strip, being the land in question, and embracing 81.24 acres, would, upon the extension of the subdivisional surveys over this township, remain in place as a part of section 16. He made settlement thereon in October, 1883, moving his family into a small shanty then upon the land, and began the erection of a house, which was finished next month, costing between four and five hundred dollars.

In this house they continuously resided for about two years and made other valuable improvements, when, due to his enfeebled condition, they moved to Los Angeles, where he could receive medical attention, and where he died in December 1887.

Since leaving the land in the fall of 1885, crops have been raised upon the land each year by tenants of Simpkins.

Simpkins evidently thought that the land in question inured to the State under the school grant, for in 1884 he addressed the following letter to H. J. Willey, Esq.:

In October, 1883, I established a home with my family in a house on Sec. 16, township No. 2 south, range 6 west, San Bernardino meridian, and have since resided on and improved the same, which is as yet unsurveyed and not platted in land office. But I am informed by a surveyor that survey and plat will be made in a few days. Now, I wish to know how I am to obtain title to this land, and what is necessary as regards residence on it farther.

It is a piece cut by Jurupa Ranch line in this  shape, and contains according to my estimation between 90 and 100 acres.

An early reply will much oblige, as I can not obtain from land office or from county officers any definite information as to how to proceed when survey is once made.

His purpose in settling upon the land is also made apparent by this letter, viz: to secure a home.

After his death, to wit, on February 28, 1888, the present claimant applied to the State to buy this land, and, on September 13, 1888, she received a certificate of purchase.

This was the condition of affairs at the date of the filing of the plat in the local office.

On December 19, 1888, Charles E. Hays offered a timber-culture application for this land, which the local officers transmitted to your office for instructions.

By letter of February 6, 1889, you returned the application for allowance, "provided it is found regular in all other respects, and that there are no valid adverse claims," and the same went of record February 14, 1889, as timber-culture entry No. 2630.

On March 29, 1889, Ellen M. Simpkins applied to make homestead entry of the land under sections 2304-5 and 7 of the Revised Statutes, as the widow of Otis J. Simpkins, deceased, and also to make final proof, dating her residence from October, 1883, and deducting from the five years residence required, three years service of her husband during the war of the rebellion.

This application was considered by your letter "K" of September

18, 1889, which authorized a hearing, the local officers recommending the allowance of her application and the cancellation of Hays' timber-culture entry.

Your decision of July 27, 1891, is adverse to the application of Mrs. Simpkins, and rests upon laches on her part in making claim to the land.

Said decision states:

The records show that from and after February 21, 1887, the land was a part of the public domain, and subject to the claim of the first legal applicant. Mr. Simpkins, it appears, lived for nine months after this fact was made apparent, and died without having applied for it.

After her husband's death, Mrs. Simpkins did not attempt to hold the land by virtue of any right vested in him, but she applied for it, and purchased it from the State as an independent transaction of her own; nor did she, at any time prior to the entry of the land by Hays, attempt to secure it under any law of Congress relating to the public lands. She says she never applied for it at the U. S. land office, because she did not suppose it was government land, as there was no plat in the office, to her knowledge, up to February, 1888.

It seems evident that Mrs. Simpkins made a mistake in applying to the State, instead of to the United States; but, in my judgment, her mistake is now past remedying, and your decision is, therefore, reversed.

The case comes to this Department upon her appeal from said decision.

In the first place, it must be remembered that, until the filing of the plat in the local office, the land can not be said to be subject to entry. This was not until after the death of Mr. Simpkins, and it can not be urged that he was in default in not applying to make entry during his lifetime. I think from what has been before stated that his purpose in settling upon the land has been made apparent, viz: a desire to secure a home. It is true that both he and his wife looked to the State for title, because it seems to have been generally believed that the land belonged to the State, but I do not think this fact can militate against their rights in the premises.

In the case of school lands, the title passes, if at all, upon the identification of the same by the government survey. The land in question was returned as a part of a school section—viz: section 16. The State claimed it, and upon the application of Mrs. Simpkins, sold it to her. Believing her title good, she rested thereon.

Even the local officers had doubts as to the status of the land, and, when applied for by Hays, sought instructions from your office.

It was upon this application that your office held, in letter of February 6, 1889, that the land did not belong to the State, and during the next month Mrs. Simpkins, hearing of your holding, presented the application under which she now claims. The sole reason for the refusal of her application is on account of the timber-culture entry by Hays. At the dates of his application and entry there were improvements upon this land, valued at many hundred dollars, consisting of house,

barn, and nearly the entire tract under cultivation. Hays must have had knowledge of these facts, and can it be held, under the peculiar facts of this case, that this land is subject to the operation of the timber-culture laws, and as against the owner of said improvements, who is duly qualified and seeking to make entry of the land? I think not.

I am aware that it has been held that occupancy and possession of land by one who asserts no record claim thereto within the period provided by law does not exclude such land from entry under the timber-culture law, but, in the present case, I do not think that claimant can be held to be in default in the matter of asserting her claim.

It is true that this land, not belonging to the State, was legally subject to entry as soon as the approved plat of survey was filed in the local office, but, until your office formally held that it did not pass to the State, no application would be received by the local officers, and it would, to my mind, be a great injustice to hold her in default for not applying to make entry before it had been determined not to belong to the State.

I must therefore reverse your decision, direct the cancellation of Hays' timber-culture entry and the allowance of the entry by Mrs. Simpkins as applied for.

OKLAHOMA LANDS--SECOND HOMESTEAD.

D. A. HARVEY.

The right to make a second homestead entry is not conferred by the act of March 3, 1891, opening to entry the Cheyenne and Arapahoe lands in Oklahoma.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 12, 1892.

Yours of August 24, 1892 was duly received. You ask the opinion of the Department as to—

whether those who have for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as a "commutation provision" of the homestead law are qualified to make a homestead entry upon the Cheyenne and Arapahoe lands.

The provisions prescribing how said lands shall be disposed of are found in section 16 of the act of March 3, 1891 (26 Stat., 989-1026), from which I quote as follows:

That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall, by operation of law or proclamation of the President of the United States, be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply).

There is nothing in these provisions to take the lands in question out of the general rule as to the allowance of second homestead entries,

which is that one who makes a homestead entry thereby exhausts his rights under that law, and will not be allowed to make a second entry. There are exceptions to that rule, as where one has made entry, after the exercise of due diligence on his part, of land not habitable, or where the first, through no fault of the claimant, can not be carried to patent, or where the first was not for the land intended to be taken, the entry-man having exercised due care in the matter, etc. The act of March 2, 1889 (25 Stat., 854) provides for second homestead entries by the class of persons therein described.

The commutation of a homestead entry is held to be an entry under the homestead law, and therefore one who has acquired title to a tract of land by that process is held to have exhausted his homestead right, and can not be allowed to make another homestead entry. Frank J. Lipinski (13 L. D., 439). When the Seminole lands were purchased, it was provided they should be disposed of under the homestead laws only, with the proviso, "That any person who having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands," (act of March 2, 1889, 25 Stat., 980-1004), and it was probably a knowledge of this that caused the inquiry as to these Cheyenne and Arapahoe lands; but as we have seen, no provision similar to that above quoted from the act of 1889 was inserted in that of 1891. Each case must be disposed of on its merits as it comes before the Department, and it is impossible to give any general rule to cover all cases, but the foregoing principles will apply to cases coming within them.

FORFEITED RAILROAD LANDS—RIGHT OF ENTRY.

SOUTHERN PACIFIC R. R. CO. v. THOMAS.

A settler on railroad lands forfeited by the act of September 29, 1890, is entitled under section 2, of said act, as amended by act of February 18, 1891, to a preferred right of entry for six months from the promulgation of instructions relative to the restoration of said lands.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 16, 1892.

This case arose upon the application by John Thomas to make homestead entry of lots 1, 2, 3, 4, and 5, Sec. 5, T. 14 S., R. 6 E., M. D. M., San Francisco land district, California, accompanied by affidavits tending to show that said tracts were excepted from the grant for the Southern Pacific Railroad Company, by reason of the settlement claim of one Francisco Luna, existing at the date of the definite location of the road.

Upon the testimony taken at the hearing had on said allegations, the

local officers held the land to have been excepted from the grant, and your decision of March 11, 1890, sustained that of the local office.

Upon appeal this Department, in its decision of June 15, 1891, modified your decision and held that the settlement claim of Luna did not extend to lots 1, 2, and 5, and rejected the application by Thomas as to said lots.

It appears that Thomas was notified of said decision by registered letter, April 1, 1892, and on the 28th of that month he filed in the local office a motion for review, which is now under consideration.

The first ground upon which the motion is based is as follows: "The land embraced in this hearing is opposite the unconstructed portion of the road between Tres Pinos and Alcalde, and was restored to the public domain by the act of September 29, 1890."

Upon inquiry at your office, I learn that said lots are opposite the unconstructed portion of the road, and were included in the restoration of July 27, 1892. The company can therefore have no claim to them, and, as Thomas appears to be a resident upon the land, having settled thereon in 1875, it would seem that, under section 2 of the forfeiture act of September 29, 1890 (26 Stat., 496), he is entitled to a preferred right of entry for six months from the promulgation of instructions by your office relative to the restoration of said lands. See amendatory act of February 18, 1891 (26 Stat., 764).

Should he renew his application within the time stated, he will be permitted to enter all the lands originally claimed, and the former decision of this Department, in so far as it may be in conflict herewith, is recalled.

FORFEITED RAILROAD LANDS—ACT OF JUNE 25, 1892.

INSTRUCTIONS.

The act of June 25, 1892, amending the forfeiture act of September 29, 1890, extends the period within which "actual residents" under section 3, of said act are entitled to the right of purchase until September 29, 1893. The amendatory act of February 18, 1891, so far as in conflict with the later act is thereby repealed.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 16, 1892.

I am in receipt of your letter of August 10, 1892, asking for a construction of the act of June 25, 1892, amending the act of September 29, 1890, (26 Stat., 496), as follows—

That section three of an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," be and the same is, amended so as to extend the time within which persons actually residing upon lands forfeited by said act shall be permitted to purchase the same in quantities and upon the terms provided in said section at any time within three years from the passage of said act.

Inasmuch as "said act" was passed September 29, 1890, (the date of its approval) "three years from the passage of said act" would expire on September 29, 1893.

Such was the construction given to the above cited act by Commissioner Carter in his letter to this Department of January 16, 1892, which was transmitted to the chairman of the Senate Committee on Public Lands on January 23, 1892, with the approval of this Department. See Congressional Record, Fifty-second Congress, First Session, p. 5755.

It will be observed that the act above cited makes no reference to the act of February 18, 1891 (26 Stat., 764), which amended the act of September 29, 1890, as follows:

So that the period within which settlers, purchasers, and others under the provisions of said act may make application to purchase lands forfeited thereby or to make or move to perfect any homestead entries which are preserved or authorized under said act, when such period begins to run from the passage of the act, shall begin to run from the date of the promulgation by the Commissioner of the General Land Office of the instructions to the officers of the local land offices, for their direction in the disposition of said lands.

This act of February 18, 1891, still applies to the second section of the act of September 29, 1890, and remains in force as to that section, but does not apply to the third section of said act so far as it relates to "persons actually residing upon lands forfeited by said act," because its operation as to said third section so far as actual residents only are concerned, is repealed by implication by the act of June 25, 1892, being inconsistent therewith.

The "period" to make homestead entry mentioned in the second section of the act of September 29, 1890, is "within six months after the passage of this act," which period is extended by the act of February 18, 1891, so that it begins to run from the date of said "promulgation" instead of the "passage" of the act.

The period for purchase by persons "in possession" of lands mentioned in the third section of the act of September 29, 1890, is "any time within two years from the passage of this act," which period, in the cases of actual residents only is extended by the act of June 25, 1892, to "any time within three years from the passage of said act," which is a specific direction that in such cases one year longer time be given to purchase, and therefore that in those cases the said period runs to September 29, 1893. The act of February 18, 1891, is still in force as to said third section of the act of September 29, 1890, as to persons merely "in possession" of said lands, but who are not "persons actually residing upon lands forfeited by said act," which latter persons only are affected by the act of June 25, 1892.

PRACTICE—AFFIDAVIT OF CONTEST—CORROBORATION.

EPPS *v.* KIRBY.

A corroboratory affidavit which sets forth that the affiants are acquainted with the land in question and believe the statements contained in the affidavit of contest are true, is sufficient under rule 3 of Practice.

Concurring decisions of the local and General Land Office as to questions of fact are generally accepted as conclusive by the Department, where the evidence is conflicting.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 16, 1892.

On the 23d of October, 1885, Brandon Kirby made desert land entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 24, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, T. 10 S., R. 13 E., the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 19, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 10 S., R. 14 E. (unsurveyed land), in Las Cruces land district, New Mexico.

On the 21st of April, 1888, Henry C. Epps filed an affidavit of contest against said entry, except as to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24, and on the 8th of September, 1891, you affirmed the decision of the local officers, and held for cancellation that portion of Kirby's entry contested by Epps. An appeal from your decision brings the case to the Department.

While the errors complained of in your decision are enumerated in six specifications, only two questions are presented for consideration by the appeal. These are the sufficiency of the contest affidavit, and the character of the land.

In his affidavit the contestant alleged that the land covered by the entry of Kirby, or, at least, the one hundred and sixty acres thereof, contested by him, is in no respect desert land, that it is capable, and annually in fact does produce crops of good grass, from which good and sound hay can be made in large quantities; that the same covers said tract; that said land had, at the time of making said entry, and still has, a considerable growth of timber thereon, which covers a good portion of the tract; that the greater portion of the soil of said tract is of sufficient humidity to annually grow cereals and other crops. To this affidavit by Epps is added one signed by Benjamin B. Adams and W. T. Alston, in which they say

They have read the foregoing affidavit of Henry C. Epps, and know the contents, and know the land in said affidavit and entry stated, and they believe the statements therein to be true, and that said contestant is a respectable person, and they have no interest directly or indirectly in said issue.

At the trial the counsel for Kirby objected to the introduction of any evidence under the allegations filed as the grounds of contest, for the reason that the same does not specify or set forth any fact or reason showing that said desert land entry was not made in full compliance

with law, and for the reason that the facts charged do not support the conclusions, and that if every fact alleged were proven it would not alter or affect the rights of the contestee.

This objection was overruled, the trial proceeded, and resulted in a decision by the local officers in favor of the contestant. In his appeal therefrom to your office, the counsel for Kirby raised a question upon the sufficiency of the corroboration of the contest affidavit, and insisted not only that the affidavit was insufficient, but that it was not corroborated, and hence conferred no jurisdiction upon the local officers.

You held that the affidavit stated facts sufficient to constitute a cause of action, and that it was too late to raise a question as to the sufficiency of its corroboration, upon appeal; that that question should have been raised before proceeding to trial. Both before you, and in the appeal now before the Department, counsel for Kirby claim that the objection to the sufficiency of the contest affidavit included the corroboration thereof, as corroboration was one of the requirements of such affidavit, and it was not necessary, therefore, to object separately to the sufficiency of the affidavit, and also to that of the corroboration.

In this position I think the counsel are correct, but giving them the benefit of their exception, it avails them nothing for the reason, as I view it, that the affidavit and corroborative evidence do state a cause of action and are sufficient to put the entryman to proof in support of the issue.

The Department has repeatedly held, one of the latest cases on that subject being *Paulson v. Owen* (15 L. D., 114) that an affidavit of contest may be based on the information and belief of the contestant. It was also held in the case of *Hyde et al. v. Warren et al.* (14 L. D., 576), that an affidavit of corroboration may be made on the information and belief of the affiant. This is not contained in the syllabus to that case, but the statement on page 579, as to the contents of the affidavit of corroboration therein under discussion, and the conclusion reached thereon, as stated on page 588 of said decision, justifies the statement made.

On the 27th of June, 1887, the department issued a circular of instruction (5 L. D., 708), prescribing what lands were not desert, and subject to desert land entry, under the act of March 3, 1877 (19 Stats., 377). Such lands were divided into four classes, including those which produced native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons; those which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, and those which contain sufficient moisture to produce a natural growth of trees.

In substance, the charges of Epps were that the land embraced in the entry of Kirby was such land as was described in the departmental circular as non-desert. He said nothing about artificial irrigation, neither did the circular mention that subject in enumerating the land

which could not be entered under the law. I am clearly of the opinion that, if the allegations contained in the affidavit of Epps are true, the land was not subject to entry as desert land.

The corroboration was by two reputable persons, who made oath that they had read the affidavit, and knew the land to which it referred, and that they believed the statements in the affidavit in relation to the land were true. I think this was an affidavit "in support of the allegations made" by Epps, which is the corroboration required by rule 3 of the rules of practice.

The question of law, as to the sufficiency of the contest affidavit and its corroboration, being found by me against the contestant, the only other question in the case is that of fact, as to the character of the land. Upon this question there have been concurring decisions by the local officers and your office. It was said in *Conly v. Price* (9 L. D., 490), that concurring decisions of the local and the general land offices as to questions of fact are generally accepted as conclusive by the department, where the evidence is conflicting. I have not adopted that rule in the case at bar, without a careful examination of the great mass of very conflicting evidence submitted at the hearing. This evidence is such, that fair minds might arrive at different conclusions as to what it establishes. Under such circumstances the department will not interfere. *Mary Campbell*, 9 L.D., 331. Notwithstanding the irreconcilable character of the evidence in the case, I think a preponderance thereof justifies the concurring decisions already rendered therein, and the conclusion reached in the decision appealed from is therefore approved and affirmed.

SETTLEMENT RIGHT—ACT OF JUNE 20, 1890.

JOHNSON *v.* CRAWFORD.

The word "day" as employed in section 3, act of June 20, 1890, opening to settlement and entry certain reservoir lands, is not restricted to the "business day" recognized in the practice of the local office, but contemplates the calendar day of twenty-four hours; and a settlement on said lands, made after the beginning of said day and prior to the entry of another on the same day, defeats the right of such entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 21, 1892.

The land involved in this appeal is the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 32, T. 37 N., R. 9 E., Wausau, Wisconsin, land district.

The record shows that John M. Crawford made homestead entry of said tract December 20, 1890. On January 3, 1891, John Johnson presented his application to make homestead entry of the same lands, which was refused on the ground that the land had been segregated by the defendant's entry. He also filed an affidavit stating that he had

settled on said land "December 20, 1890, two minutes after 12 o'clock a. m." reciting his improvements and their value. A hearing was had before the local officers and as a result thereof, they found that Johnson had "made a *bona fide* settlement upon the land and has maintained his residence thereon in good faith; he has the prior right to the same, and Crawford's entry should therefore be canceled." Crawford appealed, and you by letter of November 2, 1891, affirmed their decision, whereupon he prosecutes this appeal.

The errors discussed in the briefs of counsel and apparently relied upon for a reversal of your decision, are as follows:

Third. In holding the act of May 14, 1880 (21 Stat., 140) applicable to or in any wise controlling this case.

Fourth. In applying to this case the rule that settlement at any hour of the day, is authorized and legal.

Fifth. In holding that the prohibition of settlement upon the land in contest imposed by the special act of June 20, 1890 (26 Stat., 169) restoring this land to the public domain "before the day on which such lands shall be subject to homestead entry at the several land offices" authorized settlement thereon the instant after midnight, although by practice and previous public announcement the doors of the local land office were not open to permit homestead entry by Crawford until 9 o'clock of the morning of the day on which Johnson's settlement two minutes after midnight, a. m., is admitted to have been made.

Sixth. In holding that proper construction of said act of June 20, 1890, and the word "day" as used therein contemplated the twenty-four hours commencing at midnight.

Seventh. In holding that Johnson's settlement if held as commencing at 9 o'clock a. m., on December 20, 1890, has priority over the entry of Crawford, because not made until 3 o'clock p. m., of that day.

Eighth. In holding that the act in question providing for disposal of this land permitted settlement thereon prior to actual entry at the local land office.

Ninth. In holding for cancellation the existing entry of Crawford and affirming the right of Johnson to make entry of the land.

The land in controversy, with others, had been withdrawn from the market for reservoir purposes by proclamation of the President, and by act of Congress June 20, 1890, (26 Stat., 169) the same was restored to the public domain subject to entry under the homestead law. The first section provided:

That there is hereby restored to the public domain all the lands described in certain proclamations of the President of the United States in the State of Wisconsin; and that these lands, when so restored, shall be subject to homestead entry only.

Section 2 has no bearing upon the issue herein involved. Section 3, reads as follows:

That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of the said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

By circular of July 22, 1890 (11 L. D., 212), for the instruction of the local officers, it was said:

You will observe that the statute, by its terms, does not take effect until December 20, 1890, no entry for, or settlement upon, said lands will be allowed until the expiration of that time, and the lands are made subject to entry under the homestead law only.

The facts in this case as conceded by counsel are, that Crawford made entry of the land at about 3 o'clock, p. m., of December 20, 1890, after having stood in line at the local office for about thirty hours; that Johnson went upon the land at two minutes past 12 o'clock, a. m., on the same day, settled on the same and began the erection of his house, which he speedily completed and occupied together with his family.

Counsel for defendant insist that the proper construction of Sec. 3, is that the land was not subject to settlement until 9 o'clock a. m., of the 20th, the hour which, under the established rules, the local office was open for the transaction of business, and that the word "day" as used in said section should be construed to mean the "business day" as defined by the rules, and not the calendar day of twenty-four hours. It is urged by counsel that to put the latter construction on the section is discriminating in favor of the settler and against the entryman as there is not an even chance between the two, if the former be allowed to initiate his right several hours before the latter can.

There are two methods by which the homestead right may be initiated. Under sections 2289 and 2290 (R. S., 421), it could only be done by entry, and this continued to be the only method until the passage of the act of May 14, 1880 (21 Stat., 140), when it was provided that the settler

shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws, to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption law.

So that at the time the land in controversy was open for settlement, the settler could select which of the methods provided by Congress that he would pursue, and in the race for the land the one first initiating his right under the law had the superior right to the land. See Tobias Beckner (6 L. D., page 136).

I can not agree with counsel in his interpretation of this statute. If Congress intended to have other than the ordinary construction put upon the word "day" as therein used, it certainly would have said so in express terms, and in my opinion it would be foreign to the intention of Congress to restrict the term to the time during which the local land office is open for business; that is from 9 a. m. to 4 p. m. It is a well known principle of construction that words are to be given their ordinary meaning in construing a statute. Certainly the ordinary meaning of the word "day" is that period of time which elapses between the

successive midnights. (2 Blackstone, 141). It seems to me that any other construction, in this instance at least, would be arbitrary. The right of him who makes a *bona fide* settlement has always been recognized as superior to a simple entry, where both methods are provided. *Murphy v. Taft* (1 L. D., 83).

And in this case this rule works no hardship, nor does it discriminate in favor of either. Every man is presumed to know the law. If the defendant elected to rely on his entry he did so from choice, not necessity.

Your decision is therefore affirmed.

PRACTICE—AFFIDAVIT OF CONTEST—AMENDMENT.

NESBITT v. NEAL.

(C)

The refusal of the local office to allow the amendment of an affidavit of contest is not an abuse of discretion, where the amended charge is much more comprehensive than the original, and the facts therein set forth are known to the contestant prior to the commencement of his action.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 21, 1892.

I have considered the case of John F. Nesbitt *v.* John Neal, involving the timber-culture entry made by the latter for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 7 N., R. 4 W., Boise City, Idaho.

The entry was made January 16, 1884. Contest affidavit was filed May 9, 1891, alleging:

That the said claimant has not planted to trees, seeds, or cuttings, ten acres of said entry, or any amount, at any time since said entry was made, or at all; and that there is not now growing on any portion of said entry ten acres of trees, seeds, or cuttings, or any amount; and that all of such failure to comply with the requirements of the timber-culture law still continues.

Hearing was had on June 29, 1891. Counsel for the defendant moved to dismiss the case, on the ground that the affidavit did not set forth facts sufficient to warrant the cancellation of the entry. The motion was overruled. The first witness was the contestant, who on cross-examination admitted that the entryman had planted to trees, seeds and cuttings about ten acres of the tract. Thereupon his counsel asked leave to file an amended affidavit, which set forth that, although ten acres of the tract had been properly planted,—

None of said cuttings had grown, and all of said cuttings are now dead save and except not to exceed one hundred, scattered over about two acres of land; that said cuttings planted as aforesaid have not been protected from claimant's stock by fences or otherwise; that all the land embraced in said entry is arid in character, and will not produce an agricultural crop, or trees, seeds, or cuttings, successfully, without artificial irrigation; that no portion of said entry planted to cuttings as aforesaid has ever been or is now irrigated by conducting water thereon or other-

wise; that all of said entry save two acres is now in its natural arid condition, and will not produce trees, seeds or cuttings successfully without irrigation; that claimant has held said entry for more than seven years last past, and he has not now to exceed one hundred small bushes from six inches to two feet in height growing thereon; that all other trees, seeds, or cuttings planted on said timber-culture entry, save the small bushes above specified, and save about twelve trees near claimant's house, are now dead, are not growing and will not grow; that all of said failure continues and is existing at the date of the filing of this amended affidavit.

Counsel for the defendant objected to the filing of the amended affidavit, and moved to dismiss the contest; whereupon the register and receiver held—

That the alleged amended affidavit is virtually a new affidavit of contest; that the original affidavit of contest having been by contestant admitted to be untrue in the leading allegation therein, there is no foundation upon which to rest this contest. The amendment offered is denied, and the contest is dismissed.

The contestant appealed to your office; and October 12, 1891, you affirmed the judgment of the local officers.

Rule 2 of Practice provides that—

In every case of an application for a hearing, an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

and Rule 8, subdivision 6, requires that the notice of contest must "briefly state the grounds and purpose of the contest." The object of these rules is that the party against whom charges are made may know what they are, and come to trial prepared to meet them. The original affidavit of contest in the case at bar charged only failure to plant and cultivate the tract to timber. This charge was all that he was called upon to meet. The allegation of neglect to protect the growing plants from the inroads of stock, of failure to irrigate, and the other allegations in the second affidavit, were charges that he had not been notified to prepare to defend himself against at the date of the trial. Amendments are largely within the discretion of the trial court and while the register and receiver in the interest of justice might have allowed the amendment prayed for without an abuse of discretion, allowing the entryman time to prepare for the amended charge, yet, as it was so much more comprehensive and enlarged upon than the original, it was not an abuse of discretion to refuse to allow the affidavit to be amended in the manner desired, especially so, as it is apparent that the contestant must have known when he filed his affidavit of contest that the facts which he desired to incorporate therein upon the trial existed before he commenced his proceeding.

Your decision dismissing the contest is affirmed.

RELINQUISHMENT—PROTEST.

Lauritson v. Carlson.

It is no objection to action upon a relinquishment that it is filed without the knowledge or consent of the entryman's attorney.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 28, 1892.

By letter dated February 23, 1892, you transmitted the papers in the appeal of Elling Lauritson, filed December 19, 1891, from your decision of October 6, 1891, in the case of said Lauritson *v.* John G. Carlson, guardian Andrew Johnson, insane, involving the SW. $\frac{1}{4}$ Sec. 15, T. 122 N., R. 46 W., Benson, Minnesota.

You find that Lauritson's homestead entry, dated June 20, 1887, under which he claimed said land was made in violation of Johnson's right thereto and held the same for cancellation.

Pending said appeal, you forward by letter dated May 7, 1892, Lauritson's relinquishment of his said entry, filed December 7, 1891. Also his application, dated March 9, 1891, for the repayment of fees and commissions paid by him in making the entry.

On February 25, 1891, Lauritson executed a like relinquishment and application and filed the same in your office March 1st, following. These papers you forward by letter dated March 17, 1892.

By said letter of May 7, you also forward the affidavit of Addison J. Parker, filed April 16, 1892, wherein he avers that he is the duly authorized attorney for Lauritson and that said relinquishment and application were filed without his (Parker's) authority by "some party other than himself." He accordingly asks that they be neither considered nor given "weight."

Parker asserts no interest in the land and has none in the suit other than as attorney for Lauritson. He does not dispute that said relinquishment was duly executed and filed by the latter. His protest is therefore without a base. He has no attorney's lien which the department can enforce by refusing to recognize Lauritson's right to relinquish his entry.

Lauritson, in consequence of his relinquishment, being a party without interest, his appeal here need not be considered.

— *See 39 A. P.*
NOTICE—ORDER OF CANCELLATION—ATTORNEY.

MEYER *v.* BROWN.

162 225

Notice of cancellation to the attorney of a successful contestant is due notice to such party.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 30, 1892.

I have considered the case of Edward Meyer against John M. Brown, as presented by the appeal of the former from your decision of Sep-

tember 28, 1891, affirming the decision of the local officers, dismissing his contest against said Brown.

It appears that Thomas G. Clark made timber culture entry (No. 2432) for the SW. $\frac{1}{4}$ of Sec. 2, T. 25 S., R. 17 W., on October 8, 1878 at Larned, Kansas.

On September 18, 1884, Edward Meyer initiated a contest against the same, and a hearing was had November 12, 1884, when Clark made default of appearance, and decision was rendered in favor of the contestant. Said entry was afterwards cancelled, and on October 1, 1885, the local officers mailed a letter to P. C. Hughes, the attorney of record for said Meyer, giving him notice of said cancellation. This letter was received by Hughes before October 10, 1885.

On October 7, 1885, John C. Patten made timber culture entry (No. 6035) for said land, which was cancelled December 6, 1886.

On December 27, 1887, John M. Brown made timber culture entry (No. 6758) for said tract.

In the meantime, on November 18, 1885, said Meyer made application to enter said tract under the timber culture law, claiming that the preference right to do so enured to him as the successful contestant against said Clark.

The local officers rejected his application for the reason that said Patten's entry was then upon the records.

From this action Meyer appealed, alleging, *inter alia*, that he had received no notice of the cancellation of Clark's entry till November 17, 1885, when he accidentally heard of it, and that—

He has reason to believe, and does believe, that said P. C. Hughes neglected to notify him, the said Meyer, in order that the said Meyer might not exercise his preference right of entry, and that by the failure to notify the said Meyer, the cancellation of the said entry might enure to the benefit of the said John C. Patten; and that the said P. C. Hughes did wilfully and fraudulently conspire with the said John C. Patten to cheat and defraud said Meyer out of said timber claim.

By letter of September 5, 1888, you directed the local officers to advise Meyer that if he would make a formal application to enter said tract within thirty days' time, such act would be considered sufficient basis for a hearing. Meyer complied with this requirement, and a hearing was ordered and trial had January 23, 1889.

On August 7, 1889, the local officers rendered their opinion that the contest should be dismissed, and that Brown's entry should remain intact upon the records, which decision was affirmed by you, as already stated.

Meyer failed to exercise his preference right of entry within the thirty days after his attorney was notified of the cancellation of Clark's entry. Notice to his attorney must be deemed notice to him. Rule 106, Rules of Practice; *Reed v. Casner* (9 L. D., 170). The burden of proof, therefore, rested upon him to establish the charge of fraud and conspiracy made against his attorney, in order to show that he no

longer sustained that relation to his client, but had practically severed it. The evidence failed to establish this charge. It seems evident that no letter notifying Meyer of said cancellation was addressed to him at Garfield, his post-office address, either by his attorney or the local officers, and yet that is his address plainly written upon his application, and he swears that he gave the same address to his attorney, and is corroborated in that statement by a witness who was present and heard it.

While this failure to notify him may show negligence on the part of his attorney, it falls short of proving fraud and conspiracy with the opposite party. It follows that Meyer's application to enter the land filed November 18, 1885, conferred no rights upon him, because the land was then segregated by Patten's entry. *Goodale v. Olney* (13 L. D. 498). Inasmuch as it was not a legal application, it had no force or effect when Patten's entry was cancelled. The tract then became vacant public land subject to the first legal applicant, and so continued from December 6, 1886, to December 27, 1887, when Brown made his entry.

Your judgment is affirmed.

MINING CLAIM—SURVEY—CONFLICT.

BI-METALLIC MINING COMPANY.

In case of a mineral entry that is in conflict with a prior pre-emption claim the land embraced within said entry that lies beyond the point where the lode or vein intersects said pre-emption claim must be excluded from the mineral survey.

Secretary Noble to the Commissioner of the General Land Office, October 1, 1892.

I have considered the appeal of the Bi-metallic Mining Company from your decision of October 24, 1891, holding for cancellation mineral entry No. 2260 of the Bassett, Jr., lode claim, the greater part of which is situated in the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, and the remainder in the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 36, T. 7 N., R. 14 W., Helena, Montana, as to "that part lying southwesterly from the point where 'said lode line intersects the east side line of said pre-emption claim,'" because "the presumed lode line, as indicated on the plat of the survey, runs in a southwesterly direction through the centre of the mineral claim for about nine hundred feet where it intersects the east side of the pre-emption claim, continues on for the distance of about three hundred feet through and to where it crosses the southeast side line of the pre-emption claim, and thence to the southwesterly end line of the mineral claim" and under the authority of the departmental decision in the Andromeda case (13 L. D., 146) you held that said entry must be cancelled as to the part above stated.

The company in its appeal alleges error in your decision in holding without any proof or evidence that the said "Bassett, Jr." lode extends through a part of the ground embraced in said pre-emption entry, and in not giving proper force to the judgment and decree of the court filed in the record, deciding against the adverse claim of the Granite Mountain Mining Company in a suit against said company for a part of the land embraced in its said claim.

Neither of said allegations can be sustained. It is not for the government to show affirmatively that the lode proceeds in a straight line and hence cuts the easterly line of the pre-emption claim, as indicated by the prolongation of the line on the plat filed in the case. It must be presumed that the lode proceeds in a straight line in the centre of the diagram filed, unless evidence be submitted showing a different direction.

Since the applicant is entitled to only three hundred feet on each side of the middle of the vein at the surface, if the course of the vein diverges from a straight line, the applicant should indicate the direction and adjust his survey accordingly.

Nor does the fact that the court decreed to the claimant the possession of that part of the said Bassett, Jr., lode claim which was covered by the adverse claim of the Granite Mountain Mining Company warrant the conclusion that a patent must issue on said entry without regard to the question whether the law has been complied with.

In the case of the Apple Blossom Placer *v.* Cora Lee Lode (14 L. D., 641), the Department held that:

A decree of a court in adverse proceedings determines the right of possession as between the parties but does not deprive the Land Department of the requisite authority to ascertain whether there has been due compliance with the law, and the land is of the character claimed by the mineral applicant.

Upon a careful examination of the whole record, I find no error in the decision appealed from, and it is therefore affirmed.

COAL DECLARATORY STATEMENT—SECOND FILING.

CONNER *v.* TERRY.

The right to file a second coal declaratory statement cannot be recognized in the absence of some valid reason for abandoning the first.

Final proof will not be accepted on a coal land declaratory statement filed in the interest of others.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 1, 1892.

On April 2, 1889, James J. Conner filed coal declaratory statement (No. 847) for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 25, T. 35 N., R. 6 E., at Seattle, Washington.

On July 19, 1889, John Y. Terry filed coal declaratory statement (No. 868) for the same land.

On October 18, 1889, said Conner filed a protest against final proof being allowed to said Terry, on his said declaratory statement, alleging that he, Conner, was the discoverer of coal on said tract; that he had expended \$350 in labor and improvements thereon; and had mined and taken coal therefrom.

On November 6, 1889, said Terry submitted final proof on his declaratory statement, which was suspended on a hearing ordered to determine the respective rights of the parties to said land. Said hearing was had in July and August, 1890, and in April, 1891, the local officers found that the coal declaratory statements of both parties should be refused—that of Conner because he had before exercised the right of filing a coal declaratory statement, and that of Terry because it was made in the interest and for the benefit of other persons than himself, and advised the cancellation of both of said filings.

Both parties appealed, and the action of the local officers was affirmed by your letters of October 19, 1891, and November 30, 1891.

Both parties have now appealed to this Department.

The record shows that James J. Conner had filed a coal declaratory statement (No. 99) on June 25, 1881, in his own name, for lands in sections 23 and 26, T. 35 N., R. 6 E., and a second one (No. 142) on August 7, 1882, for the NE. $\frac{1}{4}$ of Sec. 25, same township and range. These filings were made previously to the one now in contest.

Section 2350 of the Revised Statutes authorizes "only one entry by the same person." Rule 9 of the coal land circular of July 31, 1882; (1 L. D., 689) construes this and other provisions of the coal law as follows—"One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone, or as a member of an association."

In the case of Albert Eisemann (10 L. D., 539) the law was fully examined and the conclusion reached that a second coal land filing cannot be allowed in the absence of some valid excuse for abandoning the first. This doctrine was affirmed in the case of Walter Dearden (11 L. D., 351).

The only excuse offered by Conner is that he made these filings not for himself but as attorney in fact for other parties. But this excuse cannot be accepted as satisfactory. Rule 28 of said circular prescribes the form of the declaratory statement, which runs as follows:

I, _____, do solemnly swear that I never have held or purchased any coal lands, and I do hereby declare my intention to purchase and that I came into possession of said tract, and have ever since remained in actual possession continuously; that I have located and opened a valuable mine of coal thereon, etc.

Conner could not truthfully take this oath as attorney for another.

Rule 34 of said circular provides that "any party duly qualified

under the law, *after* swearing to his application or declaratory statement, may, by a sufficient power of attorney, . . . empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required." Swearing to the statement by proxy can find no support in law.

It follows that Conner had exhausted his right to make a coal filing, and was disqualified to do so when he filed the statement now in contest, and the same was properly rejected on account of such disqualification.

The declaratory statement of Terry was rejected because the testimony satisfied the local officers and yourself that he filed it in the interest of others. The evidence upon this point is circumstantial, but points strongly to that conclusion. Terry had been a clerk in the local land office, and was doubtless well known to the register and receiver, before whom the contest was tried. They heard the witnesses testify and saw their demeanor on the stand. A judgment rendered under circumstances so favorable to the finding of a correct result ought not to be disturbed unless clearly wrong, especially, when concurred in by you. The facts are fairly stated in the opinion of the local officers, and I see no error of law or fact in the conclusion reached.

Your judgment is affirmed.

RAILROAD LANDS—ORDER OF RESTORATION.

BAY DE NOQUET AND MARQUETTE GRANT.

Adjustment of the grant, and instructions for restoration of lands relinquished to the government.

Secretary Noble to the Commissioner of the General Land Office, October 3, 1892.

Under date of the 1st instant you made report in the matter of the adjustment of the grant under the acts of June 3, 1856 (11 Stat., 21), and March 3, 1865 (13 Stat., 520), to aid in the construction of the railroad from Little Bay de Noquet to Marquette, in the State of Michigan, from which it appears that 12,717.23 acres have been patented in excess of the grant, which by the act of March 3, 1865 (*supra*), was limited to two hundred sections, or 128,000 acres.

By the act of June 3, 1856 (*supra*), grants were made to aid in the construction of several railroads radiating from Marquette of every alternate section of public land, designated by odd-numbers, for six sections in width on each side of the several roads.

The act of 1865 increased the grant from six to ten sections per mile; limited the grant for the Bay de Noquet and Marquette Railroad Company to two hundred sections, and provided when, how, and where said

lands were to be taken. Under this act no lands were to be selected and certified on account of this grant

east of that portion of the range line dividing ranges twenty-six and twenty-seven, that is, south of the township line between townships forty-seven and forty-eight, nor south of that portion of the township line dividing townships forty-seven and forty-eight, that lies east of the dividing range line above named.

Your letter states that prior to the passage of said act, 195,011.59 acres had been certified on account of said grant, nearly all of which were found to be without the limits specified in said act. As to all such lands falling without the specified limits, your letter states that they were re-certified to the State on account of the grants, or restored to entry, thus treating the act of 1865 as re-investing the United States with title to all such lands.

An adjustment was thus begun of the grant within the specified limit, and in this adjustment only 4,688.31 acres were charged to the grant as remaining under the certification made prior to 1865; consequently, in 1871 and 1873, 123,311.69 acres were patented on account of said grant, together with the charge of 4,688.31 acres, making 128,000 acres, or two hundred sections.

Since 1873 no action has been taken relative to said grant, until on September 26, 1889, the governor of the State, acting under the joint resolution of the State legislature, approved June 15, 1889, executed a relinquishment to the United States of certain lands theretofore certified or patented on account of railroad grants, embracing 15,970.33 acres, patented on account of this grant.

Under the joint resolution referred to, the governor of the State was—authorized and empowered to relinquish and surrender to the United States all the lands heretofore certified to this State under the act to aid in the construction of said roads, which are opposite to and coterminous with the uncompleted portions of said roads, and *all other lands* certified to the State for the Marquette, Houghton and Ontonagon Railroad Company, or the Little Bay de Noquet and Marquette Railroad Company, which have not been earned nor *heretofore been patented* by the State to said companies.

Since the receipt of said relinquishment, you have prepared a new adjustment of this grant, and report that of the certifications made prior to 1865, there remained within the limit prescribed by said act 17,405.54 acres, instead of 4,688.31 acres as charged in the former adjustment; hence, there has been an excess of 12,717.23 acres certified and patented on account of this grant.

This being the condition of the grant, you recommend that the governor's relinquishment be accepted as to 12,717.23 acres, being the amount in excess under the adjustment recently made.

There having been an excess certified or patented on account of the grant, and the State having returned such amount of the lands, it would remain to the United States subject to future disposition, and might be restored to entry, as suggested by you, if unencumbered.

In answer to a call upon the governor of Michigan, as to the status of the lands relinquished by him on September 26, 1889, the report made by the Deputy Commissioner of the State land office relative to these lands is as follows:

The following described lands were approved to the Bay de Noquet and Marquette Railroad Company, June 5, 1871. They were included in the deed or patent issued by you September 26, 1889, but, as no reconveyance had been made by the railroad company, there was no title in the State when this deed or patent was issued.

The deed or patent here referred to is presumably the relinquishment executed by the governor to the United States.

From this report I had some doubt as to whether these lands had been conveyed by the State to the company prior to the governor's relinquishment, and therefore directed that a telegram be sent the governor requesting information as to whether such was a fact. Although such telegram was sent more than two weeks ago and answer was requested by wire, yet no response has been received to date.

It has therefore not been affirmatively shown that the State had not passed these lands to the company prior to the governor's relinquishment, but, as he was only authorized to relinquish lands "not earned nor heretofore been patented by the State to said companies," in the absence of proof to the contrary, he will be presumed to have acted within the scope of his authority.

You will therefore direct the publication of the notice preliminary to the opening of these lands to entry, as required in other similar cases, and also advise the company so that it may make any showing desired during the period of publication.

Your recommendation as to the manner of the restoration meets my approval, and steps should be taken at once to the end that the lands may be opened to entry at the earliest day possible.

INTERNAL IMPROVEMENT GRANT—SELECTIONS.

STATE OF LOUISIANA.

Warrants issued by the State, in satisfaction of the internal improvement grant, afford no basis for the selection of lieu lands, in satisfaction of deficiencies under said grant arising from an erroneous certification thereunder of lands not subject to such disposition.

Secretary Noble to the Commissioner of the General Land Office, October 3, 1892.

I am in receipt of your letter of June 3, 1892, transmitting list No. 5 of selections made for the State of Louisiana, in the Natchitoches land district, under the grant for internal improvements made by the act of September 4, 1841 (5 Stat., 453), containing 1,581.71 acres, issued in

lieu of the same quantity of land embraced in warrants issued by the State, which have been surrendered by the holders in the location of the lands embraced in said selections.

I must decline to approve this list, for the reason that the warrants issued by the State in satisfaction of said grant afford no basis for the selection of lieu lands, the quantity of lands having already been certified to the State.

The 8th section of the act of September 4, 1841 (*supra*), granted to Louisiana, with other States named in said act 500,000 acres of land, for the purpose of internal improvement.

As I understand from your said communication of June 3, 1892, selections have heretofore been made and certified to the State in full satisfaction of this grant, but, since the approval of said selection, it has been discovered that part of the land selected and approved to the State was within the limits of confirmed private land claims, and said selections are to that extent void and the approval thereof was ineffectual to convey any title to the State. It is to satisfy this deficiency that the selections now presented are made, which can only be approved when predicated upon such a basis, and which should be set out in the list of selections.

The warrants issued by the State can not be recognized by the Department, except when located, which is an act of selection made by the State, through its grantee, and would only be valid when approved by the Department and founded upon a proper basis. Before the full quantity of lands had been certified to the State these warrants might have performed a useful office. The location of the warrants was nothing more or less than a selection of the land by the State through its grantee, and when such selection was approved, the warrant had performed its office. Further than this, the validity of these warrants can not be recognized by the government.

Since there has been approved to the State the full quantity of lands granted, no further action can be taken by the Department, unless it be shown that a deficiency exists because the list approved embraced lands that were not public lands, or from any other cause. This deficiency can not be shown by warrants issued by the State, whether they have been located or not, and they should not be recognized by this Department. If the State is entitled to a further quantity of land under this grant by reason of the selection and approval of lands within private grants, the basis for each selection should be clearly specified, and the State should file a formal relinquishment of all claim to such basis, and should file satisfactory evidence that it has not attempted to dispose of such land.

PRACTICE—APPEAL—INDEMNITY SCHOOL SELECTION.

WAGGENOR v. STATE OF CALIFORNIA.

Where an application of the State to select school indemnity is rejected on account of an adverse claim, and the State elects to stand on a protest against said claim and not appeal from the rejection, it will be bound by the result of the action on said protest.

Secretary Noble to the Commissioner of the General Land Office, October 3, 1892.

The attorneys for the State of California have filed a motion for review of the departmental decision, dated May 5, 1892, in the case of Eva L. Waggenor *v.* said State, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 30, T. 5 S., R. 22 E., Stockton, California, land district.

The record shows that on the 11th day of April, 1889, the State of California, through its agent, presented to the local officers a list of lands selected as indemnity in lieu of school lands lost in place, in which the land in controversy was embraced.

The register refused to file said list, for the reason that no non-mineral affidavit as to the character of the lands accompanied it; thereupon the person who presented it proposed to leave it in the local land office, but the register returned it to him and he took it away.

On April 12, 1889, Eva L. Waggenor filed in the local office her application to purchase the tracts under the act of June 3, 1878, 20 Stat., 89.

On April 13, 1889, said list was returned to the local office accompanied by the required non-mineral affidavit. The register notified the agent of the State that its application to select the tracts in controversy would have to be rejected for the reason that it conflicted with Waggenor's application to purchase under the timber and stone act, and also notified him that June 26, 1889, was the time set for Waggenor to make proof. At said time Waggenor appeared before the register and receiver and submitted proof; at the same time the State appeared by its attorney and protested against the allowance of her purchase. The register and receiver held that Waggenor should be allowed to complete her purchase. From their decision the State appealed. On the 26th day of February, 1891, you reversed the judgment of the local officers and rejected Waggenor's claim. She appealed.

The department reversed your judgment as aforesaid. The motion under consideration asks a review and reversal of said decision.

The only error assigned by the motion is that in the opinion

It is stated therein that the amended application of the State, to select the said land, which was presented on the 13th of April, 1889, was *rejected* by the local offi-

cers, because of the prior application of Mrs. Waggenor—the fact being, on the contrary, that the said amended application was *filed* by the said officers, and was not rejected. Consequently, you erred in holding that the State was in default by failure to appeal from the said supposed rejection, for there was nothing to appeal from.

Copies and the originals of certain letters that passed between the attorney for the State and the register at Stockton are attached to and submitted with the motion as follows:

1st. Copy of letter from F. A. Hyde to the register, dated April 12, 1889, returning the State selection for action.

2nd. An original letter from the register of the land office to F. A. Hyde, dated April 16, 1889, wherein the register informs him that the amended selection is found to conflict with the application of Mrs. Waggenor, and will, therefore, have to be rejected.

3rd. Copy of letter, in reply, from Hyde to the register, dated April 17, 1889, suggesting that, under the circumstances, such would not be the proper and legal course to pursue; but, that, under the Rules of Practice, the timber land application of Mrs. Waggenor would not be a bar to the filing of any application, and that the selection should, therefore, be filed, and the whole facts in the case brought out when Mrs. Waggenor offered her proof.

4th. Letter from the register to Hyde, dated April 20th, 1889, accepting his suggestion, and informing him that the selection would be filed, and that the State could appear and protest against the proof of Mrs. Waggenor when offered.

The attorney for Mrs. Waggenor, in a motion filed by him to dismiss the review, contends that it is immaterial whether the application of the State was rejected or filed by the local officers April 13, 1889, because the application of Waggenor was prior in point of time, and at the hearing the State failed to defeat her claim to the land. This contention is not well taken, and can not be sustained.

The departmental decision proceeded upon the theory that the State, having failed to appeal from the refusal of the local officers to receive its selection presented on the 11th of April, and also to appeal from the action of the local office upon the State's amended application to select received on the 13th of April, lost its right to be heard upon its application to select the lands in controversy; that under the record of the case it simply stood in the relation of a protestant upon the charges as to the character of the land, and the qualification of Waggenor to purchase it under the timber and stone act. The question presented by the motion is whether as a matter of fact the local office *rejected* the amended application. In order to determine this question it is only necessary to refer to the letter of the register dated April 16, 1889, addressed to the agent of the State on the subject, which is attached to the motion and relied on by the State to show that the amended application was *not rejected* by the local office. Said letter reads:

Referring to your favor of 12th inst., Indemnity school land application (State No. 2393) will have to be rejected for the reason that, upon an examination of the record, I find that on the 12th inst., Eva L. Waggenor, made application under the timber

and stone act of June 3rd, 1878, for N. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 29 and N. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 30, T. 5 south, R. 22 east.

The day set for her to make proof is June 26, 1889.

Very respectfully,

GEO. A. MCKENZIE,
Register.

This language clearly amounts to a rejection of the State's second, or, as is termed in the departmental decision, amended application, from which an appeal would lie, but no attempt to appeal therefrom appears to have been made. The attorney for the State in his letter of April 17, 1889, to the register says, among other things, that—

Under the rules of practice, the State has thirty days to appeal from your rejection. . . . At the time the State selection was presented, the land was free; I shall, therefore, appeal from your rejection of the State selection, if you do so reject it, but, I would respectfully suggest that it would be proper for you to file the same, noting thereon the whole facts of the case, just as they are—that is to say, that the same was presented on the 11th inst., that you refuse to file the same until accompanied by a non-mineral affidavit; that the non-mineral affidavit was received on a certain day, and thereupon the selection was filed. No harm can result therefrom, and the State is entitled to the filing in any case even though the timber application has been filed prior thereto. If you will file the selection as suggested, I will see that the State is represented on the 26th day of June, and objection can be made to the timber land entry at that time and the whole matter can go up to the Commissioner for adjudication. This will save delay, as well as the rights of all parties.

On the 20th of April, 1889, the register replied to the attorney's letter saying: "I have noted the selection and you can see that the State is represented on June 26, 1889, the date fixed for proof by the timber land applicant."

The register's letter of April 16, being an adjudication, the fact that counsel did not so understand it is not material, or rather his failure to understand it, can in no way change or affect its validity as a judgment. It was his duty to appeal from it, if he desired to protect the State in the matter. John A. Stone (13 L. D., 250).

It seems to me fair to conclude from all the papers presented with the motion, that the agent of the State waived his right of appeal from the rejection, and elected to rest his rights in the premises upon his ability to defeat the claim of Waggenor upon the charge of her disqualification, or as to the character of the land as charged in his protest. There were two courses open for him to pursue in order to assert his rights under the selection: (1) To appeal from its rejection as offered originally or as it was amended; (2) To protest Waggenor's right to purchase and if successful, defeat it and thereby secure the acceptance of his selection. He elected to pursue the latter course and failed. In pursuing it he necessarily waived the former, and there is no just reason why he should not be bound by the result.

The motion is denied.

DESERT ENTRY—PREMATURE CONTEST—RELINQUISHMENT.

PRESSEL v. McDANIEL.

A stranger to the record will not be heard to allege that a contest is premature, where, prior to the day set for hearing, the entry is relinquished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 3, 1892.

On April 20, 1888, Jefferson D. McDaniel made desert land entry No. 172, for the SW. $\frac{1}{4}$ of Sec. 24, T. 11 N., R. 20 E., North Yakima, Washington.

At 9:33 A. M. of the 20th day of April, 1891, Frank A. Pressell filed his affidavit of contest against the entry, alleging complete failure to make reclamation of the land within the period prescribed by the desert land act.

Notice was issued fixing May 26, 1891, as the date of hearing before the register and receiver, and the same was served upon the entryman forty-two minutes after the contest was filed, as evidenced by the following endorsement which appears on the back of the notice:

I, Frank A. Pressell, of Tacoma, Pierce county, State of Washington, do solemnly swear that on Monday, the 20th day of April, 1891, at the hour of 10 o'clock and 15 minutes in the forenoon, I served the within notice upon Jefferson D. McDaniel, at the United States Land Office in North Yakima, Washington, by handing him a copy of the same.

(Signed)

Frank A. Pressell.

Sworn to and subscribed before me this 20th day of April, 1891.

Ira M. Kurtz,
Register.

It appears that at 10:21 A. M., on the 20th day of April, 1891, Thomas Jackson McDaniel, brother of contestee, appeared at the local office with the latter's written relinquishment, and expressed a desire to make homestead entry of the land. Upon learning that the tract was under contest, he did not file the relinquishment at that time, but returned at four o'clock of the same day, filed the same, and the entry was duly canceled.

Upon the day fixed for the hearing (May 26, 1891), both parties were present, and the testimony was duly taken. It appears that claimant expended the sum of \$350 in the construction of a ditch. Twelve miles of this ditch had been made, and a smaller ditch leading from the larger one had been constructed to within a quarter of a mile of the land, but no part of the land had been reclaimed.

The register and receiver recommended the cancellation of the entry, and on appeal you, by your decision of October 8, 1891, reversed that judgment and dismissed the contest "as prematurely brought," and also directed the allowance of Thomas J. McDaniel's application to make homestead entry of the land.

Contestant's appeal brings the case to this Department.

There is some discrepancy in the testimony as to whether notice of contest was served on claimant before or after he appeared at the local office to file the relinquishment. It may be fairly inferred that claimant came to the office with the intention of relinquishing his claim, and that he knew nothing of the contest until he had reached the office, at which time he was served with the notice. He did not file the relinquishment, however, until four o'clock of that day (April 20).

As above seen, the entry was made April 20, 1888. The contest was filed April 20, 1891.

The language of the statute provides that proof of the reclamation of the land shall be made "at any time within the period of three years after filing said declaration," and section 13 of the circular approved June 27, 1887 (5 L. D., 708), provides that:

Before final proof shall hereafter be submitted by any person claiming to enter lands under the desert-land act, such person will be required to file a notice of intention to make such proof, which shall be published in the same manner as required in homestead and pre-emption cases.

Conceding that claimant had all of April 20, 1891, in which to present proof of reclamation, yet he had not at that time either filed or published the required notice of his intention to make such proof; and, when at four o'clock on April 20th he filed his relinquishment, he had then been served with the notice of contest, filed six hours before. Thereafter he had no further claim to the land, which was open to settlement and entry by the first legal applicant, subject only to any existing rights under a pending contest.

Objections to the affidavit of contest can only be raised at the hearing (*Gotthelf v. Swinson*, 5 L. D., 657), and, since the claimant had relinquished his claim before the day set for the hearing, and thereafter had no interest in the result of the contest, the homestead applicant, as a third party, was not in a position to plead that the contest was prematurely brought. *Hemsworth v. Holland* (on review, 8 L. D., 400).

By filing the affidavit of contest, the contestant secured for himself a right to proceed against the entry, and this right could not be defeated by a subsequent relinquishment. *Webb v. Loughrey et al.*, on review, 10 L. D., 302.

The evidence taken at the hearing, which was had long after the three years had elapsed, conclusively shows that there was a complete failure to reclaim the land; and the further fact that claimant had given no notice of his intention to make the required proof at the end of the three years allowed for reclamation, establishes clearly the default alleged.

I think contestant should be awarded a preference right of entry for his diligence, and that the right of Thomas J. McDaniel to make homestead entry of the land is subject to such preference right. Such will be the order, and the decision appealed from is accordingly reversed.

TIMBER LAND—COAL LAND—MINING CLAIM.

SMITH v. BUCKLEY.

The burden of proof is upon a timber land applicant to show that the land applied for is not excepted from such disposition under the provisions of the statute.

In determining whether land is subject to entry under the coal-land law the means of transportation can not be taken into consideration as affecting the value of the coal shown to exist.

Acting Secretary Chandler to the Commissioner of the General Land Office, September 14, 1892.

On August 10, 1889, Jeremiah A. Buckley filed in the local office at Oregon City, Oregon, his timber land application (No. 1388) to purchase the SE. $\frac{1}{4}$, Sec. 2, T. 3 N., R. 10 W., under the act of June 3, 1878 (20 Stat., 89). Notice was duly issued and published that he would offer proof to establish his claim to said land before the local officers on November 7, 1889, at which date said proof was submitted.

On August 22, 1889, William R. Smith, filed a protest against the allowance of said application, alleging that he had opened a valuable mine of coal on said land; that he had taken possession of it on July 8, 1889, by his agent; that he had expended \$50 in labor and improvements thereon, and that said land was properly within the meaning of the coal land act of March 3, 1873 (17 Stat., 607). Said Smith also at the same time tendered his coal declaratory statement of his intention to purchase said land under the provisions of the Revised Statutes relating to the sale of coal land, which was rejected by the local officers.

On October 20, 1890, the register and receiver appointed a hearing on January 8, 1891, at their office, to determine the character of said land, when both parties appeared and testimony was submitted. Upon consideration of the proof offered, the local officers on April 25, 1891, jointly held—

That protestant has failed to prove that this is coal land that would pay for the working as such, and we are of the opinion that the protest of William R. Smith should be dismissed and the application of Jeremiah A. Buckley to purchase this land should be allowed.

On June 2, 1891, said Smith filed a motion for a new trial and a rehearing, on newly discovered evidence, accompanied with corroborative affidavits, which was denied by the local officers on June 8, 1891. An appeal was taken, by Smith, and on October 13, 1891, deciding the case you held—

I concur with you in your two opinions in the case; the first, because the preponderance of evidence establishes that the land is valuable in fact only for its timber, and that accordingly the protest should be dismissed, and the timber claimant should be allowed to perfect his entry; and the second because the reasons assigned do not justify a rehearing.

An appeal now brings the case before me.

The act of June 3, 1878, (20 Stat., 89), providing for the sale of timber lands, applies only to public lands "valuable chiefly for timber, but unfit for cultivation," section I, in part, reads:

That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes.

And the third section of said act provides that—

the person desiring to purchase shall furnish to the register of the land office satisfactory evidence secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, cinnabar, copper, or coal.

The burden of proof was therefore upon Buckley to establish the fact that said land was of the character above mentioned at the date of said hearing on January 8, 1891. *Hughes v. Tipton* (2 L. D., 334).

Section 2347 of the Revised Statutes provides that any qualified persons may enter "vacant coal lands by legal subdivisions not exceeding one hundred and sixty acres to each person at not less than \$10 an acre where the land is situated more than fifteen miles, and \$20 an acre where it is less than fifteen miles from "any completed railroad."

Section 2348 of the Revised Statutes provides that—

Any person or association of persons severally qualified, as above provided, who have opened or improved, or shall hereafter open or improve, any coal mine, or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved.

It would also appear, therefore, that the burden of proof was upon Buckley to establish the fact that there was at the date of the hearing no "*bona fide* claim under any law of the United States, or . . . any mining claim" to said land, because if any such claim existed, he could not "defeat or impair" it. And if Smith had "opened and improved any coal mine" and was "in actual possession of the same," he was "entitled to a preference right of entry" under said section 2348.

A comparison of these different enactments seems to show that the law favors the mineral claimant rather than one who seeks to purchase the land under the timber act, and requires the former to pay four times as much money for the land as the latter, and eight times as much if the land is within fifteen miles of a railroad. See Circular (6 L. D., 114); *Porter v. Throop* (*ibid.*, 691).

The evidence shows that Frederick Lange, as the agent of said Smith, took possession of said land on July 8, 1889, having then found a coal vein thirty-two inches thick, of good quality, and that during the sum-

mer and fall he tunnelled said vein thirty feet into the ground and took out from fifteen to nineteen tons of coal on the NE. quarter of said claim, and that the vein ran through the claim in a SW. direction; and that on the SW. quarter of the claim he found a vein of two inches thickness of the same quality of coal; that he built a cabin on the claim and made trails and worked there one hundred and forty-nine days before winter. He also worked in 1890, and found other croppings of coal around. He had had fifteen years' experience as a miner, and had mined with profit a vein of coal eighteen inches thick. It appears that two square yards of a coal vein thirty-two inches thick would yield a ton of coal, and that this coal could be mined and put on "the dump" at from one dollar to a dollar and a half a ton.

The vein is two and one-half or three miles from water communication, and it would cost to deliver at tide water fifty cents a ton, and it could be shipped to Astoria by steamer in six hours at \$2 a ton, making it cost at Astoria from \$3.50 to \$4 a ton, where it could be sold at from \$5 to \$6 a ton.

Herman Tubbesing assisted in opening this vein, and worked for twenty-four days from August 22, 1889, in digging coal from the vein, building a cabin, and making a tunnel and trail; and had had six years' experience as a coal miner. He testified that "coal is found on most any branch on the claim in small quantities." That the course of the vein was in a southwesterly direction from the tunnel, and he also found by digging a hole, a cropping of the vein three rods NE. of the tunnel. He also found coal by digging another hole about three hundred yards SW. from the vein, and also on one of the branches of the west fork of Coal Creek, and loose pieces of coal were to be found in the branches.

Said Smith expended \$347.75 in 1889 for labor alone in developing the coal on said land.

There is no doubt that the coal is of an average quality, but it is contended that with the present means of transportation it can not be put upon the market at a profit. This view of the case seems to have determined largely the decision of the local officers. It is evident that the means of transportation can not affect the intrinsic value of the coal. The mineral is there and is intrinsically valuable as coal.

The statutes except land which contains coal where the coal claimant has a "*bona fide claim*" for it, which was well known at the time of the hearing; and by the express terms of the statute, the timber claimant can not "defeat or impair" it. "The evidence shows that this coal burns well, holds its heat well, and leaves but little ash and no clinker. These are the essential qualities which decided that it meets the statutory requirement.

Smith had opened and improved the mine and was "in actual possession" of it when the timber claimant made his final proof. Buckley saw the excavation on August 29, 1890, and again on September 12, 1890.

For timber this land is worth from \$12 to \$15 an acre. It does not appear that there is any nearer market for timber than Astoria, or that there is any different means of transportation for timber than for coal. It is obligatory upon the timber claimant to prove that "the chief value of the land must be its timber." United States *v.* Budd (144 U. S., 154-168). "The statute does not refer to the probabilities of the future, but to the facts of the present." (*ibid.*)

Under the facts and circumstances of the case I am of the opinion that the coal claimant should have the preference right of entry.

Your judgment is reversed.

SETTLEMENT RIGHT—TOWNSITE—SECOND CONTESTANT.

WEST GUTHRIE TOWNSITE *v.* COHN ET AL.

A settlement right can not be acquired on land that is embraced within a prior townsite claim, even though said land may not be at such time actually occupied for townsite purposes.

A second contestant whose application to contest is received and held pending the disposition of a prior suit on the same ground, acquires no right under the act of May 14, 1880, in the event that the entry under attack is canceled as the result of a hearing ordered to determine all conflicting claims to the land in question.

Secretary Noble to the Commissioner of the General Land Office, October 3, 1892.

The attorneys of Henry H. Bockfinger have filed a motion for review of departmental decision of December 16, 1891, in the case of Townsite of West Guthrie *v.* Mark S. Cohn *et al.* (13 L. D., 690) involving the W $\frac{1}{2}$ of section 8 T. 16 N., R. 2 W., Guthrie, Oklahoma land district.

The claim of the townsite covers the whole W $\frac{1}{2}$ of said section 8. There were various adverse claims to the respective tracts in this half section by way of entries, applications to enter and applications to contest entries, of which many were disposed of by default at the hearing had before the local officers, others by failure to appeal from the adverse decision of the local officers, and others by failure to appeal from the decision of your office adverse to them, while all claims save that of the townsite settlers were decided against in the decision of this Department in which all have acquiesced except Bockfinger, who presents the motion now under consideration. One of the claims adverse to the townsite claimants was that of James W. Feagins under his homestead entry made April 23, 1889, for the SW $\frac{1}{4}$ section 8 T. 16 N., R 2 W. Of the various affidavits of contest filed against said entry all were disposed of by the decision of the local officers except those of two parties, whose appeals were allowed and considered by your office, and hence these two are the only ones necessary to mention at this time. One Ezra Maples filed his affidavit of contest against said entry on May 8, 1889, alleging Feagin's

disqualifications as an entryman because of his being within the Territory prior to the day it was opened to settlement. On May 24, 1889, Bockfinger presented his affidavit of contest against Feagin's entry upon precisely the same grounds as had been set forth in Maples' affidavit. While both these affidavits were received by the local officers and marked filed, no notice was ever issued under either of them, and no steps taken to bring about a hearing thereunder. Of course nothing could be done with Bockfinger's until the prior one had been disposed of.

On June 18, 1889, an application to make townsite entry for the W $\frac{1}{2}$ of said section was filed in the local office, which was transmitted to your office. With the facts as to the various claims to this land before you, you ordered a hearing to determine when the land was first actually selected and occupied as a townsite or townsites, the number of inhabitants, the character, value and location of all municipal improvements thereon, and as to the settlements and dates thereof by the homestead claimants. To these points was afterwards added one as to the qualifications of the homestead claimants. This hearing was first fixed for December 3, 1889, but was continued at various times and for various reasons until March 28, 1890, when the case was called for trial. Up to this time Bockfinger had asserted no claim to the land as a settler, but in his testimony given on June 3, 1890, he states that he settled on said S. W. $\frac{1}{4}$ about April 29, 1890, and had thereon a house and other improvements of the value of \$250.

As a result of the hearing the local officers decided in favor of the townsite claimants as to the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 8, and that a hearing should be had to determine the rights of the several homestead claimants as to the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$. Upon appeal by the various parties, your office awarded the entire W. $\frac{1}{2}$ of said section to the townsite claimants, subject to this condition, namely, that if when proof is offered, it shall appear that each legal subdivision thereof had been occupied for municipal purposes prior to, or on, May 14, 1890, or subsequent thereto and prior to the initiation of a valid homestead claim to any portion thereof, such entry shall be allowed, but if it appears, that one or more legal subdivisions thereof shall not have been so occupied, at the time named, such subdivision shall be excluded from such entry, and a hearing will be had to determine, under the law and Rules of Practice, who is the party rightfully entitled to make entry of the same.

By the decision of this Department, the whole of the W. $\frac{1}{2}$ of said section was awarded to the townsite claimants, and in that decision all parties acquiesced except Bockfinger, who files the motion for review now under consideration. The alleged errors are not set forth in short and explicit statements, but are presented in the following form:

MATTERS OF FACT.

1. That it was error of fact to find as follows:

"The settlers of the townsite of West Guthrie selected the W. $\frac{1}{2}$ of Sec. 8, 16 N., 2 W., as the site of a town at about 4 o'clock P. M., April 22, 1889. Town meetings

were held that day and the next, and organization effected; taxes collected from those who had on the first day located and claimed lots; officers were selected to preside over and control the affairs of the town, and organization for municipal purposes has been kept up continuously since that date. There were at least one hundred people who selected this tract for town purposes on April 22, 1889, before any agricultural claimant made settlement or claim on either of said tracts, except Cohn, Feagins, and Taylor, who were not eligible to make settlement, etc."

After the settlers of West Guthrie had made their selection of the W. $\frac{1}{4}$ of said section for townsite purposes and taken possession thereof on April 22d, at about 4 o'clock P. M., the time had passed when any one could initiate a homestead claim for any part thereof.

2. That it was error of fact to find as follows, concerning the Commissioner's decision:

"The voluminous record in this case has been examined, and it is found that your decision appealed from contains a succinct statement of the facts in the case."

ERRORS OF LAW.

1. That it was error of law to hold as follows:

"But I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma Townsite act of May 14, 1890 (26 Stat., 109), for legal subdivisions not actually occupied for municipal purposes by the townsite at the date of the passage of the act above cited. Under said act, one hundred people or more may select three hundred and twenty acres of land in Oklahoma Territory for a townsite, although they may not at the date of the selection, or of the townsite act, use such smallest subdivisions thereof for municipal purposes."

2. "After the settlers of West Guthrie had made their selection of the W. $\frac{1}{4}$ of said section for townsite purposes and taken possession thereof on April 22d, at about 4 o'clock P. M., the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about one hundred and twenty acres has not yet been settled upon as a place of residence, will not prevent said portion from being included in the townsite entry.

"Towns are not built in a day, and from the very nature of things they should not be required to improve each of the smallest legal subdivisions in their selection before making entry, any more than a homestead claimant should be required to improve each forty acres making up his homestead before making his final entry."

It may be profitable before proceeding farther in the consideration of this motion to consider and determine the status occupied by Bockfinger in the case. He has made no application to enter this land, and does not claim to have made a settlement thereon until April 20, 1890, nearly a year after the application by the townsite claimants was filed. While his claim is mainly based and argued on the theory that he acquired a right of entry by virtue of his contest affidavit attacking Feagins' entry, yet it is alleged as an alternate claim that the townsite claimants had not settled upon and occupied any portion of said quarter section prior to his settlement, and that therefore he acquired a right to said land by virtue of such settlement immediately upon the cancellation of Feagins' entry. This claim cannot be sustained. Whatever may be concluded as to the land claimed by the townsite on April 22, or 23, 1889, or prior to the filing of Bockfinger's contest affidavit on May 24, 1889, it is clear that this particular tract was claimed long prior to Bockfinger's settlement, for it was included in the plat filed

with the application to make the townsite entry, was described in that application, and was a part of the land contemplated by the order for a hearing in this case, which was made October 23, 1889, all long prior to Bockfinger's settlement. He certainly had notice of the claim of the town to this tract before he performed any act of settlement on said land. Again, whatever may have been the number of people located on the west half of said section up to, and at the date, of Bockfinger's affidavit against Feagins' entry, it is indisputable that at the time of filing the townsite application there was a large number of people upon the N.W. $\frac{1}{4}$ of said section, certainly sufficient to entitle them to take the whole west half thereof and that this number steadily increased up to the time of the hearing and of Bockfinger's settlement. It may be true that at the date of the hearing there was no one on the S.W. $\frac{1}{4}$ of claiming as a townsite settler, but if true, this condition of affairs is satisfactorily explained by the fact established by the testimony that all such as were thereon were removed by the military on or about June 15, 1889. It was, in my opinion, the intention to acquire said last named quarter section of land for townsite purposes, and this intention was shown by settlements thereon, by surveying a part of it, and by including the whole in the plat filed with the townsite application, all of which Bockfinger had actual notice, or is chargeable with notice prior to his settlement. That the parties in interest desisted from following up their settlements, survey, etc. in the face of the action of the military authorities, is not to be held as an abandonment of their claims, especially in view of the fact that they have continuously asserted their rights, and sought an adjudication thereof through the proper processes of a trial and judgment of the different tribunals of this Department. Under this view of the case it may be doubted if it be necessary to invoke the doctrine laid down in the following quotation from the departmental decision complained of, referring to the act of May 14, 1890 (26 Stat., 109), viz:

Under said act, one hundred people, or more, may select three hundred and twenty acres of land in Oklahoma Territory for a townsite, although they may not, at the date of the selection, or of the townsite act, use each smallest subdivision thereof for municipal purposes. Townsite of Norman v. Robert Q. Blakeney (13 L. D., 399); William H. Walker v. Townsite of Lexington, (13 L. D., 404).

the correctness of which proposition is denied in the argument in support of this motion, whether or not it be necessary to invoke this doctrine it is sufficient to say that this question was fully discussed in the cases cited, and I see no good reason for receding from the position then taken, or indeed any necessity for entering again upon an extended discussion thereof. In arguing this branch of the case, it is insisted that there can be no selection for townsite purposes in Oklahoma except by actual settlement and occupancy, and the counsel formulate the following deductions from the opinion of Attorney General Cushing,

cited and quoted from in the case of *Walker v. Lexington Townsite*, *supra*, viz:

That the selection must be by settlement and occupancy.

That the inchoate right begins from the beginning of such occupation.

That the ultimate sufficiency of that occupation is to be determined in part from subsequent facts which consummate the occupation, and also demonstrate its *bona fides*.

Immediately following is the statement by counsel in these words:

The municipal occupation is sufficiently evidenced by an actual survey upon the ground, of said town, into streets, alleys and blocks, or the publication of a plat of the same, evidencing the connection therewith of the public surveys, so as to give notice to others.

This last had at least been done long before Bockfinger's settlement, and hence, under their theory of the law, he can claim nothing as against the townsite claimants by virtue of his settlement, but must succeed, if at all, because of some right secured by filing his contest affidavit.

I find no error, either in law or fact, in said decision by which Bockfinger, in his character of settler, has been injured, and hence the motion in question will not be allowed, in so far as it is based upon his rights as such settler.

It becomes necessary now to consider his status otherwise and determine whether he has secured such a standing in the case by reason of having filed the affidavit against Feagins' entry as to be entitled to prosecute the motion in question, and if this be answered in the affirmative, whether there is such error in said decision as deprives him of some right in his character of contestant.

The act of May 14, 1880 (21 Stat., 140), contains among others the following provision:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

In this case Bookfinger presented his affidavit of contest, containing the same allegations made in affidavits filed ahead of his, and it was received by the local officers to be held until the preceding contests should be disposed of. It was never acted upon or considered as a contest, he did not pay the land office fees, and he did not procure the cancellation of Feagins' entry. He has never reached the place where he could properly be called a contestant, his status being only that of an applicant to be allowed to proceed against the existing entry, whose application was not in a condition to be acted upon, but must necessarily be held in abeyance for the time being. Surely he acquired no vested right to make entry for the land thereby. It must be borne in mind also that his charge was the same as that in the prior affidavit,

so that if proceedings under such former affidavit had been carried to a final judgment, Bockfinger could have secured nothing under his application to contest; because had that judgment been for the cancellation of the entry, his application must have been denied, as there would have been no entry to proceed against (*Hyde et al. v. Eaton et al.*, 12 L. D., 157), and if the judgment had been in favor of the entryman the same result would have followed, because an issue once tried and determined can not be made the basis of a second contest (*Busch v. Devine*, 12 L. D., 317). There is nothing in this case to take it out of the operation of that general rule. Bockfinger's relation to this case based upon his contest affidavit, is entirely too remote to justify the conclusion that he has been injured by the decision complained of, even if the errors alleged therein do exist, which it is not intended to say hereby is the fact, and hence there is no sufficient reason apparent for granting his motion.

Said motion, asking that the departmental decision of December 16, 1891, be revoked and set aside for the reasons herein set forth, must be, and the same is hereby denied.

The attorneys for Bockfinger have filed a motion for rehearing in this case on the ground of newly discovered evidence, supporting the same by affidavits of various parties. These affidavits are to the effect that no selection was made of the S. W. $\frac{1}{4}$ of Sec. 8 for townsite purposes prior to June 5, 1889. Counter affidavits have been filed, but I do not consider it necessary at this time to discuss the contradictions between the two sets or the fact that some of the parties making the affidavits in support of this motion were examined as witnesses at the hearing heretofore had.

It may be admitted for the purpose of the present discussion that these affidavits set forth the facts actually existing, and still they afford no sufficient reason for a new hearing, in view of the status we have determined Bockfinger occupies in this case. They do not controvert the conclusion that the land was actually selected by the townsite prior to Bockfinger's settlement, but on the other hand tends strongly to support it, and hence do not aid his claim as a settler. And, if as heretofore concluded, he has secured no right as a contestant to enter said land, a new hearing which would establish the facts as set forth in these affidavits could not confer such a right on him. For these reasons the motion for a rehearing is hereby denied.

MINING CLAIM—PUBLICATION OF NOTICE—REVIEW.

CONDON ET AL. v. MAMMOTH MINING CO. (ON REVIEW).

The discretion vested in the register to designate a newspaper within which the notice of a mineral application must be published, is subject to review and control by the General Land Office and the Department.

A motion for a review will not be granted where it presents no new question.

Secretary Noble to the Commissioner of the General Land Office, October 4, 1892.

I have before me the motion filed by the attorneys for the Mammoth Mining Company, for review of the case of Pat Condon *et al. v.* The Mammoth Mining Company, reported in 14 L. D., 138, dated February 5, 1892, involving mineral entry No. 1408, for the Bradley lode claim Salt Lake, Utah, land district.

The record shows that in September, 1887, the Mammoth Mining Company filed its application for a patent for the Bradley lode claim in the Tintic mining district, Utah.

The register of the local land office, directed the publication of the notice of the application to be made in the Territorial Enquirer, a newspaper published at Provo City, Utah, in which said notice was published for the period of sixty days.

No adverse claim nor protest having been filed during that time, the entry was allowed in December, 1887. In August, 1889, the Condons filed a protest, against the issuance of a patent on the entry, alleging in substance that they were the owners of three conflicting claims, to-wit: the Accident, Dipper and Eclipse lode claims; that they had maintained their rights of possession to said claims by due compliance with the law, and that said conflicting claims were located prior to the location of the Bradley lode claim; that they never had any notice of said application for patent for the Bradley lode claim; that the notice thereof was not published in the newspaper nearest the claim; the Nephi Ensign, published at Nephi, Utah, which was near the claim; that the Territorial Enquirer in which it was published, was remote and much further away from the claim than the Nephi Ensign.

Protestants also alleged that the claimant of the Bradley lode claim had failed to do \$100, worth of work on the surface of said claim.

On the 30th of October, 1889, you ordered a hearing to determine whether the notice of the application of patent for the Bradley lode claim was made in the newspaper published nearest to the claim "in accordance with the law and the regulations thereunder." The special attention of the local officers was also called by you to the provisions of the circular approved April 21, 1885.

The hearing was had; the parties appeared and introduced their testimony; the register and receiver decided that the publication of the

notice of application for patent to the Bradley lode claim was not made in accordance with law, and that the protest in this respect was well taken. The Mammoth Company appealed to your office.

On October 25, 1890, you affirmed the judgment of the local officers and held the entry for cancellation and upon the appeal of said company to the Department, your judgment was, on the 5th day of February, 1892, modified by suspending the entry made by the Mammoth Mining Company, and requiring a new notice to be published.

The motion under consideration asks a reconsideration and review of said departmental decision.

In the decision complained of, it is stated that,—“The only question in issue is as to whether or not the notice of application of patent of the Mammoth Mining Company was published according to law. If it was, under the provisions of section 2325 of the Mining Laws, Revised Statutes of the United States, the protestants in this case can not now assert an adverse claim. A statute providing for the service of notice by publication should be strictly followed in order to give jurisdiction. I have considered the evidence in the record, and am of the opinion that your judgment, from which an appeal has been taken, is sustained by the facts shown in the record.

The facts are that on the 6th day of October, 1887, the register of the land office at Salt Lake, directed the notice of the application of the Bradley lode for a patent to be published as follows: “I direct this notice to be published in the Territorial Enquirer, at Provo City, Utah, the newspaper published nearest the said mining claim, for the period of sixty days. D. Webb, Register.”

The Enquirer was published in Utah county. The Nephi Ensign was a newspaper published in Juab county, the county in which the Bradley lode claim was located. It was first published in June, 1887, and continued its publication regularly every week. It was a paper of general circulation in Juab county and the Tintic Mining district. It was recognized by the land office at Salt Lake as a proper newspaper for the publication of proof notices; the register before and immediately after September 6, 1887, directed final proof notices in agricultural cases to be published in said paper. Geographically measured the Ensign was published eleven and a half miles nearer the Bradley claim than the Enquirer. While there was a conflict in the testimony as to whether the Ensign was published nearer said claim by the usual ways of travel than the Enquirer, it is safe to conclude that the preponderance of the testimony showed the Ensign to have been published nearer the claim than the Enquirer was.

Mr. Webb, who was register at the time the order of publication was made, was examined as a witness at the trial and was asked on cross-examination: “Why did you, on the 6th day of September, 1887, issue an order for publication of the Bradley Mining Claim, in the Territorial Enquirer in Provo and on the next day, the 7th of September, 1887, issue an order for publication in the Nephi Ensign?” He answered: “I don’t know, unless we regarded mineral applications of more im-

portance than we did agricultural, and we were a little more strict with them."

In the motion under consideration and in the argument in support of it, counsel contends that the Department erred in its decision as to the question of the jurisdiction of the local officers to pass upon the mineral application. It is also argued in support of the motion that the register had the discretion to order the publication of the notice in this case, under the facts and circumstances, to be made in the paper he did, although it is not denied that the same was published eleven and one-half miles, geographically measured, farther from the claim, than the Nephi Ensign was. This was really the question in the case as decided by the Department, whatever may have been the language used in determining it. Waiving, therefore, the jurisdictional question we will come directly to the real question in the case, which is, whether the register has any discretion in designating the newspaper in which notices of mineral applications for patent may be published under the law.

On this subject there seems to be a want of uniformity in the expressions of your office and the Department in the past, therefore a brief reference to them may serve to make my conclusion more easily understood.

In *Tomay et al. v. Stewart* (1 L. D., 570), Secretary Kirkwood held that the register may exercise his official judgment as to whether publication in the paper nearest the claim will effect the object of the statute requiring notice to be given.

The notice in that case was published for the required time (from July 14, to September 15, 1881) in a weekly newspaper published about three miles from the land applied for, and it was claimed that said notice should have been published in a newspaper published about one mile from the claim. The latter paper was established June 3, 1881, and ceased its existence October 21, 1881. Its circulation never reached quite one hundred copies per week.

The protestants in that case took notice of the publication, and filed adverse claims, and commenced suits pursuant to said notice.

The case of *William A. Arnold* (2 L. D., 758) was a decision by the Commissioner of the General Land Office, which so far as I have been able to find, was never approved by the Secretary of the Interior. It announces as the rule, in the selection of newspapers for publication of mining notices, that it is a matter resting in the sound discretion of the register. Said decision was dated on the 19th day of February, 1884. It was followed by the circular of July 31, 1884, which was approved by the acting secretary, August 1, 1884. Among other things said circular stated that:

Where there are several papers which are "newspapers" within the meaning of the law, and any one of which might be designated under these instructions, you will use your discretion in making your selection, and in the reasonable and honest

exercise of that discretion you will not be interfered with by this office. You are not to construe the words "as nearest" as binding you to any rule of strict calculation of geographical distance, but you are to select which among the proper papers regularly published and having a stable circulation nearest the land you will designate for the purpose of publication.

This circular was modified by the circular of April 21, 1885, directed to registers and receivers, which was approved by Secretary Lamar, in which he instructed them:

That you have *no discretion* under the law to designate any other than the newspaper "nearest the land" for such purpose, when such paper is a "newspaper of general circulation" as defined in said circular. But you will in all cases designate the newspaper of general circulation that is published nearest the land geographically measured. L

In *Erie Lode v. Cameron Lode* (10 L. D., 655), it was held that the register may exercise his official judgment in the selection of a newspaper nearest the mining claim for the publication of an application for patent.

In that case a hearing was had, the same as in this one, to determine whether the notice had been published in the nearest newspaper to the claim; in that case, as in this, the finding of the local officers, upon the facts was affirmed by your judgment and the Department.

In that case it was shown that prior to January 25, 1885, a newspaper called the 'Silver Record,' was published at Gothic, seven or eight miles from the claim in controversy. From that date to May 30, 1885, it was printed at Crested Butte, fifteen or sixteen miles from the claim on the press and type of another newspaper published there. The application for patent was filed February 28, 1885, and notice thereof was published from March 5, 1885, to May 7, 1885, in the Elk Mountain Pilot, a newspaper printed at Crested Butte. It thus appears that as a matter of fact, the real controversy in that case was between two papers published in the same town, for the 'Silver Record' was published in Crested Butte during the whole period of the publication of said notice in the 'Elk Mountain Pilot' published in said town. Furthermore, the office of the Record at Gothic was shown to have been closed and not in use when the application was made, and the register testified that no paper was published nearer to said claim than at Crested Butte, and that he deemed the existence of the Silver Record as precarious. After referring to the case of *Tomay et al. v. Stewart* (1 L. D., 570), it is said (page 657): "In the case at bar the register exercised his official judgment and selected the newspaper which he believed to be best fitted for the proper publication of the Cameron notice.

That portion of section 2325 of the Revised Statutes under which notices of this character are published, necessary for consideration in the determination of the question here involved reads as follows:

The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published

nearest to such claim; and he shall also post such notice in his office for the same period.

I am of the opinion that this means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interests and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, its stability and general circulation and the like. But it is a legal discretion and in its exercise his act is certainly subject to review and control by your office and the Department, and where it is shown that he has abused such discretion, your office, as well as the Department, has the power to set aside his action in order to avoid injustice or unfair discrimination, or an ignoring of the provisions of the law and the rules and regulations of the Department.

The Nephi Ensign was published in the county in which the claim was located, and the register having determined that it was a paper of general circulation for the purposes of publishing agricultural notices, before this application was made, there is no reason why it was not one of general circulation for the purpose of publishing mineral notices. In other words, if it were good enough to publish agricultural notices in it, certainly it must have been good enough for the publication of mining notices.

In the light of the record and testimony in this case, I am satisfied that the register abused the discretion which is vested in him by the statute in designating the Territorial Enquirer as the newspaper in which the notice of the Mammoth Mining Company's application should be published, and that the same calls for correction at the hands of the Department, hence there was no error in the conclusions reached in the decision complained of which calls for a modification of the judgment on this motion.

The circular of April 21, 1885, was in full force when the application in this case was made. I therefore see no just ground upon which applicants can complain, for in so far as it was not in conflict with the statute under which it was issued it had all the force and effect of law. *Allen et al. v. Merrill et al.* (on review) (12 L. D., 13); *Hessong v. Burgan* (9 L. D., 353).

It is true that it is claimed that the Nephi Ensign was shown by the evidence not to have been a newspaper of general circulation in the

vicinity where it was published at the time the notice was published in this case. This is a question of fact, and as such, it was decided by the local officers, by you, and by the Department, against the contention of counsel, and there is no such palpable preponderance of the evidence against such finding as would warrant the Department on review, in disturbing it. *Guthrie Townsite v. Paine et al.* (on review), (13 L. D., 562); *Crogan v. Graves* (9 L. D., 463); *Dayton v. Dayton* (8 L. D., 248).

It is claimed that the Nephi Ensign never was a paper of any stability; and as a circumstance to show this there is attached to counsel's argument an "obituary" of said paper, which is dated April 24, 1891, over three years after the publication in question was made. This does not overcome the testimony in the case which shows it to have been a newspaper of general circulation when the publication was made.

All the grounds of the motion relate to the facts as found and the law as applied to the case. All of the matters recited in the motion and complained of in it, were necessarily considered by the Department, in deciding the case; every proposition embodied in the motion was fully argued before the Department, upon the merits of the case; no new question of law or fact is presented by it. Under such circumstances a review of the decision complained of is not warranted, under the repeated rulings of the Department. *Pike v. Atkinson* (12 L. D., 226); *Ary v. Iddings* (13 L. D., 506); and *Stone v. Cowles* (14 L. D., 90). In view of the importance of the case the testimony and record have been carefully re-examined and no sufficient reason has been found for any change in the opinion sought to have reviewed.

The motion for review is therefore denied.

SAN LORENZO *v. RIES et al.*

Motion for review of departmental decision rendered November 28, 1891, 13 L. D., 612, and application for rehearing, denied by Secretary Noble, October 4, 1892.

OKLAHOMA TOWNSITE—PURCHASE PRICE—SCHOOL FUND.

A. L. COCKRUM.

Evidence of organization to be furnished by a municipality that applies for the purchase price of a townsite under section 22, act of May 2, 1890.

Acting Secretary Chandler to A. L. Cockrum, September 19, 1892.

I am in receipt of your application, as treasurer of the townsite of Orlando, for the payment of \$1,500, paid to the Secretary of the Interior by Warren H. Hysell, for the SE. $\frac{1}{4}$ of Sec. 2, T. 19 N., R. 2 W.,

as the townsite of Orlando, under the provision of section 22, of the act of Congress, approved May 2, 1890 (26 Stat., 81). Said act requires that the money thus received shall be paid over to the authorities of the municipality when organized, to be used for school purposes only.

Before the money can be paid over, there must be satisfactory evidence that the municipality has been organized as required by the laws of Oklahoma. With your application you file a certificate of the clerk of Logan county, reciting "that the Town of Orlando in Logan county, Oklahoma Territory, has been duly and legally incorporated as a town as required by Chapter 16, Art. I, of the Statutes of Oklahoma and that all the requirements of said statute have been complied with."

This is not the evidence of the organization of the municipality which is required.

The following evidence should be furnished.

First. A duly certified copy, under seal, of the order of the board of county commissioners, declaring that the specified territory shall, with the assent of the qualified voters be an incorporated town, also the notice for a meeting of the electors, as required by paragraph 5 of Article I, Chapter 16 of the statutes of Oklahoma.

Second. A like certified copy of the statement of the inspectors filed with the board of county commissioners, also a like certified copy of the order of said board, declaring that the town has been incorporated, as provided by paragraph 9, of said article one.

Third. A like certified copy of the statement of the inspectors, filed with the county clerk, declaring who were elected to the office of trustees, clerk, marshal, assessor, treasurer, and justice of the peace, as provided by paragraph 16, of said article one.

Fourth. A like certified copy of the town clerk, of the proceedings of the board of trustees electing one of their number president, also, a copy of the qualifications to act by each of the officers mentioned, as provided by paragraph 19, of said article one.

Fifth. A certified copy, by the town clerk, of the proceedings of the board of trustees, designating some officer of the municipality to make application for and to receive the money to be paid by the Secretary of the Interior.

Sixth. A proper application for the money, by said designated officer.

The evidence now before me is a satisfactory compliance with requirements numbered fifth and sixth, and upon the receipt of the remaining required evidence, if the same is satisfactory, the money will be promptly paid over.

HOMESTEAD CONTEST—ENTRY—SECTION 2294 R. S.

MOLEN v. BARTLETT.

A homestead entry based upon a preliminary affidavit executed before a clerk of court, without the pre-requisite residence on the land, is voidable, and the defect cannot be cured, if, prior to the establishment of residence the adverse right of a contestant intervenes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 5, 1892.

On the 28th of May, 1889, Enoch Bartlett made homestead entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 5 N., R. 38 E., Blackfoot land district, Idaho. His homestead affidavit was made on the 27th of that month, before the clerk of the court for Bingham county, and contained the statement that he was then residing on the land, etc., as required by section 2294 Revised Statutes.

On the 29th of July, 1889, James W. Molen filed an affidavit of contest, alleging that Bartlett's "statements made under oath at time of making said entry before the clerk of the court, under section 2294 R. S., at Eagle Rock, regarding residence and settlement, were not true." He also alleged that Bartlett had not yet established his residence on said land. This affidavit was corroborated by four witnesses.

The trial was set for the 27th of September, 1889, and was followed by a decision by the local officers, without date, in which they awarded the land to Bartlett. An appeal from that decision was taken to your office, and on the 15th of December, 1891, you affirmed the same, and dismissed the contest. A further appeal brings the case to the Department.

Bartlett frankly admitted at the hearing, that he was not residing on the land in question, at the time he made his homestead affidavit, nor was any member of his family residing thereon at that time. He also admitted that he was not residing there at the time the notice of contest and hearing was served on him, and had not resided there prior to that time. Such notice was served upon him on the 30th of July, 1889.

At the hearing, a stipulation signed by the attorneys for the respective parties, was made part of the record, which reads as follows:

It is hereby stipulated and agreed, that at the date of Enoch Bartlett's filing before Joseph A. Clark, deputy clerk, at Eagle Rock, on the 27th day of May, 1889, the said Bartlett had no improvements on the land, and that he, nor any member of his family resided on the land, and that no actual residence or settlement was made on the place or land until the 11th day of August, 1889.

In the case of O'Connell v. Rankin (9 L. D., 209), it was held, on review, that

A homestead entry based upon a preliminary affidavit executed before a clerk of court, without the pre-requisite residence on the land, is voidable, and said defect cannot be cured, if, prior to the establishment of residence, the adverse right of a contestant intervenes.

This doctrine was repeated in *Swims v. Ward* (13 L. D., 686), and is uniformly adhered to by the Department.

All the proof in the case is clear and positive that Bartlett established his residence in a house built by him upon the land, on the 11th of August, 1889, and not before, while the notice of contest was served on him on the 30th of July, of that year.

This house was commenced by him before the contest was initiated, as Molen testifies that on the 30th of July, when he served notice of contest upon Bartlett "there were logs laid up for a house, and part of the lumber on the house for the roof, but no doors or windows cut."

Bartlett's son testified that he hauled the logs, out of which the house was built, upon the land for his father on the first day of June, 1889, but that the house was not completed so that it was habitable until about the 11th of August, when his father "bought his grub and began living there."

These are the facts of the case, and upon them you base your decision in favor of the entryman. In support of such decision you cite the cases of *Humble v. McMurtrie* (2 L. D., 161); *Grimshaw v. Taylor* (4 L. D., 330), and *Henry Hoffmeister* (7 L. D., 410). All these cases in effect hold that residence is established from the time the settler goes upon the land with the bona fide intention of making his home there, to the exclusion of one elsewhere.

I have no hesitancy in agreeing with the correctness of those decisions, under the circumstances of the cases in which they were made. In the Hoffmeister case the entryman settled upon the land on the 5th of April, his first act of settlement being the erection of a house. He did not move his family into it until the 15th of that month, and he made final proof on the 10th of October. You held that his residence must date from the 15th of April, and that his proof was therefore prematurely made, and rejected the same. The Department reversed your decision, holding that his residence dated from the time of the erection of his house, and passed his entry to patent. The other cases present similar equities.

In the case at bar, however, it is expressly stipulated that the statements in the affidavit upon which the entry was made, were not true. It is proved that the entryman had no place upon the land in which he could reside until about the 11th of August, 1889, and it is stipulated that he did not attempt to dwell or sojourn thereon prior to that date, while notice of contest and of the hearing was served upon him on the 30th of July, of that year. I am therefore obliged to hold, in accordance with the uniform rule of the Department, his entry being based upon a preliminary affidavit executed before a clerk of court, without the pre-requisite residence on the land, and the adverse rights of a contestant having intervened prior to his having any abode, dwelling or habitation thereon, that the defect in his entry cannot be cured, and that it must be canceled. The decision appealed from is accordingly reversed.

EXTENSION OF TIME FOR PAYMENT—REGULATIONS.

NATHANIEL WOODIWISS.

The joint resolution of September 30, 1890, authorizing an extension of time for payment is remedial in character, and its provisions are applicable on due showing made in accordance with the regulations.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1892.

I have considered the appeal of Nathaniel Woodiwiss from your decision of January 15, last, denying his application for extension of time for one year within which to pay the purchase money for the SE. $\frac{1}{4}$ of Sec. 8, T. 160 N., R. 60 W., Grand Forks, N. D., upon which he submitted final proof on November 21, 1891, showing residence since settlement on February 1, 1889, with improvements valued at \$600. You state that on the same date of submitting final proof Woodiwiss filed his corroborated affidavit in which it is alleged that during the season of 1889 he had fifty acres in crop, which failed on account of the drouth; that in 1890 he put one hundred and twenty acres in wheat, which was so badly injured by the frost that after deducting expenses and keeping enough wheat for seed and bread for the coming year, nothing will be left to pay for said land; that during 1891 he had one hundred and five acres in wheat, which is yet in the shock, and on account of the uncertainty of the weather, cannot, probably be threshed before the ensuing spring; that he is unable to realize anything on said crop at the present time, and having nothing from former crops, he asks to have the time extended.

You refuse his said request because the allegations of loss of crop for 1889 or 1890 is not a sufficient basis for granting the relief provided for by the joint resolution of September 30, 1890, (26 Stat., 684); that said resolution requires that the applicant shall show a loss during the year in which he applies for relief, and "it does not appear that Woodiwiss has sustained any loss in 1891; therefore, though the crops of 1889 and 1890 were a failure, his application for relief on that account is denied."

By said resolution it is provided—

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

By the circular of October 27, 1890, (11 L. D., 417, General Circular February 6, 1892, p. 14, 15) it is prescribed that—

Any party applying for the extension of time authorized by said resolution will be required to submit testimony to consist of his own affidavit, corroborated, so far as possible, executed before the register or receiver, or some officer authorized to administer oaths in land matters within the county where the land is situated, setting forth in detail the facts relating to the failure of crops, on which he relies to

support his application and that he is unable by reason of such failure of crops to make the payment required by law.

In addition to the allegations of the applicant set forth in your decision, Woodiwiss states in his affidavit filed in support of his said application, "that he has no other means except by his own labor by which to get the money for the final payment on his land. That it is impossible for him to make said payment at the present time."

The applicant has filed with his appeal his affidavit, corroborated by two witnesses, in which he repeats his statements relative to the failure of crops in 1889 and 1890, and he also alleges that on account of the failure of crops during the seasons of 1889 and 1890, he was left without means to live during the time he was raising the crop of 1891, and was obliged to mortgage the future crop of that year to get means to live and pay his expenses; that his crop of 1891 is badly damaged by the frost, so that he cannot realize more than half a crop, and on account of the weather he has been unable to thresh the same; that after being threshed it will not net more than enough to pay off the chattel mortgage on the crop and furnish bread and seed for the coming year; that it is utterly impossible for him to raise the purchase money for said land at this time, and having used his right of homestead unless his application be allowed, he is liable to lose his valuable improvements which he has placed upon the land.

The resolution of 1890 is remedial, and should receive a liberal construction. It authorizes the Secretary of the Interior to prescribe the "evidence" which the applicant must file in the offices of the register and receiver, and he has prescribed that such evidence shall consist of the applicant's "own affidavit, corroborated, so far as possible, . . . , setting forth in detail the facts relative to the failure of the crops on which he relies to support his application, and that he is unable, by reason of such failure of crops, to make the payment required by law." The applicant appears to have complied with both the letter and the spirit of the said regulation, and, in my judgment, his application should have been granted.

Your decision is reversed.

UMATILLA INDIAN LANDS—ADDITIONAL ENTRY.

JAMES A. MARSTON.

The right to make an additional entry of Umatilla lands under the first proviso of section 2, act of March 3, 1885, is not limited to cases where the original entry was made prior to the passage of said act, but extends to fractional entries existing at the time of the sale provided for in said act, if the entryman is otherwise qualified.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1892.

I have considered the appeal of James A. Marston from your decision of November 30, 1891, holding for cancellation his additional cash entry

of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and lot 4, of Sec. 1, T. 2 N., R. 32 E., at La Grande, Oregon, under the first proviso in section 2 of the act of Congress approved March 3, 1885 (23 Stat., 341), for the reason that said proviso does not protect one whose original entry was made after the passage of said act.

It appears that said Marston made a homestead entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 7 of said section 1 on August 19, 1889, and commuted the same to cash entry No. 3775.

Said proviso in section 2 of the act of March 3, 1885, reads—

That persons who settled upon or acquired title under the pre-emption or homestead laws of the United States to fractional subdivisions of lands adjacent to the lines of said reservation, as now and heretofore existing, and at the time of the sale herein provided for are residing upon such fractions, and have been unable to secure the full benefit of such laws by reason that the lands settled upon were made fractional by the boundary-line of said reservation crossing such subdivision, shall have a right, at any time after advertisement, and before sale at public auction, to purchase, at their appraised value, so much of said lands as shall, with the fractional lands already settled upon, make in the aggregate one hundred and sixty acres; and no additional residence shall be required of such settler, but he shall take and subscribe the oath required of other purchasers at the time of purchase.

On March 26, 1891, the Department issued instructions for the sale of the ceded lands in the Umatilla Indian Reservation under said act of March 3, 1885, in which, among other things, it is stated—

It will be observed that persons who settled upon or acquired title under the pre-emption or homestead laws, to fractional subdivisions of land adjacent to the lines of said reservation as now and heretofore existing, and at the time of the sale are residing on such fractions, and have been unable to secure the full benefits of such laws for the reason that the lands settled upon were made fractional by the boundary line of said reservation crossing such subdivisions are permitted at any time after advertisement and before the public sale, to purchase at their appraised value, so much of said lands as shall, with the fractional lands already settled upon make in the aggregate one hundred and sixty acres; and no additional residence will be required of such settlers, but you will require them to file the affidavit prescribed for others. Also one on form marked "A."

Such purchasers of additional tracts will be restricted to lands as contiguous as may be to the lands originally settled upon, but in view of the privilege granted them, of purchasing at the appraised valuation, prior to the day of public sale, these persons will be required to make payment in full at time of purchase, at which time you will issue the proper certificate and receipt.

It will be observed that said act of March 3, 1885, is remedial and must be liberally construed. It provides for additional entries by persons who have "settled upon or acquired title under the pre-emption or homestead laws of the United States to fractional subdivisions of lands adjacent to the lines of said reservation, as now and heretofore existing," etc. If this proviso had stopped at the word "existing," your ruling might be sustained. But it does not restrict the additional entry solely to those who have made fractional entries "adjacent to the lines of said reservation as now and heretofore existing," but adds, "and at the time of the sale herein provided for," if the entrymen then

"are residing on such fractions, and have been unable to secure the full benefit of such laws," etc.

Besides, said circular of March 6, 1891, also recognizes this right of the entryman to make an additional entry, for it expressly includes those who "at the time of the sale" are residing upon their fractional entries and have been unable to secure the full amount of land allowed under the homestead laws, because the boundary line of said reservation made their tracts fractional.

After a careful examination of the whole matter, I am clearly of the opinion that the claimant is entitled to make additional entry of the land in question, and your decision is therefore reversed.

MEANDED STREAM—REFORMATION OF SURVEY.

BERNARD RUANE.

On a proper showing hearing may be allowed to determine the existence, or non-existence, of a stream, that is represented on the plat as "meandered," with a view to the reformation of the survey if improperly made.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1892.

On June 23, 1890, Bernard Ruane made pre-emption cash entry for lots 2, 3 and 4, of Sec. 7, T. 6 S., R. 91 W., and lots 3 and 4 of Sec. 12, T. 6 S., R. 92 W., Glenwood Springs, Colorado.

On October 30, 1891, you considered said entry and by decision of that date found "from an examination of the plats" that lot 4 in said section 7, and lot 4 in said section 12, "are situated upon an island formed by two meandered branches of the Grand River and hence are not contiguous with the lots upon the bank" to wit, the remainder of said entry.

You accordingly hold that under the ruling in the case of Jacob Dunbar (12 L. D., 73), the tracts named are not contiguous, and direct that Ruane be required to "relinquish so as to preserve the contiguity of the entry retaining that portion of this tract covered by his improvements."

From this action he appeals here.

With his appeal he files his affidavit corroborated by two witnesses also an affidavit by one Logan, averring in effect, that the meandered stream shown by the plats did not in fact exist; that between said lots and the balance of his entry there is simply a slough fifty to one hundred feet in width, and that said slough, across which his cattle continually passed, is overgrown with willows.

The appellant also urges that said branches should never have been meandered for the reason that "neither of them come within the rule of the Department requiring rivers to be meandered only where the general average of their width at a right angle with the course of the stream is three chains and upwards." In support of this allegation counsel

cite the decision in the case of Hattie Fuhrer (12 L. D., 556), wherein it was held that "the fact that a stream has been meandered, will not operate to defeat an entry embracing lands on each side thereof, where it is satisfactorily shown by the records of survey, that such stream does not fall within the class that should be meandered."

In that case, however, it was shown that the meander of the stream in question had been made without instructions and by a wrong assumption of authority by the surveyor.

In the case at bar, it is not suggested that the meander of the stream dividing Ruane's entry was not made by due authority; conceding therefore that said stream was in width less than three chains, the fact that the meander was regularly made, would take it out of the scope of the decision referred to.

The allegations hereinbefore outlined to the effect that the stream shown by the plat as dividing Ruane's entry, does not, in fact, exist, are sufficient to warrant an inquiry by the Department, to the end that if said allegations be sustained the survey be reformed.

In pursuance of the foregoing you will direct that, as was done in the similar case of Jacob Dunbar, *supra*, a hearing be duly had to determine the existence or non-existence of said stream, and upon the evidence adduced you will readjudicate the case.

Your judgment is so modified.

DESERT LAND ENTRY—CITIZENSHIP.

JOHN DAVIDSON.

An actual resident of the State or Territory in which the land is situated, who has declared his intention to become a citizen is qualified, in the matter of citizenship, to make desert entry under the amendatory act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1892.

I have considered the appeal of John Davidson from your judgment of November 30, 1891, holding for cancellation his desert land entry No. 215, made April 2, 1891, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 2 S., R. 41 E., Miles City, Montana.

You held his entry for cancellation because at the date of making said entry he was not a citizen of the United States having only declared his intention of becoming a citizen, and because the act of March 3, 1891, (26 Stat., 1095) requires an entryman to be a "resident citizen of the State or Territory in which the land sought to be entered is located."

The Department has construed the above phrase as used in the desert land act amended March 3, 1891, as meaning to embrace all persons living in such State or Territory and entitled to protection in the exercise of civil rights without regard to their political rights, and must be read in connection with the provisions of sections one and seven of said act. (See instructions of June 22, 1892, 14 L. D., 677.)

This construction, which is undoubtedly the right one, allows an actual resident of Montana to make a desert land entry, though he has only declared his intention to become a citizen. Davidson having so declared his intention, and furnished the certified proof thereof, his entry should be allowed to stand intact.

Your judgment is accordingly reversed.

RAILROAD LANDS—ACT OF AUGUST 5, 1892, ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Instructions under the act of August 5, 1892, providing for the relief of settlers on certain railroad lands in the States of North Dakota and South Dakota.

I.

Secretary Noble to the Commissioner of the General Land Office, October 8, 1892.

Referring to your letter of October 1, 1892, enclosing certain lists, prepared in accordance with the directions contained in my letter of September 10, 1892, under the act of August 5, 1892, entitled, "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," I herewith return lists numbered 2 and 4.

These lists embrace lands within the limits of the several grants for the St. Paul, Minneapolis and Manitoba Railway Company, as extended into the States of North and South Dakota, under the decision of the supreme court in the case of said company *v. Ransom Phelps* (137 U. S., 528), which are shown by your records to be included in unperfected claims.

An examination of these claims shows that a number have expired by limitation. The act of August 5, 1892, provides that the company be furnished with a list of the several tracts "which have been purchased, claimed, occupied, and improved as stated in section 2 of this act, and are now claimed by such purchasers or occupants, their heirs or assigns."

As to such of the claims embraced in these lists as have expired, I have to direct that the parties be called upon to show cause why the same should not be canceled, and as to the remainder, that the claimants be required to show that they had not on August 5, 1892, abandoned such claims as they may have heretofore asserted to said lands.

In addition to this, I have to direct that a public notice be given in the districts in which these extended limits lie, advising persons who, prior to January 1, 1891, had purchased, or occupied, or improved, in good faith, under color of title or right, under any of the land laws of the United States relative to the public domain, any portion of such lands, and who were still claiming the same on August 5, 1892, that they are entitled, upon making proper proofs of these facts, to make entry thereof. After the expiration of such notice, and with the evi-

dence then on hand, you will prepare a further list of such claims which, in your judgment, are protected by this act, and submit the same for my consideration.

II.

Secretary Noble to the President of the St. Paul, Minneapolis and Manitoba Ry. Co., October 8, 1892.

Referring to resolution of the Board of Directors of the St. Paul, Minneapolis and Manitoba Railway Company, dated August 24, 1892, accepting the provisions of the act of August 5, 1892, entitled, "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," I transmit herewith two lists of lands, numbered 1 and 3, embracing, respectively, 25,427.12 and 18,363.29 acres, showing the disposal of lands within the several grants for said company as extended into the States of North and South Dakota, under the decision of the supreme court in the case of said company *v.* Ransom Phelps (137 U. S., 528).

As to the tracts embraced in said lists, the Commissioner of the General Land Office reports that the parties claiming the same have made proof thereon, and patents have issued. They seem to come within the terms of the act of August 5, 1892, and upon proper relinquishment will become the basis for selection elsewhere, as provided by said act.

The Commissioner reports other tracts shown by his records to be embraced in the unperfected claims of other parties. These claims will be duly considered, and, together with any further land which may be hereafter claimed, will be embraced in a subsequent list, of which you will be advised in the future.

Under the act of 1892, it will be necessary that you make proper release of the lands embraced in said lists, and, also, that you procure and cause to be released to the United States all liens and claims thereto, derived through said company. Upon filing proper evidence of such release, and also proof of ownership to any portion of the road claimed by you without the State of Minnesota, proper instructions will be issued to the local officers within the States into or through which this road may go, governing their action in the matter of future selections to be made by you in said States on account of said relinquishment.

RIGHT OF WAY—RESERVOIR—ACT OF MARCH 3, 1891.

MT. NEBO RESERVOIR.

The Secretary of the Interior has no jurisdiction to act upon an application for right of way, under sections 18 to 21, act of March 3, 1891, unless it affirmatively appears that some portion of the public domain is affected thereby.

Secretary Noble to the Commissioner of the General Land Office, October 8, 1892.

I am in receipt of your letter of September 30, 1892, transmitting a map in duplicate, with field notes, of "Mt. Nebo" Reservoir, with ap-

plication of William Dieterle for their approval by the Secretary of the Interior, that he may have the benefit of the sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat., 1095).

There is a memorandum, made by the chief of the division of surveys, in your office, accompanying the papers, which indicates that this reservoir covers the track of the Union Pacific Railroad, for over six miles, and an examination of the surveys and plats on file in your office shows this to be substantially correct, yet you do not mention the fact in your letter, but recommend the approval of the maps.

This map shows this reservoir to be over six miles long, and averaging about a half mile wide, lying, it appears, in a valley along which a stream flows, and along which the railroad runs, crossing the stream at different points. The map, however, filed herein, makes no note of any railroad, and it does not show that any portion of the land sought to be overflowed belongs to the government. Your office may take judicial notice of what your records show, but you do not show in your letter that any portion of the land belongs to the public domain, so that from all that is before me, the Department has no jurisdiction to act in the matter. If the lands crossed are owned by individuals and the railroad company, patents having been issued therefor, the Interior Department has nothing to do with them.

Maps filed should show the tracts of land affected that belong to the public domain, and if it does not affirmatively appear that some portion of the public lands is affected, the Secretary has no jurisdiction to act in any given case. While it is true that maps for right of way, or right to overflow land are approved, "subject to existing valid rights," it is useless to transmit maps to the Department when it does not affirmatively appear by the map, or accompanying papers, that the Secretary of the Interior has jurisdiction in the case.

I return this map without my approval, that it may be so amended as to show the facts in the case, and as the records appear in your office, the facts concerning the railroad will have to be shown.

RAILROAD GRANT—ADJUSTMENT—SETTLEMENT RIGHTS.

NEW ORLEANS PACIFIC RY. CO.

For the protection of settlement rights recognized by the confirmatory act of February 8, 1887, action will not be taken on selection lists until after publication of notice.

All fees and costs attendant upon the selection of these lands must be paid before favorable action will be taken thereon.

Secretary Noble to the Commissioner of the General Land Office, October 8, 1892.

Acting under departmental letter of August 13, 1892, relative to the patenting of certain lands to the New Orleans Pacific Railway Company, your letter of September 15, 1892, forwards clear list No. 8, em-

bracing 75,529.08 acres lying within the primary limits of the grant for said company under the act of March 3, 1871 (16 Stat., 573), and recommends its approval as the basis for patents to be issued thereon.

These lands were formerly certified to the State of Louisiana in aid of the construction of the New Orleans, Opelousas and Great Western Railroad, under the act of June 3, 1856 (11 Stat., 18), and were afterwards embraced in the forfeiture declared by the act of July 14, 1870 (16 Stat., 277).

The condition of these lands as affects the rights under the later grant for the New Orleans Pacific Railroad Company was considered in departmental decision of April 2, 1892 (14 L. D., 321), wherein it was held that by said act of forfeiture these lands were restored to the public domain, and being in that condition at the date of the attachment of rights under the act of March 3, 1871 (*supra*), they passed thereunder.

The act of February 8, 1887 (24 Stat., 391), in confirming to the New Orleans Pacific Railway Company rights under the act of March 3, 1871 (*supra*), provided:

That all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession or in the possession of their heirs or assigns shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States.

The present list appears to be clear of adverse claims, as far as shown by your records.

These lands have, however, been in a peculiar condition for many years, and all possible care should be used to the end that those who may have been occupying any of these lands for years may be protected in their rights, as contemplated by the act of February 8, 1887 (*supra*).

The company has filed certain stipulations, with a view to the speedy settlement of all pending cases against its grant, the same to be effective upon the approval of the present list. This only furnishes additional reason for care, so that no future complications may arise.

I have therefore directed that public notice be given in one or more newspapers having a general circulation in the vicinity of these lands, for at least twenty days, advising all settlers upon said lands of the contemplated action looking to the patenting of the same to the New Orleans Pacific Railway Company, and that they should assert any claimed rights by reason of their settlements within the period of the publication. At the expiration of that time, you will eliminate any tracts claimed as against the grant, and retransmit a clear list for my approval.

In this connection, I note that fees to the amount of \$1,948.65 are chargeable against this list for costs of surveying, etc., in relation to which your letter states that you have been informed by the attorney for the company that the same will be paid, if the list receives my approval.

My approval will not be given to the list until all charges on account of the lands have been paid, and you will so advise the company, so that when the list is again forwarded, it may be free from all objections now appearing thereto.

Herewith is returned the list and accompanying papers.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

COLONIAL AND UNITED STATES MORTGAGE CO.

The confirmatory provisions of section 7, act of March 3, 1891, can not be invoked by the entryman, nor by anyone claiming under him, when it is shown that the encumbrance, by reason of which confirmation is asked, has been released.

A mortgage given before final payment on an Osage entry does not bring such entry within the confirmatory operation of said section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 8, 1892.

With your letter of February 19, 1892, you transmit the appeal of the Colonial and United States Mortgage Company from your decision of December 9, 1891, denying the application of said company for the re-instatement of Osage cash entry No. 14,185 of Charles W. Marts, upon the NW. $\frac{1}{4}$ of Sec. 29, T. 34 S., R. 9 W., Larned, Kansas.

Claimant filed his declaratory statement for the land November 6, 1882, alleging settlement October 30, of that year. He submitted his final proof August 6, 1883, and the land was fully paid for January 14, 1885, and on the same day final certificate was issued.

On September 4, 1883, Special Agent Drew reported the entry for cancellation. A hearing was ordered May 15, 1885. On December 5, of that year, the order for a hearing was rescinded, and the entry held for cancellation. Subsequently (on claimant's application), a hearing was ordered, which was had June 29, 1886, and, on December 30, of that year, the register and receiver recommended the cancellation of the entry, and, on appeal, your office on October 20, 1888 (not 1886 as you have it), affirmed the judgment, saying (*inter alia*): "I am of the opinion that no bona fide settlement has been made."

No appeal having been filed from that judgment, your office, by its letter ("P") of February 10, 1890, canceled the entry.

On April 25, 1891, the Colonial and United States Mortgage Company applied for the re-instatement of said entry. As grounds of said application, the said Mortgage Company set forth the facts (above given), as to the issuance of said final certificate to the entryman; that on January 8, 1885, the entryman mortgaged the land for \$350 (as shown by abstract filed with application), to the Showalter Mortgage Company; that this mortgage was released July 14, 1888; that to secure the payment of \$975, the entryman on March 30, 1888, mortgaged the land to the applicant, and on same day the mortgage was filed for record; that

said mortgage "is valid and subsisting made in good faith, and without any knowledge or information whatsoever of there being any proceedings had towards the cancellation of said entry," that the first "intimation or information had towards said cancellation, as made by Commissioner's letter 'P' February 10, 1890, was a letter received dated 1891." The company asked that said entry be "at once reinstated," and then confirmed under the act of March 3, 1891 (26 Stat., 1095).

Your decision of December 9, 1891, denied this motion, and an appeal brings the case to this Department.

The company (appellant) asks a re-instatement of this entry, with a view to its confirmation under the act of 1891 (*supra*), the body of which reads as follows:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

It can hardly be held that the confirmatory provisions of the act above quoted can be invoked by the entryman, or any one claiming under him, when it is shown that the incumbrance, by reason of which confirmation under the statute is asked, has been released. (See instructions under act of 1891, *supra*, 12 L. D., 450.)

Furthermore, the mortgage first given to the Showalter Mortgage Company was executed and filed for record before the final certificate was issued (January 14, 1885), and, hence, an additional reason exists why the entry is not confirmed because of the first mortgage (filed for record January 8, 1885). *United States v. Bush*, 13 L. D., 529.

Applicant's mortgage was given March 30, 1888. It does not therefore meet the conditions authorizing confirmation, not being given "prior to the first day of March, 1888." Moreover, your office, after a hearing had for that purpose, held the entry for cancellation. Claimant did not appeal from that judgment, and the entry was canceled upon your records, February 10, 1890, long prior to the passage of the act invoked in behalf of the company. When the money was loaned, and the mortgage given (March 30, 1888), claimant's appeal was then pending from the action of the local officers recommending the cancellation of the entry. The company, by ordinary diligence, could have ascertained that fact, and, to have properly protected its interests, should have done so. It should, also, have filed in the local office a statement of its mortgage lien on the land; but it appears to have neglected this, and it does not appear that the local officers had any knowledge whatever of the company's claim, so as to have given it notice of

its right of appeal from the action of your office (October 30, 1888), holding the entry for cancellation.

If the entry were re-instated, confirmation thereof, as above seen, could not be made under the terms of the statute, and the entry can not be re-instated, because the decision holding it for cancellation became final by failure to appeal. The Department is therefore powerless to give relief, and the decision appealed from must be, and it is hereby, affirmed.

SCHOOL INDEMNITY—INDIAN RESERVATION.

STATE OF CALIFORNIA.

Indemnity may be properly allowed for school sections embraced within an executive order, made prior to survey, withdrawing lands for an Indian Reservation.

Secretary Noble to the Commissioner of the General Land Office, October 10, 1892.

This case comes before the Department upon the appeal of the State of California from your decision of September 18, 1891, rejecting indemnity school selections made by said State, in Marysville land district, as follows:

No. 3192, for the SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 7, and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 29, T. 9 N., R. 2 W., M. D. M., embracing 320 acres, in lieu of the W. $\frac{1}{2}$ of Sec. 36, T. 2 S., R. 1 E., S. B. M.; and

No. 3193, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and Lot 3 of Sec. 18, the NW. $\frac{1}{4}$ of Sec. 20, the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 30, the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 31, and the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 32, T. 9 N., R. 2 W., M. D. M., embracing 549.80 acres, in lieu of part of Sec. 16, T. 2 S., R. 1 E., S. B. M.

The bases of said selections are unsurveyed lands within the limits of an Indian reservation, but the selections were rejected by you upon the ground that said sections sixteen and thirty-six were especially excepted in the executive order of August 25, 1877, withdrawing portions of said township and setting it apart for Indian purposes.

The material question involved in this case is, whether the land is embraced in said reservation, or is excepted therefrom.

The reservation of this township was originally made by executive order of May 15, 1876, which withdrew and set it apart as a reservation for the permanent use and occupation of the Mission Indians, in addition to lands reserved by executive order of December 27, 1875. By executive order of May 3, 1877, this township, with other lands embraced in said executive orders of December 27, 1875, and May 15, 1876, was restored to the public domain.

On August 25, 1877, an executive order was issued by President Hayes, again placing this township in reservation, "excepting sections sixteen and thirty-six, and also excepting all tract or tracts the title to which had passed out of the United States government." At the date

of this order, the township had not been subdivided, and sections sixteen and thirty-six, not having been indicated by survey, the grant of the State to the specific school sections had not attached, although it is evident that the President intended to except from the reservation the lands that might upon survey be indicated as the specific school sections.

In view of the occupancy and cultivation of these lands by the Indians, the Commissioner of Indian Affairs called attention to this fact, in his letter to the Secretary of the Interior, dated February 23, 1881, in which he also stated that he had learned upon inquiry at the General Land Office that no part of said township has been subdivided, and, hence, there is as yet, technically, no section thirty-six in that township. He further called attention to the fact that the restoration of the sixteenth and thirty-sixth sections was recommended, because they were supposed to belong to the State of California as school lands, under the impression that they had been subdivided, and that, as the supreme court, in the cases of *Sherman v. Buick*, 3 Otto, 209, and *Water and Mining Company v. Bugby*, 96 U. S., 165, had decided that the title does not pass to the State until the surveys have been completed, it would seem that the State has no title to the lands in question, nor does it assert any title thereto. He therefore recommended that the executive order of August 25, 1877, be modified by withdrawing the exceptions therein made, so far as relates to land that would inure to the State were the township surveyed, and, in accordance therewith, President Garfield, on March 9, 1881, made the following order:

It is hereby ordered that all the unsurveyed portions of township two south, range one east, San Bernardino Meridian, California, excepting any tract or tracts, the title to which has passed out of the United States government, be and the same are hereby withdrawn from sale and settlement and set apart as a reservation for Indian purposes.

When this order was issued the township had not been subdivided, and it is still unsurveyed. It was therefore within the power and authority of the government to dispose of this land through its proper officers, or to place it in reservation for proper purposes, and thus to defeat or postpone the right of the State to take the specific sections until the order creating the reservation was revoked. *Heydenfeldt v. Daney Gold Mining Company*, 93 U. S., 634; *State of Colorado*, 6 L. D., 412; *Gregg v. Colorado*, 15 L. D., 151.

As the order of President Hayes, of August 25, 1877, had already placed this township in reservation, excepting the sixteenth and thirty-sixth sections, and all tract or tracts of land the title to which has passed out of the United States government, it is evident the sole purpose of the order of President Garfield was to put in reservation that part of the township that might upon survey be designated as the sixteenth or thirty-sixth sections, and that the reservation of land "the title to which has passed out of the United States government" was

not intended to refer to such sections. The State is therefore entitled to make selection of lands in lieu of the sixteenth or thirty-sixth section, or such parts thereof as may be included therein which may be ascertained in advance of the public surveys by protracting the lines across said reservation.

You will re-examine these selections, and, if it is found that the bases are within said reservation, and no indemnity has been taken therefor, and the lands selected are subject thereto and free from adverse claim, they will be approved.

Your decision is reversed.

SECOND CONTEST—ORDER FOR HEARING APPEAL.

GRAY *v.* WHITEHOUSE.

An issue once tried and determined can not be made the basis of a second contest. The question as to whether a contest should be allowed against a final entry rests in the sound discretion of the Commissioner of the General Land Office, subject to appeal in case a hearing is denied.

Secretary Noble to the Commissioner of the General Land Office, October 10, 1892.

I have examined the case of William C. Gray *v.* Manley H. Whitehouse upon the appeal of the former from your decision of December 3, 1891, and your denial of a motion for review of said decision, dated January 9, 1892, refusing to order a hearing upon the contest affidavit of said Gray against the entry of said Whitehouse for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1 and 2 of Sec. 6, T. 25 N., R. 43 E., Spokane Falls, Washington land district.

The record shows that on May 4, 1883, Whitehouse filed pre-emption declaratory statement for said tract, alleging settlement April 18, 1883, and on January 7, 1886, he made cash entry therefor. His proof showed him to be a single man; that from May, 1883, his residence upon the tract in question was continuous to date of proof; that he had built a house cleared and fenced five or six acres; that he had planted some four acres in fruit trees and cultivated the remainder of the land cleared.

On September 30, 1887, H. M. Williams filed an affidavit of contest against Whitehouse's entry charging that he had not complied with the law as to residence and improvements, for six months prior to his entry. On November 12, 1887, you ordered a hearing which was had thereon. The local officers rendered dissenting opinions on the testimony submitted. On April 15, 1890, you dismissed the contest. On September 19, 1891, the Department affirmed your judgment. On November 5, 1891, the local officers transmitted to you the application, of William C. Gray, to contest the entry of Whitehouse, which was filed in the local office September 30, 1887, and held to await the result of the prior contest of Williams.

Upon the examination of the records you found that the case of Williams *v.* Whitehouse had been prosecuted to final determination; and that the complaint filed by Gray,

alleges substantially the same facts that were set forth in the complaint filed by Williams, viz., failure on the part of the entryman to comply with the legal requirements in the matter of residence and improvements of the land covered by said entry. The question just brought in issue appears to have been fully investigated at the trial of the case of Williams *v.* Whitehouse, the testimony introduced at said trial being very voluminous.

Thereupon you denied the application. On December 15, 1891, counsel for Gray filed a motion for review of said decision, which you denied on the 9th day of January, 1892.

Gray appealed.

In argument in support of the appeal counsel does not seriously question or take issue with the facts as found by you, and as substantially outlined hereinbefore. He chiefly complains of the application of the law to the case as made by you. In support of his contention he cites the case of Cameron *v.* McDougal (15 L. D., 243). In that case it was held that the absolute denial of an application to contest an entry is a final decision from which an appeal will properly lie. In the case at bar you expressly held that Gray had the right of appeal from your decision. In that case the contest affidavit of Cameron charged that McDougal's entry was fraudulent in every particular. Two former contests had been initiated against said entry, but in each case the contestant failed to introduce any testimony in support of his allegations, no trial had taken place involving the acts of the entryman respecting his *bona fides* in the matter. Furthermore the application was supported by the sworn statements of four persons who swore to positive facts, within their personal knowledge, tending to show the *mala fides* of the entryman.

In the case at bar the facts are quite different. The affidavit of contest of Gray was filed in the afternoon of the same day that Williams filed his contest. The affidavit of Gray charges essentially and in fact the same default charged by Williams' affidavit.

Voluminous testimony was introduced in the Williams case pro and con, upon the issues tendered; the case was successively prosecuted before the local officers, before you and before the Department, to a final judgment. There is no claim that there was any collusion between the parties to that case. The contest appears to have been commenced and prosecuted in good faith from beginning to end.

From these statements the distinction between the case under consideration and the case of Cameron *v.* McDougal is quite apparent.

In cases similar in their facts to the case at bar, the Department has repeatedly held that an issue once tried and determined can not be made the basis of a second contest. Busch *v.* Levine (12 L. D., 317); Reeves *v.* Emblem (8 L. D., 444); Parker *v.* Grinnell (3 L. D., 390).

These cases are based upon the ground that in every case where a hearing is asked at your hands, after final entry has been made, the question as to whether a hearing should be granted rests in your sound discretion, subject to appeal therefrom in cases where you deny it. In such instances your judgment will not be interfered with unless an abuse of this discretion is affirmatively made to appear. In the case at bar this is not done. Your judgment is accordingly affirmed.

CANCELLATION—REPORT OF SPECIAL AGENT—RE-INSTATEMENT.

CASTELLO *v.* BONNIE.

The cancellation of an entry upon the report of a special agent is contrary to law and the established rules of evidence, and an entry so canceled should be reinstated. The intervening entry of another in such case should not be canceled without due notice and opportunity given to be heard.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 11, 1892.

I have considered the case of Patrick Castello *v.* William Bonnie, involving the pre-emption cash entry made by the latter for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The entry was made August 19, 1882. Upon a report by a special agent that it was fraudulent, having been made in the interest of a lumber company, it was canceled June 15, 1883.

Notice was sent to the entryman at his last known post-office address on June 20, 1883; but on July 2, same year, the notice was returned with an endorsement showing that it had not been taken from the post-office.

On August 20, 1883, John Comstock, claiming to be transferee of Bonnie, filed in the local office an application for a hearing, which was forwarded to your office by register and receiver's letter of September 22, same year. A hearing was ordered by your letter of February 15, 1887, and was had November 25, 1888. On February 8, 1889, the register and receiver rendered a decision adverse to the entryman, and recommending that the entry be canceled. (It had, however, been actually canceled, five years and eight months before, see *supra*.)

From the above decision of the local officers, Comstock, on March 30, 1889, filed an appeal to your office. You, on October 23, 1891, held that as the entry had been canceled upon the report of a special agent, *without notice to the entryman*, such cancellation was illegal; you therefore revoked your action, and re-instated the entry, in order that Comstock, the transferee of the entryman, might be given his "day in court."

Long prior to the date of such re-instatement, however, one Patrick

Castello, had, on July 29, 1885, made homestead entry of the land, and commuted the same to cash entry on August 5, 1886. Your decision of October, 23, 1891 (*supra*), re-instanting Bonnie's entry, decided further that as two entries of the same land at the same time were not permissible, and as Bonnie's entry had been re-instated because of having been canceled illegally, Castello's entry must be canceled.

On June 16, 1891, the Boston Safe-deposit and Trust Company filed in your office an application to intervene, and asked for the confirmation of Bonnie's cash entry under Sec. 7 of the act of March 3, 1891, "To repeal timber-culture laws, and for other purposes," alleging that, on March 21, 1885, after the issuance of the receiver's receipt, and prior to March 1, 1888 it became a *bona fide* incumbrancer of said land for a valuable consideration. On June 17, 1891, you granted the application; and your decision of October 23, 1891, holds that the case comes within the provisions of Sec. 7, of said act.

From this decision Castello appeals, filing nine assignments of error, only one of which it will be necessary to consider; viz. (in substance), that Bonnie's entry was improperly re-instated.

If its cancellation was an error, its re-instatement was proper.

The cancellation of an entry upon the report of a special agent is contrary to law and the established rules of evidence. (See Le Cocq cases, 2 L. D., 784; Abraham L. Burke, 4 L. D., 340; Gilbert E. Read, 5 L. D., 313; William E. McIntyre, 6 L. D., 503.) The cancellation of Bonnie's entry was therefore illegal, and it was properly re-instated. It follows furthermore, that Castello's entry was improperly allowed.

Nevertheless, it ought not to have been canceled without notice to him, and an opportunity being afforded him to be heard in its defense (Southern Pacific R. R. Co. v. Stillman, 14 L. D., 111).

The case at bar is in all essential respects similar to that of Peterson *v.* Cameron *et al.*, decided by the Department November 27, 1891, with the exception that in that case it did not appear (so far as the reported decision shows 13 L. D., 581,) that the entry had been actually canceled, the land subsequently entered by another party, and the first entry afterward re-instated. In that case it was held that the entry was confirmed under Sec. 7, of the act of March 3, 1891.

There can be no doubt that the same conclusion as that announced in your decision of October 23, would have been reached by you had Costello, prior to such decision, been notified to show cause why his entry should not be canceled. Inasmuch, however, as no such opportunity was afforded him, he will be allowed sixty days after notice of this decision within which to make such showing. No hearing for such purpose will be ordered, but he may file his proof, or argument with the local officers for transmission to your office. If, in your judgment, sufficient cause is shown, you will readjudicate the case accordingly. If he fail to make such showing, the decision appealed from will stand affirmed, and patent will issue for the land. Your decision of October 23, 1891, is modified as herein indicated.

OKLAHOMA LANDS—SECOND HOMESTEAD.

JOHN WANER.

The right to make a homestead entry of Oklahoma lands, conferred by section 13, act of March 2, 1889, upon persons who had previously made homestead entry and commuted the same, is extended by section 18, act of May 2, 1890, to Pottawatomie lands that were a part of the original Seminole purchase.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 11, 1892.

On September 26, 1891, John Waner made homestead entry (No. 919) for the NW. $\frac{1}{4}$, Sec. 27, T. 12 N., R. 1 E., at the land office in Oklahoma City, Oklahoma Territory.

In your letter of December 16, 1891, it is said that said Waner—made H. E. 2816, July 9, 1885, at Garden City, Kansas, for SE. $\frac{1}{4}$, Sec 13, T. 20, R. 37 W., and commuted the same to C. E. 6102 May 27, 1887. The law makes no provision for entry in the Pottawatomie lands by persons who have previously made homestead entry and commuted the same. H. E. 919 is therefore held for cancellation.

An appeal now brings the case before me.

The appellant admits the facts to be as stated by you, but alleges error on your part in holding his entry for cancellation, for the alleged reason that “the law makes no provision for entry in the Pottawatomie lands by persons who have previously made homestead entry and commuted the same.”

This contention raises a question of law which must be determined by a fair construction of the statutes relating to the disposal of said lands.

Section 13, of the act of March 2, 1889, (25 Stat., 1004, 1006) provides, *inter alia*,

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): *And Provided further*, That any person who, having attempted to, but for any cause, failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

All the foregoing provisions with reference to lands to be acquired from the Seminole Indians, . . . shall apply to and regulate the disposal of the lands acquired from the Muscogee or Creek Indians, etc.

The President by his proclamation of March 23, 1889, (26 Stat., 1544,) recites said section, and after describing the boundaries of said ceded lands, further declares that the same—

Will at and after the hour of twelve o'clock, noon, of the twenty-second day of April next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations and restrictions contained in said act of Congress approved March 2, 1889, and the laws of the United States applicable thereto.

The act of May 2, 1890 (26 Stat., 81), providing a temporary government for the Territory of Oklahoma, provides in section 18, that the lands in said Territory acquired by cession of the Muscogee (or Creek) Indians confirmed by the act of March 1, 1889 (25 Stats., 757) and also the lands acquired in pursuance of an agreement with the Seminole Indians by re-lease and conveyance, dated March 16, 1889, which may hereafter be open to settlement, "shall be disposed of under the provisions of sections 12, 13 and 14" of the act of March 2, 1889, (25 Stat., pps. 1004-1006) "and under section 2" of the act of March 1, 1889, (25 Stat., p. 759).

By an agreement made between the government and the citizen band of Pottowatomie Indians on June 25, 1890, certain lands, including that in dispute, were ceded to the United States, so far as the Indians had any title thereto. Said agreement is set forth in the act of March 3, 1891, (26 Stat., 989-1016).

It is provided in section 16 of said act (*Ibid.*, p. 1026) that the land so acquired "shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws," excepting section 2301 of the Revised Statutes.

I do not think it was the intention of this enactment to repeal any of the "provisions of the homestead laws," but to apply these provisions to actual settlers upon these particular lands, so far as they are applicable, except said section 2301.

The land in question is a part of said tract ceded by said Indians, and Warner, although he "made entry under what is known as the commuted provision of the homestead law," is nevertheless "qualified to make a homestead entry upon said lands," under said section 13, unless it had been repealed. Circular of April 1, 1889, (8 L. D., 336) Rule 1.

It is not repealed by said section 16 of the act of March 3, 1891, unless by necessary implication, and because the two enactments are so inconsistent with each other that they can not both exist. Repeals by implication are not favored in the law:

It is a well settled principle of the law, that repeals by implication are not favored, and are never allowed, except in cases where inconsistency and repugnance are plain and unavoidable. Potter's Dwarris on Statutes, 156; *McCool v. Smith*, 1 Black (U. S.), 470. Ordinarily express language is used when a repeal is intended, and in the absence of such express repeal none will be declared, unless the two acts are irreconcilably inconsistent; and then only to the extent of such irreconcilable conflict. Wisconsin Central R. R. Co., 10 L. D., p. 63. And,

When there are different statutes *in pari materia*, though made at different times and not referring to each other, they should be taken and construed together as one system and explanatory of each other. Daniel G. Tilton, 8 L. D., p. 368.

Construing these statutes *in pari materia*, there is no such conflict in their provisions that both may not stand and have full force and effect and at the same time work in complete harmony.

I am of the opinion, therefore, that there was error in your decision in

holding said entry for cancellation, because said Waner had "previously made homestead entry and commuted the same."

Your judgment is therefore reversed.

There is transmitted with the record the appeal of Elbert S. Hensley from the action of the local officers in rejecting his application to make homestead entry of the same tract, tendered November 14, 1891. As you do not appear to have rendered any judgment thereon, it is here-with returned for such action as you may deem appropriate.

PREFERENCE RIGHT—INTERVENING ENTRY.

SEVERY v. BICKFORD.

Where an intervening entryman is required to show cause why his entry should not be cancelled and a successful contestant permitted to exercise his preference right, a hearing will not be ordered at the request of such entryman, in the absence of specific charges as against the right of the contestant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 11, 1892.

The land involved in this controversy is the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lots 12, 18, and 19, of Sec. 33, T. 13 N., R. 7 W., Oklahoma land district, Oklahoma, and the case is brought to the Department upon an appeal by Calvin L. Severy, from your decision of October 12, 1891, in which you directed the local officers to "note the cancellation of Severy's entry, and report the facts."

The facts of the case are that one James A. Baum made homestead entry for this land at the Kingfisher land office, on the 23d of April, 1889. This entry was contested by Harvey L. Bickford. Baum made default on the trial to determine such contest, and Bickford having established the allegations of his contest affidavit, said entry was cancelled by you on the 11th of December, 1890, Bickford being awarded a preference right of entry for thirty days.

On the 18th of December, 1890, Calvin L. Severy made homestead entry for the land, subject to the preference right of Bickford. Against the allowance of this entry, the attorneys who had conducted the contest of Bickford against Baum, filed a written protest, on said 18th day of December, 1890.

On the 31st of December, 1890, Bickford presented his homestead application for the land, which was rejected by the local officers on account of the prior entry of Severy. He appealed from such action by the local officers, and on the 9th of March, 1891, you directed them to notify Severy that he would be allowed sixty days in which to show cause why his entry should not be cancelled, and Bickford's application placed of record.

Such notice was duly served upon Severy, and on the 7th of May, 1891, he filed in the local office the following:

Now comes Calvin L. Severy, by his attorney, L. P. Hudson, and asks that the Hon. register and receiver name a day upon which he may show cause why his H. E. No. 269, for (describing the land) should not be cancelled for conflict with the preference right of H. L. Bickford. As a basis for this application see Hon. Commissioner's letter "H," of March 12, 1891.

This application was signed by the attorney for Severy, and an endorsement thereon, signed by the register, reads as follows:

Filed May 7, 1891, and ordered that cause be set for hearing whenever, within the time allowed, entryman shall have filed application for hearing, stating specific causes why the entry of Bickford shall not be allowed.

On the 16th of September, 1891, the local officers reported to you their proceedings in the case, stating that no further steps had been taken by Severy since filing said application, and that he had wholly failed to comply with the order allowing him to show cause. They also stated that "Bickford now demands that this application to enter be allowed." They recommended the cancellation of Severy's entry.

On the 12th of October, 1891, you directed the local officers to note the cancellation of Severy's entry, and to place the application of Bickford of record, upon receipt from him of the proper payment. You allowed Severy sixty days within which to appeal, and Bickford thirty days thereafter in which to make payment.

In his notice of appeal the counsel for Severy claims that you erred in the following particulars:

First. In rejecting application for hearing of said Severy.

Second. In holding that it was necessary for said Severy to allege specific causes why his entry for said tract should not be canceled.

Third. In holding that a general application for hearing is insufficient, where the party has a homestead entry of record, subject to the preference right of the contestant.

Fourth. In not holding a general application sufficient where any matter may be alleged showing reasons why said entry should not be canceled, and the entry of contestant allowed.

I think all these positions are untenable. Bickford prosecuted his contest to a successful issue against Baum's entry. Having done this he was entitled under the provisions of section 2 of the act of May 14, 1880, 21 Stat., 140, to a preference right of entry for thirty days. During this period Severy made his entry subject to such right, and unless he can show as against Bickford that he has a better claim to the land, he must give way. Bickford is within the time provided for by law. Independent of whether Severy should have been permitted to have made an entry which is now sought to be made adverse, it is quite clear to my mind that a general hearing should not be ordered in this case.

Severy was allowed sixty days in which to show cause why his entry should not be canceled. If Bickford acted in good faith in prosecut-

ing his contest, it is difficult to see how Severy could show cause why Bickford should not be permitted to exercise his preference right. Having failed to make the showing, it is presumed that he could not. He has had his "day in court," and must be bound by the judgment rendered in the case.

The decision appealed from is affirmed.

STONE LAND—ACT OF AUGUST 4, 1892.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., October 12, 1892.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Attached is a copy of the act of Congress of August 4, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws."

The first section of said act extends the mineral land laws already existing so as to bring land chiefly valuable for building stone, within the provisions of said law to the extent of authorizing a *placer entry* of such land. The proviso to said first section excludes lands reserved for the benefit of the public schools or donated to any State from entry under the act.

In cases that may arise hereafter in reference to any lands subject to entry under the mining laws you will be governed by said act in admitting such entries. The proper instructions for your guidance in so doing may be found in official circular of December 10, 1891, entitled "United States Mining Laws and Regulations Thereunder", to which you are referred, and your special attention is called to the law and instructions therein relating to placer claims.

It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto.

The second section of said act of August 4, 1892, makes the timber and stone act of June 3, 1878 (20 Stat., 89), applicable to all the public land States. You will observe the same in acting upon applications for entries in your respective districts. For instructions you are referred to the General Circular of February 6, 1892, pages 35 to 38 inclusive.

In allowing placer entries for stone, chiefly valuable for building purposes, under first section of the act of August 4, 1892, you will make a reference to said act on the entry papers returned.

Very respectfully,

W. M. STONE,

Acting Commissioner.

Approved October 12, 1892.

GEO. CHANDLER,

Acting Secretary.

(PUBLIC—No. 199.)

An Act to authorize the Entry of Lands chiefly valuable for Building Stone under the Placer Mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words, "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

Approved, August 4, 1892.

COAL LAND ENTRY—HOMESTEAD ENTRY.**SCOTT v. SHELDON.**

A coal land entry attacked by a subsequent homestead claimant may be canceled as to the legal sub-divisions in conflict that are not valuable for coal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 30, 1892.

The land involved in this appeal is lot 2, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 23, T. 35 N., R. 6 E., Seattle, Washington, land district.

The record shows that Nathaniel P. Sheldon made coal entry of said land August 10, 1887. On September 2, following, James Scott made application to enter lot 2, and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section, as a homestead. This application was rejected by the local officers for the reason that the land was embraced in said coal entry. Scott appealed and filed an affidavit of contest, alleging that the land sought to be entered by him was not coal land; did not contain any coal but is agricultural land.

By letter of October 15, 1888, you directed a hearing to determine the character of the land embraced in the coal entry, and that "it should be determined whether each forty acre legal subdivision and said lot No. 2 are more valuable for the coal they contain than for agricultural purposes."

Hearing was accordingly ordered by the local officers, the testimony to be taken before the probate judge of Skagit county, where on the day set, the Skagit Consolidated Coal Company, appeared as the transferee of Sheldon, and the contestant, with their witnesses. The testimony was taken, transmitted to the local officers and on consideration thereof they decided "that the tracts in controversy are indispensable

to the working of the mines of coal therein and the adjoining tracts," and recommended a dismissal of the contest. Scott appealed and you, by letter of September 10, 1891, affirmed their decision, whereupon he prosecutes this appeal, assigning numerous grounds of error covering your findings of fact and conclusions of law.

The land embraced in this entry was returned by the surveyor-general as agricultural in character. The testimony submitted in behalf of the contestant was confined entirely to the land he sought to enter as a homestead, to wit, the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and lot 2, and the greater part of that offered by defendant was also directed to this particular tract. The record is very voluminous and so contradictory as to be almost irreconcilable as to the number of acres of land valuable for agriculture. But in my view of the case, it is not necessary to determine the actual number of acres susceptible of cultivation, as I think the question hinges on the fact as to whether or not it is valuable for coal, and upon this point there is no contradiction. The testimony shows conclusively that no coal has been discovered upon lot 2, the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ or the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said land. Both you and the register and receiver find this to be the fact. There is not even expert evidence offered to show that it is probable that the veins of coal in that vicinity extend into or underlie the land sought to be entered as a homestead. But one witness for the defense testifies to this probability, but his testimony is not sufficient to convince me, especially in the face of the fact that no attempt seems ever to have been made to demonstrate the truth of this theory.

I think it is established beyond a doubt that this land is not mineral in character, and that it is chiefly valuable for agricultural purposes. It is certainly true that the land in contest, as a present fact, is not valuable for coal; that there has been no actual production of coal therefrom, and the presence of coal deposits in the vicinity is not sufficient to characterize this as coal land. *Dughi v. Harkins* (2 L. D., 721); *Savage et al. v. Boynton* (12 L. D., 612).

Your judgment is therefore reversed and you will cancel the entry of Sheldon as to lot 2, and the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section, and direct the local office to receive the homestead entry of Scott for said land.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

BELLAMY *v.* LEMON.

The rule of April 8, 1891, does not contemplate the advancement of cases in which the question of confirmation has been the subject of decision in the General Land Office, and appeal taken therefrom.

*Acting Secretary Chandler to Messrs. Copp and Luckett, Washington,
D. C., September 14, 1891.*

You have filed a motion, under the circular of April 8, 1891 (12 L. D., 308), to advance the above named case for consideration and to confirm

the entry involved under section 7 of the act of March 3, 1891 (26 Stat., 1095).

This case was received with Commissioner's letter of August 15, 1892, and is pending on appeal by Bellamy from the decision of the Commissioner of the General Land Office, dated June 14, 1892, dismissing his contest, and holding that the entry involved is confirmed and should be passed to patent.

Fraud is alleged on the part of the transferee, and, in order to dispose of the case, an examination of the record is necessary.

The circular of April 8, 1891 (*supra*), had reference to cases pending before this Department in which the appeal raised other questions than of confirmation, and did not contemplate the advancement of a case similar to that under consideration.

The motion is therefore denied, and the case will be considered when reached in regular order of business.

OKLAHOMA LANDS—PUBLIC LAND STRIP.

CARTER TRACY.

Settlers on the "public land strip" are not entitled to receive credit for more than two years' residence prior to the act of May 2, 1890.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 12, 1890.

This case involves the NW. $\frac{1}{4}$, Sec. 35, T. 5 N., R. 28 E., Beaver, Oklahoma. Said tract lies within the territory formerly known as the "public land strip."

On June 25, 1891, Carter Tracy made homestead entry for the land and in his accompanying homestead affidavit, alleged that his settlement thereon "was commenced" November 28, 1885.

On December 17, 1891, he submitted homestead proof before the register wherein he averred that he had established actual residence on the land December 31, 1885; that with his family, comprising his son and daughter, he has continued to live thereon; that he has only been absent for periods of a few weeks at a time, during a part of 1891; that his improvements valued at \$2000, comprised a dwelling house thirty-two by forty feet, built in December, 1885, various other out-houses, a wind mill, well, force-pump, three miles of wire fencing and twenty to eighty acres cultivated six seasons.

Said proof was, it appears, rejected at the local office by reason of your certain instructions dated April 9, 1891, to Inspector W. D. Harlan.

Tracy appealed, whereupon by decision dated February 17, 1892, you directed the local officers to notify claimant that you sustained their action in rejecting his proof for the reason that the act of May 2,

1890 (26 Stat., 81) entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes,"

provides that settlers upon the "Public Land Strip" will be allowed the preference right to enter the lands upon which they have settled under the homestead laws, but they are not permitted to receive credit for more than two years' residence prior to the date of the act. Also, that it will be necessary for him to reside on and cultivate the land one year, four months and fifteen days from December 17, 1891, the date of final proof, to complete the five years' residence required by law, if he desires to complete his entry.

From this decision Tracy appeals here.

Your decision is based upon Sec. 18, of the act of May 2, 1890, *supra*, which provides that—

All the lands embraced in that portion of the Territory of Oklahoma heretofore known as the Public Land Strip, shall be open to settlement under the provisions of the homestead laws of the United States, except section twenty-three hundred and one of the Revised Statutes, which shall not apply; but all actual and *bona fide* settlers upon and occupants of the lands in said Public Land Strip at the time of the passage of this act shall be entitled to have preference to and hold the lands upon which they have settled under the homestead laws of the United States, by virtue of their settlement and occupancy of said lands, and they shall be credited with the time they have actually occupied their homesteads, respectively, not exceeding two years, on the time required under said laws to perfect title as homestead settlers.

The appellant's case proceeds upon the theory that lands within the public land strip were at the date of his settlement in 1885, public land; that therefore, under the third section of the act of May 14, 1880, (21 Stats., 140), his rights related back and took effect as of that date, and that such right is within the purview of section 27 of the act of May, 1890, *supra*, which provides:

That the provisions of this act shall not be so construed as to invalidate or impair any legal claims or rights of persons occupying any portion of said Territory, under the laws of the United States, but such claims shall be adjudicated by the Land Department, or the courts, in accordance with their respective jurisdictions.

I can not agree with this view of the case. Such a construction would make section 27 repeal section 18 of the same act without any evident intent on the part of Congress to do so.

By general circular approved July 21, 1890, (11 L. D., 79), the local officers were instructed that settlers on the "public land strip" were "not permitted to receive credit for more than two years' residence prior to the date of the act," of May 2, 1890, *supra*.

In making this order the Department necessarily considered the material question presented by this appeal, to wit, whether the public land strip prior to the act of May, 1890, *supra*, was subject to settlement under the settlement laws.

The approval of said circular was therefore an adjudication of this question adverse to the appellant.

I must, therefore, hold that by his settlement in 1885, Tracy acquired

no right against the government and that his entry was made subject to the provisions of Sec. 18 of the act of 1890, *supra*, and to the circular referred to.

Your judgment as hereinbefore outlined is accordingly affirmed.

ADDITIONAL HOMESTEAD—ACT OF MARCH 2, 1889.

LOUIS M. MOE.

But one additional entry may be allowed under section 5, act of March 2, 1889; but where a second entry of such character has been allowed, the entryman may be given opportunity to relinquish and enter the tract under section 6, of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1892.

I have considered the appeal of Louis M. Moe from your decision of August 24, 1891, requiring him to show cause why his second additional entry No. 28,868 of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 13, T. 106 N., R. 51 W., Mitchell, South Dakota, made under the provision of the 5th section of the act of Congress approved March 2, 1889, (25 Stat. 854), should not be cancelled, for the reason that under said section, only one additional entry can be made.

It appears that said Moe, on November 14, 1885, made homestead entry No. 27,743 of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (containing 37.58 acres) in Sec. 18, T. 106 N., R. 50 W., Mitchell, South Dakota, and on July 25, 1889, he made an additional homestead entry No. 28,857 of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (containing 37.46 acres in said section, under the provisions of said section 5 of the act of 1889; that on September 11, 1889, he was allowed to make said second additional entry of land which was contiguous to the tracts covered by his said former entries.

Moe made proof in support of his claim under said entries on February 2, 1891, showing settlement and residence on the land covered by his original entry from September (not February) 15, 1885, up to the date of making said proof. You find that on the date of said second additional entry one Louis Zimmerman filed his pre-emption declaratory statement for the same land, alleging settlement thereon September 7, 1889, but no mention was made thereof in the notice of publication. You required the claimant to show cause why his second additional entry should not be cancelled, and also to furnish proper evidence that the officer who certified to said final proof was at the time duly qualified to make the same.

Claimant has appealed from so much of your decision as held that only one additional entry could be made under said section 5, and, with his appeal, has filed evidence of qualification of the officer taking said final proof; also evidence of the receipt by said Zimmerman of notice to him, mailed November 4, 1891, by the attorney of the claimant

to assert his right to the land covered by said second additional entry; and has also filed affidavits that said Zimmerman never settled upon said tract.

Said section 5, under which said additional entries were made, reads—

That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry; *And provided*, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or if having been initiated, shall be cancelled.

The departmental circular of March 8, 1889 (8 L. D., 314), declares—

The fifth section provides for an additional entry of land which shall be contiguous to the land embraced in the original entry, for which the final proof of residence and cultivation made on the original entry shall be sufficient, but of which no party shall have the benefit who does not, at the date of his application therefor, own and occupy the land covered by his original entry, and which shall not be permitted, or if permitted, shall be cancelled, if the original entry should fail, for any reason, prior to patent, or should appear to be illegal or fraudulent.

It is manifest that the law does not contemplate two additional entries under said section 5, and your ruling that said second entry was unwarranted is correct. But while it is true that the claimant cannot make a second additional entry under said section 5, he may, however, be allowed to make an additional entry of the land covered by said second additional entry under section 6 of said act, which reads—

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivision of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise fully complied with such laws: *Provided, also*, That this section shall not be construed as affecting any rights as to location of soldiers' certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes.

If the claimant so desires, he will be allowed a reasonable time, to be fixed by you, within which to relinquish said second entry and make application for said N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 13 under the provisions of said section 6, and upon showing due compliance with the

departmental rules and regulations thereunder, he may receive final certificate therefor.

Your attention is called to the fact that you did not hold said second entry for cancellation—only required the claimant to show cause why it should not be cancelled. The claimant appeals, and with his appeal furnishes the reasons why his entry should not be cancelled, which have not been passed upon by you. The better practice is to hold the entry for cancellation if, in your judgment, it is illegal, and allow the entryman either to appeal or apply for a review of your judgment.

The decision of your office is accordingly modified.

APPEAL—SCHOOL INDEMNITY SELECTION.

EMERY v. STATE OF CALIFORNIA ET AL.

An appeal will lie from a decision cancelling an entry, where there has been no order holding said entry for cancellation, and where due notice of a prior rule to show cause why said entry should not be canceled does not affirmatively appear of record.

The transfer by the State of the basis of a school indemnity selection to another selection, will not defeat the title of one holding under a prior purchase from the State of the land first selected.

The failure of the local office to properly note of record a school indemnity selection will not affect the real status of the tract.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1892.

I have considered the appeal of John Emery from your decision dated December 10, 1891, cancelling his homestead entry as to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22, T. 22 S., R. 28 E., M. D. M., Visalia, California.

The record shows that on August 28, 1891, you advised the local officers that on April 6, 1891, they transmitted the application of said State, made the same day, for said tract in lieu of school land lost in Tp. 22 N., R. 5 E., M. D. M., and the same was rejected by you on the 25th of the same month for conflict with homestead entry No. 5847 made by said Emery on November 14, 1887, covering the SW. $\frac{1}{4}$ of said Sec. 22; that on June 8, 1891, the attorney for the State filed a motion with you to set aside said rejection, and that said Emery be required to show cause why his said entry should not be set aside as to the NE. $\frac{1}{4}$ of said SW. $\frac{1}{4}$ and the claim of the State allowed. In the motion, which was corroborated by several affidavits, it was alleged that on June 27, 1867, application No. 127 for said tract in section 22 was filed in the State land office in the name of Charles R. Wingfield in lieu of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 36, T. 17 S., R. 20 W., M. D. M., which was approved by the proper State officer, and application on behalf of the State to select said tract in section 22 was duly filed in the United

States local land office; that on December 21, 1867, a certificate of purchase showing a full payment was issued to said Wingfield by the State surveyor general, who was ex officio register of the State land office; that said Wingfield was at that time residing upon adjoining land, and he immediately enclosed said tract with a fence and built a dwelling house thereon, and that he and his grantee, James S. McGahey, have remained in possession of the land, keeping up the improvements and cultivating the land ever since; that the register at Visalia failed to note said selection of the State upon his records, and on account thereof in 1883 the basis of said selection was assigned to another selection, which has been approved by the Department, and said Emery allowed to enter said SW. $\frac{1}{4}$ as aforesaid; that early in 1888 said McGahey learned of the facts relative to said selection, and as Emery's homestead entry had not then been posted upon the tract books, it was held that the State might assign a new basis in lieu of the one which had been changed to another selection, and in pursuance thereof said application was made, which was rejected on account of the intervening entry of said Emery.

Upon this showing you hold that the applicant had shown error prejudicial to the State and its grantee; that Emery had obtained knowledge of the true status of said tract prior to his entry, and you revoked your former ruling rejecting said application and directed the local officers to require Emery to show cause why his entry should not be cancelled as to said NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 22.

He was called upon to show cause, but it does not appear that he had a copy of your said decision of August 28, 1891, although he acknowledges the receipt of the notice of the local land officers to show cause why his entry should not be cancelled in part. He made no answer, and on December 10, 1891, you cancelled said entry as to said tract, and directed the local officers to so note on their records.

On February 25 last Emery, by his attorney, filed in your office an appeal from your last decision, alleging errors substantially in cancelling said entry without first holding it for cancellation, and also in finding that said entry was made in bad faith, and not rejecting the State selection because it had transferred the basis of the selection in 1867 to that of another selection in 1883.

With said appeal is filed the affidavit of said Emery, confirming in many respects the statements in your letter of August 28, 1891, as to the selection of the tract in controversy in 1867, the transfer to McGahey, and the failure of the local land officers to note the State selection upon the records. He also gives as a reason for not answering the rule to show cause, the laches of his attorney, and asks a further opportunity to be heard in support of his entry. He further says that he got a plat from the local office and filled out his application for said SW. $\frac{1}{4}$ of said Sec. 22,

and went to the office to file it. Mr. Hyde told me I could not file on the whole quarter, but I could file on 120. I made out my application for 120, and went in to

the office the second time to file, as I was glad to get that much. When I went in to file I met Mr. Bell and told him I wanted to file a homestead. He took my application and looked over it and said why don't you file on the entire SW. $\frac{1}{4}$. I told him that Mr. Hyde would not let me, he said wait a minute and he would see, he said something to Mr. Hyde and they looked over the books together and Mr. Hyde then told me that I could file on it all and made out the application for me. I told him that I did not want to file on it if there was anything wrong with it as I did not want any trouble and he said it was all right and allowed my filing.

On March first counsel for the State and transferee filed a motion with you to refuse said appeal on the ground that your decision of August 28, 1891, was a judgment from which an appeal could be taken, and since Emery had made no answer to said order, the same became final, and there was no appeal from said decision of December 10, 1891, cancelling said entry. On March 15, 1892, you overruled said motion.

It is clear that the appellant had the right of appeal from your decision of December 10, 1891, cancelling his entry for the reason that there had been no order holding his entry for cancellation, and it does not appear affirmatively that he received due notice of the prior decision of August 28, 1891, requiring him to show cause why his entry should not be cancelled as to the tract in dispute.

While it is true that Emery has the right of appeal, and a hearing would be ordered if the facts did not sufficiently appear, yet, taking his own affidavit filed with the appeal, it is apparent that McGahey has the better right to said tract.

It is not denied that the State duly selected said tract and sold it prior to the entry of Emery; that at the date of said entry McGahey and his grantor were in possession of said land having enclosed the same and built a house thereon, and if Emery did not know it, it was because he wilfully shut his eyes to facts which were patent to every body else who knew the status of the land, and which he is presumed to know.

The transfer of the basis of said selection after the purchase of McGahey's grantor from the State to another selection cannot affect the latter's title, nor will the failure of the local officers to note said selection of 1867 affect the real status of said tract. *Goist v. Bottum* (5 L. D., 643) Missouri, Kansas & Texas Ry. Co. v. Lasselle (14 L. D., 278).

A careful examination of the whole record shows no error in your conclusion, and it is accordingly affirmed.

OKLAHOMA SCHOOL LANDS—INDEMNITY.

DYKE BALLINGER ET AL.

Lands claimed as school indemnity should not be leased under section 36, act of March 3, 1891, until the validity of the selection has been determined by the department.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1891.

I have considered the appeal of Dyke Ballinger from your decision of December 14, 1891, holding that the attempted leasing of certain tracts therein described in lieu of lost school lands situate in Beaver county, Oklahoma Territory, (being a part of the Public Land Strip) was irregular and unauthorized, for the reason that the mere location of said lands by the filing of a list in the county clerk's office is not sufficient to withdraw them from disposal; that in order to withdraw said lands from disposition under the public land laws lists thereof must be filed in the district land office, and until the validity of such selections shall be determined by the Department, the land included therein should not be leased under the provision of section 36 of the act of Congress approved March 3, 1891, (26 Stat., 989, 1043).

The appellant has not pointed out any error in said decision, and none has been discovered by the Department. It is accordingly affirmed.

MINING CLAIM—STONE LANDS.

MCGLENN v. WIENBROEER.

Land that contains a valuable deposit of stone that is useful for special purposes may be entered as a placer claim.

The case of Conlin v. Kelly cited and distinguished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 12, 1892.

This case is brought to the Department, by an appeal by Thomas McGlenn from your decision of October 6, 1890, in which you held for cancellation his homestead entry for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, all in township 33 S., range 64 W., Pueblo land district, Colorado.

From the record before me, I learn that on the 28th of October, 1886, William Wienbroeर filed his pre-emption declaratory statement for this land, and made settlement and established his residence thereon at that time, and has ever since resided there with his family. His buildings and improvements are quite valuable and extensive.

Finding the land not suitable for farming purposes, but containing large quantities of very superior sandstone, he opened several quarries thereon and commenced operating the same. Believing that the land was subject to entry as placer mines, Effie Maria Wienbroeer, and five other persons, each located a placer mine of twenty acres, upon the tract. All of these mines were located prior to the 3rd day of July, 1889, and covered the whole one hundred and twenty acres for which Wienbroeer had filed his preëmption declaratory statement. On the 30th of August, 1889, all these placer mines were sold and assigned to Wienbroeer, and on the 19th of September, of that year, he made mineral application for patent for the land.

Prior to this, however, to wit, on the 3rd of July, 1889, Thomas McGlenn made homestead entry for the same tract. Notice of Wienbroeer's application for patent was published according to law, and McGlenn was notified thereof, and specially cited to show cause why Wienbroeer should not be allowed to make entry, and pay for the land.

On the 11th of October, 1889, McGlenn filed in the local office an affidavit, in which he alleged that he was well acquainted with the land, and that it was more valuable for agricultural than for mineral purposes; that his homestead application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes. He therefore asked for a hearing, at which he might be allowed to substantiate the allegations contained in his affidavit.

A hearing was therefore ordered, at which a very large amount of testimony was taken, resulting in a decision by the local officers on the 20th of May, 1890, in which they held in substance that each smallest legal subdivision embraced in the tracts was shown by a preponderance of the testimony to be mineral in character, and more valuable for mineral than for agricultural or grazing purposes. In appealing from that decision the counsel for McGlenn alleged that the local officers erred in holding that McGlenn failed to show that "the land at present has any intrinsic value for agricultural purposes, and its value for grazing purposes is also slight", and in holding that "the land is worth at least \$50.00 per acre for the purpose of stone quarrying, and is scarcely worth the nominal government price of \$1.25 per acre for agricultural and grazing purposes", and that they also erred in being influenced by the fact that McGlenn had not established his actual residence upon the tract at the time of the trial.

The decision of the local officers was affirmed by you, on the 6th of October, 1890.

There is not much conflict in the evidence as to the facts. McGlenn did not attempt to show that the land was valuable for the purposes of cultivation, but that it could be successfully used for grazing. As to its value for this purpose the witnesses varied somewhat in their estimates. Numerous exhibits help to make up the record, those from E

to Q inclusive, being photographic views, showing the surface of the ground where quarries have not been opened, also the quarries and the products thereof, together with fine blocks of buildings, constructed from, or trimmed with stone from such quarries.

The preponderance of the evidence submitted, was that the land possessed but little value for any agricultural purpose except grazing, but that its principal value was on account of the large quantity of stone which it contains. This stone was shown to be of very superior quality for building, monumental, and other purposes, and that it could be readily cut, sawed, and turned into any desired form, such as blocks, square and round columns, grindstones, etc.

Wienbroeर testified that he had resided upon the land with his family, since making his preemption filing, and that his buildings, consisting of house, barn, sheds, etc., were extensive and valuable. He also had numerous derricks, and other machinery and tools for operating his quarries, together with horses, cattle, etc. He had operated quarries upon the land for over three years, and from personal examination, and inspection in detail, he knew that the ledges of good building stone thereon were practically inexhaustible, and that they extended so as to cover and penetrate the entire one hundred and twenty acres. He had quarried and sold from four to five thousand dollars worth of stone each year, since he commenced operating his quarries, and aside from the stone used in the city of Trinidad, he had shipped large quantities to Denver, Pueblo, Rocky Ford, Lamar, Colorado Springs, West Las Animas and New Mexico, and had also "shipped grindstones by the car load to California."

McGienn made his homestead entry with full knowledge of the fact that Wienbroeर was actually residing upon the land at the time, and had resided there for several years. That he had extensive quarries, and machinery and appliances for operating them, and had spent large sums of money in developing them, and that he had valuable buildings upon the land.

The equities of the case are, therefore, all on the side of Wienbroeर.

In a decision rendered by the local officers, on the 5th of June, 1889, in a contest between Wienbroeर and one Mitchell, relating to two of the forty acre tracts of the land in question, it was held that said land was more valuable for mining than for agricultural purposes, and subject to entry under the mineral law. That decision was affirmed by you, and from your decision no appeal was taken, so that the question in that case was not passed upon by the Department.

In answer to the appeal to your office in the case at bar, Wienbroeर, explains that the placer mines upon the tract were located in consequence of that decision by the local officers. In view of that decision, he believed that he could acquire title to the land in no other way than under the mineral laws, and hence his application for patent in accordance with such laws. He declared, however, that he stood ready to per-

fet title to the land as a mineral entry whenever the government would accept his money, and that he also stood ready to enter it under the settlement laws, in accordance with his pre-emption filing, should the government decide that the land was not subject to entry under the placer mining laws.

From all the facts of this case, there can be no doubt but that this land was principally valuable on account of the stone which it contained. Practically, it possessed no other value, and was comparatively worthless for agricultural purposes. The question then is: Did these valuable deposits of stone render the land subject to entry under the mineral laws? In other words: Is stone a mineral within the meaning of these laws?

This question has been passed upon, both by the courts and by the Department. In Copp's United States Mineral Lands, in his digest of court decisions, on page 424, several cases are cited. In that of *Rosse v. Wainman* (14 M. & W., 859), it was said "the term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil bodies or matters dug out of mines; in this sense, beds of stone may be included in the word mineral." In the case of *Micklethwait v. Winter* (5 English Law and Equity, 526), it was said: "Stone taken from quarries is a mineral."

In the case of *William H. Hooper* (1 L. D., 560), it was held that "whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws." In the case of *Maxwell v. Brierly*, decided by Secretary Teller, April 16, 1883, (10 C. L. O., 50), it was held that "land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land, and subject to sale under the mineral laws."

Applying the doctrine of the last case cited, to the one at bar, and the mineral application of Wienbroer must be allowed, while under section 2318 of the Revised Statutes of the United States, the homestead entry of McGlenn can not stand.

In the case of *Conlin v. Kelly* (12 L. D., 1), it was held that "stone that is useful only for general building purposes does not render land containing the same subject to appropriation under the mining laws, and except it from pre-emption entry." The facts in that case are very easily distinguishable from the facts in the one at bar. There, on November 19, 1879, William Kelly filed his pre-emption declaratory statement for the tract in controversy, completed his entry and made final payment on July 29, 1880. On January 20, 1887, nearly seven years after the entry was completed, B. M. J. Conlin filed his affidavit of contest charging that the entry was fraudulently made for the purpose of speculation, and to secure title to the land because of valuable mineral deposits therein, and that the entry was made for the benefit

of another party. Upon the trial it was shown that the mineral which it was claimed the land contained, was a ledge of unstratified extremely hard flesh colored rock, a species of rock which contained no trace of valuable metal, stone common to South Dakota which was of some value for building purposes, by way of use in foundations, cellars, walls, bridge abutments and other places where strong rough work was required, but it possessed little commercial value.

On this state of facts the Department held that the entry of Kelly should stand; that it would not cancel an entry which had been existing for seven years upon the plea that it was fraudulently made, on the ground that common building rock used for general purposes is mineral. In that case the equities as well as the law, were in Kelly's favor as they are in this, in Weinbroeर's. In that case the stone was useful *only* for general building purposes, while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monuments and other commercial purposes.

An act was approved on the 4th of August, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws," which would allow the entry of lands, such as are described in the Conlin case under the placer mining laws, but under the facts and circumstances of this case, the provisions of law in force at the time Wienbroeर's application and McGlenn's entry were made, and the decisions of the courts and of the Department, upon the questions involved, I am clearly of the opinion that Weinbroeर's application for patent for the land should be granted, and that McGlenn's homestead entry should be canceled.

Had I not reached the conclusion that Wienbroeर was entitled to patent for the land under the mineral laws, I should have had no hesitancy, under the circumstances of the case, in allowing him to complete his entry under the pre-emption laws, as thirty-three months from the time of the filing of his declaratory statement had not expired when the controversy in regard to the land was initiated. In any event, therefore, I would have directed the cancellation of the homestead entry of McGlenn, and have awarded the land to Wienbroeर. The decision appealed from is affirmed.

SECOND HOMESTEAD ENTRY—OKLAHOMA LANDS.

JOSEPH B. BALDWIN.

The right to make a second homestead entry conferred by section 13, act of March 2, 1889, can not be exercised where the original entry is made after the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 13, 1892.

On July 15, 1889, Joseph B. Baldwin made homestead entry No. 3046 for the SE. $\frac{1}{4}$ of Sec. 24, T. 13 N., R. 5 W., Oklahoma City, Oklahoma Territory, and on January 30, 1890, he relinquished said entry for the

reason, as now stated by him, that he was very ill and had been since September, 1889, and did not think he could recover. The tract thus relinquished was entered by William W. Crowley, his step-son, on the day of its relinquishment.

Baldwin recovered, and on March 4, 1891, filed his application for restoration of his homestead right, together with his application to make homestead for the SW. $\frac{1}{4}$ of Sec. 24, T. 13 N., R 5 W., Oklahoma City.

On August 20, 1891, you considered the applications and decided that Baldwin was not entitled to be restored in his homestead right.

He petitioned for a review of your judgment, and on November 27, 1891, after considering the petition, you denied it and refused to modify your former decision. He has appealed from your judgment to this Department.

After a review of the case I am convinced that your judgment is correct. By making his entry he has once had the benefit of the homestead law. He relinquished his right when he was not being attacked by any one, and when no one was asserting an adverse claim to the tract, and it is difficult to see why it was necessary for him to have given up his claim by relinquishment, when if he died the law makes provision for the entry of the land by his heirs.

It is contended that the entryman is protected by section 13 of the act of March 2, 1889, 25 Stat., 1005. That section only applied to entries which were made under laws existing prior thereto. That act does not justify second entries, where the first was made after the passage thereof. While it is true that Mr. Baldwin consulted attorneys, and, acting upon their advise, purchased the preference right of Thos. L. Beck, paying \$1,000 therefor, and to deny his application will work a financial loss to him yet, I can find no authority for relieving him from his act of relinquishment. Your judgment must be, and is hereby, affirmed.

PREFERENCE RIGHT OF CONTESTANT—RELINQUISHMENT.

EDWIN M. WARDALL.

One who files an affidavit of contest, subject to the prior contests of two others, is not entitled to a preference right of entry, where he makes no charge as against the character of said contests, and the cancellation of the entry is in no way the result of his suit.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 15, 1892.

I have considered the appeal of Edwin M. Wardall from your decision of November 27, 1891, affirming the decision of the register and receiver at Los Angeles, California, rejecting his application to make

desert land entry for the SE. $\frac{1}{4}$ of Sec. 22, T. 4 N., R. 5 W., tendered October 27, 1891. Said application was rejected because H. A. Grenell had on October 5, 1891, made homestead entry (No. 6244) for the same land.

On September 30, 1887, Henry Johnson had made homestead entry (No. 3607) for said tract. On March 18, 1890, Wylie Morrison brought a contest against Johnson's entry on the ground of abandonment, and a hearing was ordered for May 23, 1890, when Johnson made default, and the local officers found that said land had been abandoned, and recommended the cancellation of his entry. Notice of said decision was given to Johnson the next day. The papers in the case were, however held by the local officers awaiting an affidavit that notice of contest had been properly served on said Johnson at least thirty days prior to date of hearing, the decision of the local officers and subsequent notification to Johnson of their decision having been inadvertently given before evidence of service of notice was filed.

On May 21, 1891, Samuel Dufton brought contest against said entry of Johnson for abandonment, subject to the contest of said Morrison.

On September 15, 1891, Edwin M. Wardall also contested said entry of Johnson for abandonment, subject to said prior contests.

On October 5, 1891, said Grenell filed the dismissal of contest by said Morrison, dated September 30, 1891, and his waiver of his preference right of entry, and the relinquishment by said Johnson of all his right, title and interest in and to said land, dated March 31, 1890. Said Grenell was, upon filing these papers, allowed to make said homestead entry (No. 6244).

In his appeal from the decision of the local officers Wardall contends that the two prior contests of Morrison and Dufton were speculative and collusive, and summarizes his claim finally as follows:

Appellant claims the preference right of entry under the act of Congress of May 14, 1880, and asks that the homestead entry of the intervenor, Grenell, be cancelled. He also asks that the papers on file relating to the contest of Morrison and Dufton be forwarded to the Hon. Commissioner and together with the relinquishment of Johnson be considered with this appeal and made a part thereof, and if any further evidence is required, that a hearing be ordered to determine the respective rights of the parties interested.

In the decision appealed from, it is stated that

The relinquishment by Johnson of his entry, and the dismissal by Morrison of his contest and waiver by him of his preference right, all of which was done on October 5, 1891, constituted one transaction, cleared the land of all claims against it by others, and gave Grenell an opportunity to enter the land free from all pending contests.

In his appeal Wardell contends inter alia, that—

This "transaction" did by no means "clear the land of all claims against it by others." True it gave Grenell or any other legal applicant an opportunity to enter the tract, but subject to pending rights of others, and the rights of Wardall cannot be defeated by such evasion of the plain law in the case.

The "plain law" which determines the "pending rights" of Wardall, if he has any is by virtue of section 2, the act of May 14, 1880, (21 Stat., 140), which provides that:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preëmption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

Wardall has not brought himself within the terms of this statute. He has not "contested, paid the land office fees, and procured the cancellation" of Johnson's entry. He filed a third affidavit of contest against said entry, subject to the two prior contests, more than a year after the decision of the local officers had been rendered in the contest by Morrison in which they found that Johnson had abandoned his entry, and also more than a year after Johnson had executed his relinquishment; and in said affidavit he failed to charge that either of said prior contests was speculative or collusive.

"In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver fully setting forth the facts which constitute the grounds of contest." Rules of Practice, Rule 2. Wardall's affidavit simply charges "abandonment." He makes the charge that said prior contests were collusive in his appeal for the first time. He must abide the issue as he has made it.

It is evident that the contest of Wardall did not procure the cancellation of Johnson's entry, and therefore he acquired no rights by his contest affidavit. Armenag Simonian (13 L. D., 696).

Your judgment is affirmed.

HOMESTEAD ENTRY—MARRIED WOMAN—RESIDENCE.

HATTIE E. WALKER.

The homestead entry of a married woman is not impaired by her subsequent marriage if she thereafter complies with the law. But where the husband has a homestead entry also, the parties must elect which entry shall be perfected, for they cannot maintain separate residences at the same time and secure title to both tracts.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 15, 1892.

Hattie E. Walker, formerly Hattie E. Ainsworth, has appealed from your decision of January 4, 1892, holding for cancellation her homestead entry for the SE. $\frac{1}{4}$ of Sec. 4, T. 15 N., T. 53 W., Sidney land district, Nebraska.

She made said entry October 25, 1886; claims to have established actual residence November 13, same year, but left the next day, and was absent until April 2, 1887, "to make a living." On April 6, 1887, she married Irving S. Walker.

He, on October 26, 1885, had made homestead entry of the NW. $\frac{1}{4}$ of Sec. 24, T. 16 N., R. 53 W., same land district (between four and five miles distant from that of his wife.) He commuted the same to cash entry, receiving final certificate February 4, 1888. Of course he obtained said land upon proof of having lived thereon until that date; but the next day (February 5, 1888), he took up his residence with his wife on *her* homestead claim.

She made final proof November 2, 1891, claiming actual residence on the tract claimed by her from April 2, 1887, until date of making proof. Your decision of January 4, 1892, held that, "by her marriage her residence became merged in his, and constituted an abandonment of her own for the time he remained on his claim, or until he made proof and joined her on her claim." Therefore you held her entry for cancellation.

Counsel for claimant contends that, granting that she may be held to have technically, and in the eye of the law, abandoned her claim from the date of her marriage until the date when her husband made final proof and joined her on her claim, yet as no contest or adverse claim intervened, whatever technical laches she may have been guilty of, was fully cured by the residence of both her husband and herself on her claim from February 5, 1888, to the date of her making final proof—a period of more than three and half years.

The case of John Q. and Minerva C. Garner, cited by you, is not in all respects parallel to that now under consideration, and the decision therein is not properly susceptible of so broad a construction as you have by implication given it in applying it to the case at bar. It holds, according to the syllabus, which appears to sum up correctly the doctrine enunciated therein: "A husband and wife, while living together in such relation, can not maintain separate residence at the same time, *in a house built across the line between two settlement claims*, so that each can secure a claim by virtue of such residence." The same has been held in the cases of Lydia Tavener (9 L. D., 426); Thomas E. Henderson (10 L. D., 266); Emma F. Stewart's Heirs (12 L. D., 197); Stella G. Robinson (ib., 443); and others not reported. In the case at bar, the husband and wife did not attempt to maintain residence at the same time "in a house built across the line between" their "two settlement claims." They attempted to maintain residence, for nearly a year in two houses, four miles apart; and afterward, for three and a half years, they resided together (not separately) in one house (*not* built across the line, so far as set forth).

The Department has repeatedly held that an entrywoman loses no right acquired under the homestead law, merely by her marriage, provided that after marriage, as before, she continues to comply with the law. See Maria Good (5 L. D., 196); Alice M. Gardner (7 L. D., 470); Angie L. Williamson (10 L. D., 30); Hanson *v.* Earl (13 L. D., 548). In none of the cases above cited, however, does it appear that husband

and wife were both, at the same time, seeking to obtain land under any law requiring residence.

The decision in the case of *Bullard v. Sullivan* (11 L. D., 22,) announces the principle that governs in the case at bar. It is true, in the case above mentioned the residence was very questionable, and the improvements of little value; while in the case now under consideration the evidence shows that the entrywoman remained continuously on her claim after establishing residence, while the improvements are estimated to be worth more than six hundred dollars. Nevertheless, the conclusion reached by the Department in that case is equally applicable here:

It sufficiently appears from the record in this case that both claimant and her husband are endeavoring to maintain separate residences at the same time, so that each by virtue of said residence may perfect title to land covered by their respective entries. *This can not be done.*

From April 4, 1887, until February 4, 1888 (ten months), the claimant and her husband were endeavoring to maintain separate residences at the same time, so that each by virtue of said residence might perfect title to the land covered by their respective entries.

The contention of counsel that her technical residence with her husband on his claim from her marriage until he made final proof constituted laches, that was technically cured by her remaining on her own claim for three and a half years afterward, is not tenable. It is not a question of laches. When she married a man who had previously made a homestead entry, and who had not yet fulfilled the requirements of the law relative thereto as to the matter of residence, it remained for them to elect which of the two homesteads they would thereafter reside upon and prove up on; they could not obtain both. He has made his proof and received final certificate upon his homestead entry; and her entry must be canceled. (See *William A. Parker*, 13 L. D., 734-6.)

Your decision is affirmed.

HOMESTEAD ENTRY—SETTLEMENT RIGHT.

TODD v. TAIT.

When a homestead applicant alleges a prior settlement right as against an entry of record, a hearing should be ordered to determine the rights of the parties.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 17, 1892.

On the 14th of August, 1891, Thomas William Tait made homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 22, T. 32 N., R. 7 E., Grayling land district, Michigan, claiming that he was a qualified entryman on account of the naturalization of his father before the applicant became of age.

On the 31st of the same month, William Todd forwarded to the local office his application to make homestead entry for the same land. In his homestead affidavit he did not allege settlement upon the land earlier than the 20th of August, on which day he stated that he commenced living there, in a house which he had completed prior to that date. In a letter addressed to the register, which inclosed his homestead application, he alleged that Tait was not a qualified homesteader, being an alien and a minor at the time he made his entry.

Upon this showing, the local officers could take no action, except to reject the application of Todd. This they did on the 1st of September, 1891, on the ground that the land was not then subject to entry, a homestead entry therefor having been made by Thomas W. Tait, on the 14th of August.

From this action Todd appealed to your office. In his appeal, he alleged under oath that he settled upon the land on the first day of August, 1891, and built thereon a house, the dimensions of which were twelve by eighteen feet, with twelve-foot posts, into which he moved his family on the 20th of that month. He also alleged that Tait made his entry with full knowledge of the fact that he (Todd) was occupying and improving the land, and had his house nearly completed thereon, and several acres underbrushed. He further alleged that Tait was a minor and an alien, and submitted the affidavits of several witnesses in support of his allegations, together with a certified copy of Tait's application to become a citizen of the United States, which was made on the 20th of August, 1891.

On the 30th of November, 1891, you affirmed the action of the local officers, and suggested that if Todd desired to contest the entry of Tait, he could do so according to the rules of practice, "alleging in due form some cause deemed by him sufficient as affecting the legality thereof." From that decision Todd appealed to the Department, repeating, under oath, his allegations of settlement upon the land prior to the entry of Tait, which fact was well known to the latter, who was not the head of a family, but was a minor and an alien at the time. He also makes his appeal to your office, and accompanying exhibits, a part of his appeal to the Department.

The local officers had nothing before them upon which they could base any action, except such as they took. Had Todd, in his homestead application, distinctly alleged settlement upon the land prior to Tait's entry, it would have been good practice on their part to have ordered a hearing, to determine the rights of the parties, and the qualifications of the applicants for the land. This would have been in accordance with the doctrine laid down in the case of James A. Forward (8 L. D., 528), where it was said: If a pre-emptor applies to file a declaratory statement for land embraced within an entry of record, alleging settlement prior to the date of such entry, a hearing should be ordered to determine the respective rights of the parties. That

was a pre-emption case, as was also that of *Willis v. Parker* (8 L. D., 623), where the same course was recommended, but the rule would be the same, whether the application was to make entry, or to file declaratory statement for land already embraced within an entry of record.

Upon the showing made by Todd, on his appeal to your office, I think it would have been proper for you to have ordered a hearing to determine the question raised by such appeal, and accompanying exhibits. Such course not having been pursued by you, I think the Department should now take action in the matter, and order a hearing therein. You will therefore direct the local officers to appoint a time and place, at which the parties may submit their proofs upon the questions involved, giving to each due notice of such hearing.

Upon the trial, the burden of proof will be upon Todd to show his own qualifications as a homesteader, as well as the lack of such qualifications on the part of Tait, or that his rights to the land are superior to those of Tait on account of his settlement thereon prior to the latter's entry. Until the entry of Tait is cancelled, the application of Todd to make entry for the land can not be allowed.

PRE-EMPTION ENTRY—DECLARATORY STATEMENT.

ROMERO v. PACHECO.

As between two pre-emption claimants, both of whom are in default in the matter of filing declaratory statement within the statutory period, the one who first gives notice of his claim is entitled to make entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 17, 1892.

This case involves the rights of two pre-emptors, both of whom failed to file their respective declaratory statements within the statutory period following settlement. The land involved, to the extent of which the filings here in question are in conflict, is the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 13, T. 11 S., R. 9 $\frac{1}{2}$ E., Las Cruces, New Mexico.

On December 8, 1885, Anselmo Pacheco filed pre-emption declaratory statement for said land and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of same section, alleging settlement in August of the same year.

On March 22, 1886, Jesus Romero filed pre-emption declaratory statement for the tracts in question, and the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and section aforesaid, alleging settlement September 13, 1885.

On May 17, 1886, you suspended the township plat (filed in December, 1883) for error in survey. It remained suspended until April 24, 1890, when the order of suspension was revoked.

During the suspension, to wit, May 28, 1888, Pacheco submitted proof before the probate clerk of Dona Ana county, but it was not transmitted to your office nor does any action appear to have been taken thereon. On April 12, 1888, Romero filed in the local office his affida-

vit of protest against the allowance of Pacheco's proof, alleging prior settlement followed by residence upon and improvement of the land.

Thereupon a hearing was ordered at which the parties appeared with counsel before the register and receiver upon June 15, 1888. The trial proceeded until June 22, following, when it was concluded.

Upon the evidence adduced the local officers filed separate opinions. The register found that Romero's protest should be dismissed. He states incidentally that Romero failed to sustain his allegation of prior settlement but bases his opinion upon the fact that Pacheco was the first to file.

The receiver finds that Romero is the prior settler and consequently entitled to the land.

On December 31, 1891, you reviewed the case and by decision of that date held that Pacheco's proof should be rejected as to the land in question and (the suspension of survey having been revoked) allowed as to said remaining forty.

Appeal by Pacheco from this decision brings the case here.

Romero's improvements consisting of a house with three rooms; ditching, fencing, etc., seem to be located on the land in question. Pacheco's improvements which are at least of equal value, appear to be on the forty embraced in his filing, not in dispute. Concerning the question of priority in time of settlement, the evidence is conflicting. Romero claims to have begun his residence on the land in a tent during the first part of July, 1885. Pacheco claims to have moved on his claim during the following August at which time he testifies there was no sign of habitation on the land, although Romero then notified him that he claimed it.

You find that Romero was the first settler and accordingly hold that as Pacheco did not file his declaratory statement until after the expiration of the period prescribed in Sec. 2265 Revised Statutes, his claim is not of such character as can work a forfeiture of Romero's pre-emption right. In support of this you cite as authority *Watts v. Forsyth*, 5 L. D., 624; *Osmundsen v. McDowell*, 6 L. D., 391; *Christensen v. Mathorn*, 7 L. D., 537.

None of these cases, however, are similar nor are the rulings therein applicable to the case at bar. The precise question presented by this appeal is, however, determined by the rule laid down in the case of *Herbert v. Reed*, 1 L. D., 438. In that case, as in this, the prior settler made the subsequent filing and the Department held that—

As between two pre-emption claimants, both of whom are in default as respects the filing of a declaratory statement within the statutory period, the one who first gives notice of his claims is entitled to make the entry.

It follows that Pacheco's rights must prevail. Romero's protest will accordingly be dismissed and his filing canceled to the extent of the land in question.

Romero's claim to said land being thus eliminated Pacheco's proof, if satisfactory in other respects, will be passed to patent.

VIRGINIA MILITARY LAND WARRANT—SCRIP.

STEPHEN FEIKE.

An attempted location of a Virginia military land warrant and sale of the tract by the locator, does not vest in the purchaser of such tract, nor in his grantees, the right to receive land scrip under the act of August 31, 1832, in lieu of said warrant.

Secretary Noble to the Commissioner of the General Land Office, October 18, 1892.

I have considered the appeal of Stephen Feike from your decision of December 21, 1891, rejecting his application to have issued to him revolutionary bounty scrip in lieu of Virginia military land office exchange warrant No. 467, for 563 acres of land.

The applicant sets forth in his petition that—

Your petitioner, Stephen Feike of Sardinia, Brown county, Ohio, represents that he is the present owner of (660) six hundred and sixty-one thousand and seventy-four parts of Virginia military continental exchange land warrant No. 467, date June 3rd, 1839, and issued to one Sarah C. Morton for 563 acres on account of the services of an ancestor of hers in the revolutionary war.

That on the 15th of February, 1849, said Sarah C. Morton, then being the owner of the whole of said warrant, located the same on (1074) one thousand and seventy-four acres of land in Brush Creek township, Sciota county, and in Franklin township, Adams county, Ohio, by an entry of that date.

That on the 16th of February, 1849, said entry was surveyed so as to include (1074) one thousand and seventy-four acres of land, in the townships, counties and State aforesaid, and said survey was numbered 15662 (15662).

That on the 20th of October, 1865, Sarah C. Morton, then intermarried with one John L. Woolfolk, conveyed her entire interest in said warrant, entry and survey to one George Taylor Jenkins of the city of Baltimore, Maryland.

Then follows the transfers from the grantees last named by which it is shown that 660 acres of the land became vested in the petitioner. He then avers:

That the said Sarah C. Morton, being the owner of said warrant, entry, and survey, on December 31st, 1851, failed and neglected to return said survey to the General Land Office at Washington, D. C., for patent prior to January 1st, 1852, whereby all her right, title, and interest in the land covered by said entry and survey became lost and forfeited just as though she had continued to hold said warrant, and had never located the same, and said land included in said entry and survey having reverted to the United States on January 1st, 1852, on February 17th, 1871, the United States granted said land to the State of Ohio, which on March 26th, 1872, granted the same to the Ohio State University, which has since sold and disposed of the same. That by reason of the facts stated, the location of the land upon said warrant has been entirely lost. That while applicant is now entitled to but $\frac{660}{1074}$ parts of said warrant, he is negotiating for the entire ownership thereof, and expects before this case closes to have the title to all of said warrant and to present his proof of the ownership of all of said warrant in this proceeding.

Wherefore your petitioner says that he is now entitled to the revolutionary bounty land scrip for $\frac{660}{1074}$ parts of said warrant of 563 acres under the provision of the act of August 31st 1852 entitled "An act making further provisions for the satisfaction of Virginia Land Warrants." And he asks that upon final hearing hereof the same be issued to him.

This petition is dated June 9, 1888. By a supplemental petition dated November 14, 1890, he alleges that "he now owns all of said warrant 467 except $\frac{49}{1074}$ parts thereof," and presents the assignments of the various owners of the land of their interests in the warrant. From your decision denying this application Feike appealed. The errors relied upon are as follows:

IV. The Honorable Commissioner errs in rejecting said application and in holding that the quit claim deed of John L. Woolfolk to George Taylor Jenkins, and the conveyance by George Taylor Jenkins and Elizabeth H. Jenkins his wife to E. P. Evans and subsequent conveyances to Stephen Feike did not vest in him, Stephen Feike, the right to have said revolutionary bounty land scrip in lieu of Virginia military land office exchange warrant No. 467 for 563 acres of land in accordance with the acts of Congress of August 31, 1852, and June 22, 1860, and did not convey to him a clear title in and to said military exchange warrant.

V. The Honorable Commissioner erred in not issuing to said Stephen Feike the said revolutionary bounty land scrip in lieu of Virginia military land office exchange warrant No. 467, for 563 acres of land in accordance with the acts of Congress hereinbefore cited upon the law and the facts as presented in said application and exhibits herewith filed.

It is admitted by counsel that Feike purchased the land from the Ohio State University. (For a "history of the legislation relating to the Virginia Military land districts in Ohio and proceedings under the same," see Jeremiah Hall, 1 L. D., 5, and same on review, ib., 11.)

The act of Congress (August 31, 1852, 10 Stat., 143), under which this application is made, reads as follows:

Be it enacted, etc. That all unsatisfied outstanding military land-warrants or parts of warrants issued or allowed prior to the first day of March, eighteen hundred and fifty-two, by the proper authorities of the commonwealth of Virginia for military services performed by the officers and soldiers, seamen or marines, of the Virginia State and continental lines in the Army or Navy of the Revolution, may be surrendered to the Secretary of the Interior, who, upon being satisfied by a revision of the proofs or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said commonwealth, for military services so rendered, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, for the whole or any portion thereof yet unsatisfied, at the rate of one dollar and twenty-five cents for each acre mentioned, in the warrant thus surrendered and which remains unsatisfied, which scrip shall be receivable in payment for any lands owned by the United States subject to sale at private entry; and said scrip shall, moreover, be assignable by indorsement attested by two witnesses. In issuing such scrip, the said Secretary is authorized, when there are more persons than one interested in the same warrant to issue to each person scrip for his or her portion of the warrant; and where infants or feme coverts may be entitled to any scrip, the guardian of the infant and the husband of the feme covert may receive and sell or locate the same. *Provided*, That no less than a legal subdivision shall be entered and paid for by the scrip issued in virtue of this act.

It will be seen by the petition of applicant that he does not claim to own the warrant itself or to have any assignment of the same, and his counsel, in their argument, admit he does not own or possess it, but base his right to it by reason of the fact that Sarah C. Morton to whom it was issued, did by her deed sell and transfer the land she supposed had been located with it, and he now being the owner of the

identical land she attempted to locate, and did transfer, that he is *ipso facto* the proprietor of the warrant and that the scrip should be issued to him.

It seems to me that this position is untenable. This warrant authorized the location of land under the rules prescribed by statute; the land was not located because there was not a compliance with the law; it reverted to the government and was by it disposed of. If it were essential to protect or perfect the title of the owners of the land that this scrip should issue to them or their assigns, then a different question would be presented. But this is specially disclaimed.

Counsel argue that the quit claim deed by Woolfolk (*nee* Morton) was a conveyance or assignment of the warrant. This deed conveyed "No. of entry 15662 lying on Scioto Brush Creek, Adams county, Ohio, containing 563 acres more or less." The only identity, in this conveyance, with the warrant is the number of the survey. This survey was, however, fraudulent, and void, as well as the entry under it, and whatever rights could have been obtained under it had, by limitation, expired more than ten years when this deed was executed. It seems to me to hold that this applicant under his deed and the assignments he presents is entitled to the scrip authorized by the act of August 31, 1852, *supra*, would be giving him something to which he has no color of title whatever.

Your judgment is affirmed.

SCHOOL INDEMNITY—RES JUDICATA.

GEORGE A. COOPER.

A decision of the Commissioner of the General Land Office passing upon the validity of an indemnity selection is an adjudication within the jurisdiction of said officer, and binding upon his successor.

Secretary Noble to the Commissioner of the General Land Office, October 18, 1892.

On July 20, 1891, George A. Cooper made homestead entry (No. 481) for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 19 N., R. 3 E., at Olympia, Washington.

By your letter of December 5, 1891, you held the entry for cancellation for conflict with list No. 6 of school indemnity, filed in the local office February 21, 1874, by the commissioners of Pierce county, in the then Territory of Washington.

Said selection (No. 6) was held for cancellation by your letter of March, 19, 1889, because the tract selected was

included in the forty mile limits of the Northern Pacific Railroad, within which the odd sections were withdrawn from sale and the even sections enhanced in price to \$2.50 per acre, in pursuance of the sixth section of the act of July 2, 1864 (13 Stat.,

365) by executive order of October 19, 1870, which took effect by relation as of August 13, 1870, the date of approval of the map of the general route of the railroad. (*Van Wyck v. Knevals* 106 U. S., 360; *Buttz v. N. P. R. R. Co.* 119 U. S., 55; *Lawrence W. Peterson*, 11 C. L. O., 186.) Tp. 20 N., R. 2 E., the basis of the fourth selection in list No. 6, was surveyed 25 Sept., 1868. This is the date at which the school reservation is held to have attached, and the loss to the school fund to have occurred. The value of the land at date of survey determines the extent of loss and fixes the character of indemnity which may be selected therefor. If on survey the land is held at the minimum price, only land of the same price can be taken as indemnity for deficit, and that, although the township used as a basis be afterwards enhanced in value. (To B. W. Coiner, Feb. 6, 1889, 15 C. L. O., 274.)

By your letter of March 29, 1890, the above action holding said list for cancellation was rescinded, on the following ground:

There is nothing in any of the cases cited which fixes the date of survey as unalterably determining the kind of land which may be selected for deficiencies in the surveyed school land. So long as the township is held at the minimum price, only lands of the same price can be taken as indemnity for deficiencies. But when the deficient school lands are brought within railroad limits, and so enhanced in price, no reason appears why the deficiencies should not be compensated by lands of the same value which the lost lands would have been to the State.

It appears that in April, 1889, one T. O. Abbott made application to make a homestead entry which included the land now in dispute, which with several others, were passed upon by this Department in the case of *Levi Jerome et al.* (12 L. D., 165).

By your letter of February 20, 1891, you state that—

It appears that on March 29, 1890, while the case of *Abbott et al.*, was still pending before the Hon. Secretary on appeal, this office rescinded its former action holding the above mentioned and other selections for cancellation, notwithstanding the fact that no appeal had been taken by the State authorities from said decision, and restored the said selection to its original status on the records. This action was premature and irregular, so far as the tract mentioned is concerned, and was doubtless taken without knowledge of the fact stated. If, therefore, Mr. Abbott still desires to enter this tract he will be allowed to do so, provided he possesses the necessary qualifications, in accordance with the ruling of the Hon. Secretary, and the State selection of said tract will be cancelled.

In your decision of December 5, 1891, from which this appeal is taken, it is stated as follows—

By office letter "K" of February 20, 1891, addressed to the register and receiver at Seattle, they were furnished a copy of the decision of the Hon. Secretary of the Interior, dated Feb'y. 10, 1891, by which the homestead application of T. O. Abbott for the W. $\frac{1}{2}$, NW. $\frac{1}{4}$ and N. $\frac{1}{2}$, SW. $\frac{1}{4}$ of Sec. 12, T. 19 N., R. 3 E., was rejected, except as to the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, which tract was held to be subject to said application; but for reasons peculiar to that particular case, as the decision shows. As Abbott has taken no further action in the matter, it is presumed that he did not care to make entry for that tract alone, and it is clear that under the decision of the Department above referred to, no one else has the right to enter it.

The decision of the Department above referred to is the said case of *Levi Jerome et al.* (12 L. D., 165). In that case it was held that—

Until the legislature of the State of Washington shall provide the manner in which indemnity lands for school purposes shall be selected, and such manner shall be approved by the Secretary of the Interior, under the act of 1889, (*supra*) the reserva-

tions made by the selection of said tracts while the territorial government existed will continue, until it be shown that the land was not subject to selection by reason of adverse rights acquired prior to selection.

It is evident that the selections here referred to as continuing are such selections as were *prima facie* valid, and which reserved the land till declared invalid.

The act referred to, is that of February 22, 1889, (25 Stat., 676) admitting the Territory of Washington, and other Territories, to statehood, which provides in its tenth section that school indemnity lands are "to be selected in such manner as the legislature may provide, with the approval of the Secretary of the Interior." The "manner" of the selection must be approved by this Department to insure its legal validity. The question involved in this case relates to the "manner" of the selection of the tract in dispute.

In the case of L. H. Wheeler (11 L. D., 381) it was held that the invalidity of such selection might be considered, and that a selection only continued in case it should not be cancelled. The question whether a school indemnity selection of double minimum land would be valid in lieu of lost land which was of minimum value when the right of the Territory attached, was not decided in those cases.

The reasons assigned for this appeal are as follows:

1. Commissioner Stockslager's decision dated March 14, 1889, holding for cancellation the State of Washington school indemnity selection for the above described land having become final, the action of Commissioner Groff of March 29, 1890, in rescinding said decision of his predecessor and re-instanting, on his own motion, the State selection was without authority of law and of no force or effect, and it was error, in the decision complained of, to hold that Cooper's entry was in conflict with any valid and subsisting selection of the State.

2. Commissioner Groff's action in reinstating the State selection while the case of T. O. Abbott v. the State of Washington, involving this land, was pending on appeal before the Secretary of the Interior was unauthorized and unwarranted and it was error to hold that it had any legal effect upon the status of the land.

3. Commissioner Groff's action in reinstating the State selection having been taken while the land was in reservation by T. O. Abbott's homestead application which was subsequently authorized, it was error to treat said action as valid and having the effect of reinstating the State selection.

4. Error in not holding that the State indemnity selection was illegal and of no effect for the reason that it was for double minimum land in lieu of single minimum land.

The selection in this case was originally made under the authority conferred by Sec. 20 of the act of March 2, 1853, (10 Stat., 172) to establish the territorial government of Washington, which "reserved" sections 16 and 36 in each township for school purposes, and provided further that—

In all cases where said sections 16 and 36, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to any equal amount in sections or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid.

This provision was re-enacted without material change in section 1947 of the Revised Statutes, approved June 22, 1874, which "must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873." *United States v. Bowen* (100 U. S., 513).

Said sections 16 and 36 were thus "reserved" from the public domain for school purposes, and they were not included in the grant of lands to the Northern Pacific Railroad Company by the third section of the act of July 2, 1864, (13 Stat., 365).

It is unnecessary to discuss the question whether the rule that "double minimum land may not be taken in lieu of single minimum loss" applies to this case or not. It is sufficient that the decision of Commissioner Stockslager of March 19, 1889, holding said selection for cancellation so far as it embraced the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 12 disposed of the question to what extent said selection was valid, and to what extent it was invalid. That disposition of the matter was an adjudication within the jurisdiction of said Commissioner, and was binding upon his successor. *State of Oregon* (3 L. D., 595).

It must be held that said adjudication so far as the land now in dispute is concerned, was legal, and said decision, not having been appealed from, became final. Your decision of March 29, 1890, reinstating said selection upon the records, was "premature and irregular," as stated in your letter of February 20, 1891.

By your said letter of February 20, 1891, addressed to the register and receiver at Seattle, they were furnished with a copy of the decision of this Department in said Jerome case, and were directed to notify all parties in interest of the contents thereof.

It does not affirmatively appear that said Abbott received said notice as the rule requires. (*Rules of Practice, Rules 95 and 96; Pierpoint v. Stalder*, 8 L. D., 595; *Edward B. Largent*, 13 L. D., 397.) It was error therefore to "presume" that Abbott "did not care to make entry for that tract," in the absence of proof that he was notified that he could make such entry. You will therefore call on the local officers for proof that said Abbott received said notice, and at what date. If it does not appear that Abbott ever received said notice, you will require notice to be given him and allow him thirty days after receipt thereof to enter said land, and in that case the entry of Cooper will be suspended, to await the action of Abbott, and, if Abbott shall then fail to avail himself of the right to enter said land within said specified time, the entry of Cooper may be relieved of suspension.

Your judgment is modified.

OKLAHOMA LANDS—IRREGULAR ENTRY.

FAULL v. LEXINGTON TOWNSITE.

The provisions of section 13, act of March 2, 1889, prohibit the examination and selection of a tract, after the date of said act, and prior to the time fixed for opening to settlement the lands embraced therein.

An entry irregularly allowed during the pendency of an appeal on the part of another, affecting the same land, may stand in the absence of any adverse claim or charge affecting the integrity thereof.

Secretary Noble to the Commissioner of the General Land Office, October 18, 1892.

I have considered the appeal of Joseph Faull from your decision of April 4, 1892, rejecting his application to make homestead entry for the NW. $\frac{1}{4}$ of Sec. 8, T. 6 N., R. 1 W., Oklahoma City, Oklahoma. Application has also been made to enter the N. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ of section 8, as the townsite of Lexington.

Both in the decision of the local officers, and in your decision, the question of Faull's qualifications as a homestead applicant, were duly discussed, and the decision of the register and receiver and yourself, to the effect that his application should be rejected, is sustained by the evidence.

It is clear that Faull made no *bona fide* settlement upon the land in dispute at the time alleged, and had he made a genuine settlement, he was clearly disqualified from making a homestead entry either for the tract in dispute, or for the eighty acres not in dispute.

In the 13th section of the act of March 2, 1889 (25 Stat., 980), providing for the opening of the land in Oklahoma to settlement, it is said:

But until said lands are opened for settlement by proclamation of the President no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

As has been frequently remarked with reference to this legislation, there can be no doubt as to the intention of Congress in enacting the same. The peculiar conditions attending the opening of the Oklahoma lands to settlement, were recognized, and it was the intention to place all who might desire to appropriate the same on an equal footing—to give advantage to none.

There were good and sufficient reasons in the mind of Congress why a definite time should be fixed for entry into the territory and why no person should be allowed to enter in advance of another.

In the laws regulating the disposal of the public lands, the words "enter upon" have a well defined meaning; it is to appropriate; or at least to attempt to appropriate, a tract of land under some law pertaining to the disposal of the public domain. The examination and selection of the desired tract is, of necessity, a part of the act of entering upon the same; hence, it is clear to my mind that the act of examination and

selection of a tract prior to the time for the opening of the lands to settlement, was prohibited by the act in question.

I think it is clear from the evidence, that not only the townsite company, but that Faull, made an examination and selection of the tract in dispute, subsequent to the passage of the act of March 2, 1889, and prior to the time fixed by the President's proclamation for the opening of said lands to settlement, hence Faull is disqualified from appropriating the same as a homestead, and your decision rejecting his application is affirmed.

No appeal has been taken from your decision relating to the townsite application, and the same is affirmed.

It appears that on July 2, 1889, H. W. Stewart was inadvertently allowed to make homestead entry for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said section 8. On March 11, 1890, you held said entry "for cancellation pending Faull's right of future appeal, or the exercise of his homestead right by entering said S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of section 8. In the decision of this Department, dated June 20, 1891, ordering a further hearing between the townsite claimants and Faull, it was said that as Stewart had not appealed, "the case as to him will be closed." As a matter of fact, however, the entry has never been cancelled, but has remained intact on your records, and in your decision of April 4, 1892, without making any reference to your former decision or to the decision of this Department, you stated that "in the event of no appeal being taken from this decision, and in the absence of any valid adverse claim to the land covered thereby," the entry would be held intact and subject to his compliance with the law.

The proceedings with reference to this entry were irregular at inception, but we are met with the fact, that so far as the record before me shows, there is no good reason why the entry should not stand, and it is so ordered, with the understanding, however, that this decision is not to be in any way considered as recognizing the validity of said entry in the presence of any charge affecting the integrity of the same, except on the single point, that the allowance of the entry during the pendency of the appeal of Faull will not be regarded as fatal to it.

RAILROAD GRANT—HOMESTEAD ENTRY—REVIVING ACT.

SOUTH AND NORTH ALABAMA R. R. Co., *v.* WATSON.

A homestead entry of record at date of definite location excepts the land covered thereby from the operation of the grant of June 3, 1856. The revival of said grant by the later acts, is made subject to the conditions imposed by the original grant.

Acting Secretary Chandler to the Commissioner of the General Land Office, October 18, 1892.

I have considered the appeal of the South and North Alabama Railroad Company from your decision of September 26, 1891, reject-

ing its claim to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 21 N., R. 16 E., Montgomery land district, Alabama, and awarding the tract to Adam Watson.

He made homestead entry of the tract on December 16, 1885; and received final certificate for the same January 21, 1891.

The land is within the six miles (granted) limits of the road by act of June 3, 1856, (11 Stat., 17.)

The grant expired by limitation on June 3, 1866, but by act of April 10, 1869 (16 Stat., 45), it was "revived and renewed" for three years from the date of the passage of said act.

On March 3, 1871 (16 Stat., 580), the grant was renewed for three years from that date.

The road was definitely located opposite the tract here in controversy on July 26, 1871.

One Samuel J. Dennis had made homestead entry of said tract on October 5, 1869; which was canceled February 27, 1879.

Your decision holds that said entry,

Being of record at the date of the definite location of the railroad, excepted the land from the operation of the grant, and its subsequent cancellation did not affect the status of the land under the grant, nor under the reviving act; accordingly, Watson's said entry was properly allowed.

Counsel for the company contends:

(1). It was error to hold that the entry of Dennis, made October 5, 1869, for said land, was legalized by the act of April 21, 1876.

I fail to find that your decision held that Dennis's entry was "legalized by the act of April 21, 1876" (19 Stat., 35). It was legal if made in accordance with the homestead law, without any reference whatever to said act. It was not confirmed by said act, because not embraced in any of the several lists therein referred to, of entries that otherwise would have been invalid, and therefore stood in need of confirmation.

(2). It was error to hold that said entry of Dennis excepted said land from the effect of the act of March 3, 1871, renewing and extending the grant to the State of Alabama for the benefit of this company The rule that land appropriated at the time of fixing the line of definite location is excepted from the grant, applies only to the original granting act.

"The original granting act" (of June 3, 1856, *supra*), provided that—

In case it shall appear that the United States have, when the lines or routes of said roads are *definitely fixed*, sold any sections or part thereof, granted as aforesaid, or that the right of pre-emption has attached to the same,

such lands should not pass under the grant, but the State might select other lands in lieu thereof.

The first act extending the time for the completion of the road (April 10, 1869—16 Stat., 45), provided that the granting act should be "revived and renewed, subject to all the conditions and restrictions contained" in the original granting act. The second act, again extending the time (March 3, 1871—16 Stat., 580), provides as before that the grant should be revived and renewed, "subject to all the conditions

and restrictions contained" in the original act. The rule that land appropriated at the time of fixing the line of definite location is excepted from the grant applies, therefore, not only "to the original granting act," but to every act that has been passed relative to the grant in question.

Counsel for the company cites the departmental decision of March 14, 1890 in the case of the same company against Pannell (10 L. D., 306), and quotes the following, which, in his opinion settles also the case at bar:

The tract in question being within the primary limits of the grant, title thereto vested in the grantee at definite location, and became irrevocable on the fulfillment of the condition, with the consent of Congress, and before anything has been done by the government in the way of forfeiting the grant.

In the case cited, the road was definitely located on May 30, 1866; Pannell made his homestead entry June 20, 1868, more than two years after the definite location of the road opposite the land.

In the case at bar, Dennis's homestead entry was made, October 5, 1869—nearly two years before the definite location of the road opposite the same.

Holding, in strict accordance with the decision in the Pannell case, that title "vested in the grantee at *definite location*," the homestead entry of Dennis prior to definite location excepted the tract from the operation of the grant.

Your decision is therefore affirmed.

REPAYMENT—PRE-EMPTION ENTRY—MORTGAGEE.

EMMA J. CAMPBELL ET AL.

A mortgagee, whose claim is merely a lien on the land, is not an assignee of the entryman and as such entitled to repayment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 20, 1892.

On the 5th of July, 1884, Emma J. Pringle made pre-emption cash entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 27, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 155 N., R. 66 W., Devil's Lake land district, North Dakota, having filed her declaratory statement therefor on the 22d of March of that year, in which she alleged settlement on the 24th of April, 1883.

Her entry was held for cancellation on the 10th of December, 1885, upon the report of Special Agent Clark S. Rowe, of your office. She was notified of this action, and advised that she would be allowed sixty days in which to apply for a hearing to show cause why her entry should not be canceled for a failure to comply with the law.

On the 29th of March, 1886, having been advised by the local officers that she had been duly notified of your action of December 10, 1885, and had taken no action in the matter, you informed the local officers that you had that day canceled her entry on the records of your office, and directed them to note the cancellation on their records.

On the 9th of January, 1892, the local officers transmitted to your office, the petition of Lottie A. Galpin, asking that an order be made, refunding to her the two hundred dollars paid by Pringle when she made cash entry for the land. In her petition she alleged that Pringle had borrowed from one, A. V. Eastman \$250, with which to make such payment, and had secured the loan by a note and mortgage deed upon the land in question, of which instruments the petitioner was then the owner, for value. The petition is supported by the affidavit of A. B. Ovitt, the agent who procured the loan, and who made payment for the land to the local officers. The mortgage deed from Pringle to Eastman, and her application for a loan, are attached to Ovitt's affidavit.

On the 29th of January, 1892, you denied the application for repayment, and an appeal from your decision brings the case to the Department.

In your opinion, you allude to the application for repayment as the "application of Emma Campbell (formerly Emma Pringle)", whereas the only application in the case is the petition of Lottie A. Galpin, who asks for the "refunding to your petitioner the two hundred dollars as paid by said Pringle on July 5, 1884." In the affidavit of Ovitt, with which the petition of Galpin is supported, is embodied an extract from a letter from Mrs. Campbell to him, but nowhere in the record before me, is there any application or petition by Mrs. Campbell (formerly Miss Pringle) for the repayment of said money.

The rule of the Department is that the only party qualified under the statute to make application for repayment is the one in whom the title was vested at the date of the cancellation of the entry, or the heirs of such party. Adolph Emert (14 L. D., 101). This doctrine was repeated in the case of Albert G. Craven, on page 140 of the same volume.

In the case of Alonzo W. Graves (11 L. D., 283), it was held that a mortgagee, whose claim is merely a lien on the land, is not an assignee of the entryman, and as such entitled to repayment. In that case numerous decisions of the Department, in which the question has been involved, are cited, as well as the laws of Dakota, in relation to the character, force, and effect of a mortgage.

It is clear, therefore, that the application of Miss Galpin could not be granted, and your action in denying the same is approved by the Department, for the reasons herein stated.

PREFERENCE RIGHT OF ENTRY—TRANSFeree.

TILLINGHAST v. VAN HOUTEN.

The preferred right of a successful contestant is personal and can not be transferred to another. A transferee in such case acquires no right that he can assert as against the intervening entry of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 20, 1892.

The tracts involved in this case are the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 27, T. 21 N., R. 17 W., Neligh land district, Nebraska.

It appears that on July 3, 1888, Ralph Van Houten filed pre-emption declaratory statement for said tracts alleging settlement the same day and on July 29, 1889, after due publication the defendant submitted final proof and at the same time and place Tillinghast filed a protest against the acceptance of said proof alleging that defendant's settlement was made subsequent to that of the protestant and that defendant's improvements were made for the benefit of his uncle J. G. Van Houten.

The witnesses for the defendant were cross-examined and a large amount of other testimony taken from day to day before the clerk of the court of Loup county, Nebraska, until the case closed August 13, 1888, when the same was transmitted to the local officers for their action.

After due consideration, the register and receiver decided in favor of Van Houten and recommended the cancellation of the plaintiff's homestead entry. Upon the case being appealed and considered by you, under date of November 21, 1891, you affirmed the decision of the local officers, accepted the proof of the defendant and directed that, if the purchase money was paid within thirty days from receipt of notice, final papers should issue and protestant's homestead entry be canceled.

February 8, 1892, you advised the local officers that as the defendant's cash entry had now become of record, that protestant's homestead entry was canceled and said cash entry approved.

On February 2, 1892, the local officers transmitted the appeal of the plaintiff, which it appears was filed in time, but had not reached the case at the date of your action of February 8, hence on February 27, following you rescinded the cancellation of his entry and held the same awaiting departmental action on the appeal.

It appears that Van Houten, after due notice, made proof on his pre-emption filing alleging settlement July 3, 1888, but that he actually commenced the foundation of his house on the evening of the day previous; that Tillinghast made his entry July 14, 1888, eleven days after defendant's filing had become of record and therefore he had notice of the prior claim.

It seems that Tillinghast purchased the preference right of one C. I.

Bragg, a successful contestant of a former entry on the land in dispute, and upon this he relied for his claim.

The law, however, provides that the contestant who procures the cancellation of an entry shall have a preference right of entry and the Department has repeatedly held that this right is a personal one which can not be transferred to another. *Welch v. Duncan et al.* (7 L. D., 186); *Kellem v. Ludlow* (10 L. D., 560).

As the protestant was not entitled to any preference right, it follows that the only question in this case is, did the defendant make improvements upon the land and establish a residence thereon prior to that of the plaintiff. The record shows that he commenced his improvements about the 2nd or 3rd of July, 1888, and that his house was finished and he residing therein within fifteen days after date of filing; that on July 13, 1888, plaintiff had some breaking done upon the land and it is admitted by him as well as by his witnesses who did the breaking that they saw the foundation of defendant's house and knew of the claim upon the land.

After a careful examination of the testimony in this case, I am satisfied that Van Houten has the better right to the land and therefore that his proof should be accepted and the entry of protestant canceled.

Your decision is therefore affirmed.

PLAT OF SURVEY—CORRECTION OF PLAT.

CARLOS C. BURR.

In case of a discrepancy between the plat of survey in the local office, and the one on file in the General Land Office, an entry allowed in accordance with the former may be permitted to stand, with a view to its approval when the plat in the General Land Office has been corrected.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 20, 1892.

I have considered the appeal by Carlos C. Burr, transferee of James H. Priest, who made pre-emption cash entry No. 3781, on December 7, 1886, for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 25, T. 1 N., R. 41 W., lots 4 and 5, Sec. 19, and lot 2, Sec. 30, T. 1 N., R. 40 W., McCook land district, Nebraska, from your decisions of June 18, 1890, and February 7, 1891, requiring new advertisement and proof upon said entry.

From your letter of March 8, 1892, transmitting the record in the case, it appears that sections 19 and 30, T. 1 N., R. 40 W., are traversed by a meandered stream, necessitating the lotting of the tracts abutting thereon.

In the numbering of these lots it appears that the plat retained in the local office is different from that on file in your office.

Priest's entry was made according to the plat on file in the local

office, and when examined in your office it was found that the numbers given did not correspond with your plat, and for this reason a new advertisement was directed.

Priest having sold out had left the land and could not be found, but Burr, his transferee, responds and appeals from such requirement.

Your letter of transmittal states that:

It is to be regretted that this discrepancy was not discovered sooner, but in view of the fact that the greater portion of the land in said sections 19 and 30 has been patented or disposed of according to plat of survey on file in the local office, I respectfully suggest, as the simplest arrangement of the matter, that diagrams of said sections 19 and 30, numbered in accordance with the plat in the local office, be prepared by this office and attached to the plats here and at Lincoln, Nebraska, with a certificate that said diagrams are attached as a correction of the plats, to cause them to agree with the duplicate plat and with the entries made and patented in said section, and that the entry of Priest be then accepted with its present description.

This seems to be the only reasonable solution of the difficulty, and you will take such action as is necessary to make it effective.

Your order requiring new advertisement and proof upon Priest's entry is therefore set aside, and the papers in the case are herewith returned.

ROBERTS *v.* GORDON.

Motion for review of departmental decision of May 6, 1892, 14 L. D., 475, denied by Secretary Noble, October 26, 1892.

TIMBER CULTURE ENTRY—EXCESSIVE ACREAGE.

FRANK EATON (ON REVIEW).

Payment for the excess of acreage over one hundred and sixty acres in a timber culture entry is a proper requirement though such entry may have been made prior to the regulation of March 28, 1880.

Secretary Noble to the Commissioner of the General Land Office, October 26, 1892.

I have considered the motion for review of departmental decision dated May 3, 1892, (14 L. D., 450) filed by Frank Eaton, and transmitted with your letter "G" dated July 13, 1892.

Said decision held that said Eaton must "relinquish one legal subdivision of the land, or pay cash for the excess over one hundred and sixty acres" of land covered by his timber culture entry No. 2602 of the NW. $\frac{1}{4}$ of Sec. 2, T. 11 S., R. 21 W., made November 29, 1878, at Wa-Keeney land office, in the State of Kansas.

Final proof was tendered by said Eaton on November 23, 1891, and rejected by the local officers because the claimant refused to pay for 22.28 acres, the excess over one hundred and sixty in his said entry. The claimant appealed and your office affirmed the action of the local officers, calling their attention to your letter "C" of March 28, 1880, to

them, in which they were "directed to require claimants who had made, and who may hereafter make, timber culture entries for a tract of land embracing more than one hundred and sixty acres, to pay for the excess in area over one hundred and sixty acres." The claimant appealed, alleging "that you erred, because the timber culture act permits an entryman to take a quarter section, and does not specifically require him to pay for the excess over one hundred and sixty acres."

The Department in said decision modified your judgment by allowing the claimant to either pay, or relinquish a legal subdivision so as to bring the area within the required limits.

In said motion it is claimed that said departmental decision "omits all or any consideration of claimant's appeal, based upon the fact that his said timber culture entry was made nearly two years prior to the date of Commissioner Williamson's rule of March 28, 1880, requiring timber culture entrymen to pay for the land embraced in their respective entries in excess of one hundred and sixty acres."

Although no special reference is made in said decision to the length of time said entry was made prior to said order of 1880, it by no means follows that the point made by the appellant was not considered, for the decision expressly states the date when said entry was made and distinctly ruled that the claimant must either pay the excess or relinquish one of the legal subdivisions. There is no force in the contention of the claimant that his entry having been made in accordance with the rules and regulations of the Department should not be affected by a subsequent requirement of the Commissioner, for the reason that said entry was not allowed in accordance with the rules and regulations of the Department.

In the Circular of Instructions dated June 27, 1878, it is said—"Not more than one hundred and sixty acres of any one section can be entered under this act, and no person can make more than one entry thereunder." (2 C. L. L., p. 650 II No. 3.) This regulation was in force when said entry was made, and hence the claimant cannot successfully contend that an entry of one hundred and eighty acres is within the limit prescribed.

The motion must be, and it is hereby denied.

CONTEST—PRIOR SETTLEMENT RIGHT.

BURRUS v. CANTREL.

A contest, based solely on an alleged prior settlement right, to be effective as against a subsequent entry of record should be brought within the period provided by law for the assertion of settlement claims.

Secretary Noble to the Commissioner of the General Land Office, October 26, 1892.

This is a motion by Frederick Burrus for a "rehearing and review" of the decision rendered by this Department April 29, 1892, in the case

of said Burrus *v.* Eli A. Cantrel, involving the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 7, T. 9 N., R. 3 E., Sante Fe, New Mexico.

Said section 7 had been within the portion of the grant to the Atlantic and Pacific Railroad Company, forfeited by the act of July 6, 1886, 24 Stat., 123, and became subject to entry by direction of your office on January 25, 1887.

On January 26, 1887, Cantrel made timber-culture entry for the same, and on August 18, 1887, Burrus filed an affidavit of contest against said entry, alleging residence upon and improvement of the land since March, 1883.

Before the land was opened to entry, and on August 31, 1886, Burrus applied to enter the same together with the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 7, in said town and range. This application was rejected at the local office for conflict with said grant and for the additional reason that "the proper fees did not accompany the papers." So far as now appears, Burrus took no appeal from this action.

From the testimony submitted at the hearing upon said contest, this Department found—

that Burrus went into possession of the land in the spring of 1883; fixed up a residence on the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 7, and moved into it; that he repaired some stables on the same subdivision; that both tracts are partially enclosed by some fencing; the entire improvements he estimates at two hundred and fifty dollars, of which but small part—a few acres of breaking and a little of the fencing are on the tract in controversy.

It was held, however, in the decision complained of that conceding Burrus' prior right by reason of his residence and improvement, as aforesaid, "he lost the same by his laches in failing to make the entry within the time allowed by law after the land became subject to entry," that is, the period of three months. Sec. 2, act May 14, 1880 (21 Stat., 140); Sec. 2265, R. S.

Your judgment allowing Cantrel's entry to remain intact was accordingly affirmed.

The pending motion is based upon five assignments of error, which contain but two material allegations: First, that Cantrel was shown by the testimony to have failed to comply with the timber-culture law, and second, that as any application for entry, which he (Burrus) might have made "within three months after the land was subject to entry would have been rejected" because of Cantrel's entry, he was not guilty of laches.

The question of Cantrel's compliance with the timber-culture law was not raised in the complaint, and can not now be considered as a ground for review.

As to the second alleged error, it may be said that Burrus is correct in stating, as he does in effect, that after the allowance of Cantrel's entry, he could only assert his settlement right by a contest against that entry. But his settlement gave him the right of entry over intervening claimants, only for the statutory period. A contest such as

this, based solely upon prior settlement, to be effective as against a subsequent entry of record should have been brought within the time so limited.

Burrus did not initiate his contest until after the expiration of more than six months from January 25, 1887, the date when his settlement right began. It follows that his contest is out of time and that his rights are inferior to those of Cantrel.

The motion is denied.

HOMESTEAD CONTEST—MENTAL INCOMPETENCY.

OLMSTEAD v. MILLER.

It is not within the province of the Department to determine the mental capacity of an entryman under a charge that he is an "idiot and incompetent to enter public land." The mental status of the entryman should be ascertained in accordance with the laws of the State in which he resides.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 26, 1892.

The land involved in this appeal is the NE. $\frac{1}{4}$ of Sec. 33, T. 34, R. 24, Valentine, Nebraska, land district.

It appears by the record in this case, that Oscar Miller made homestead entry of the land in controversy May 20, 1884. On July 30, 1889, Arland E. Olmstead filed an affidavit of contest alleging—

That said Oscar Miller is an idiot and incompetent to enter land of the public domain; that said H. E. was entered through the contrivance and fraud of one Dr. Meecham, at whose house said Miller lived, and for whose use and benefit said land was taken and that said Meecham well knowing that said Miller was idiotic and incompetent to take said land, fraudulently procured said entry to be made for his own use and benefit, and not for the use and benefit of said Miller.

A hearing was had before the local officers and they decided "that the contestants has sustained his allegations, therefore respectfully recommend that" the entry be canceled. Miller appealed and you by letter of November 16, 1891, reversed their decision, whereupon Olmstead appealed, alleging substantially that your decision is against the law and the evidence.

The testimony in this case shows that the claimant is a weak minded person, whether he is able to transact any business or not is not clearly shown, but that he is able to and does work is clearly established. It seems that when directed what to do he does it. The first year he had five or six acres under cultivation and each subsequent year he added about five acres, until in 1889, he had about thirty acres under cultivation. He had some fruit trees and berry vines and a log house, or dug-out twelve by fourteen feet, in which he has lived, practically, all the time. The claimant has been known to Dr. Meecham for twelve years and prior to his homestead entry had lived with him. He is not

the legally appointed guardian of Miller and so far as the testimony shows he has none. But I take it, from the testimony, that Dr. Meecham has looked after him. Their lands join and it is true that Miller used Meecham's team for cultivating his land and also worked some for Meecham, and it is probably true that he furnished the claimant with the necessities of life though the doctor says he worked and paid for it.

Aside from the fact that Miller is weak-minded, I do not think the charges in the affidavit of contest are sustained. I also find as a fact that so far as disclosed by the testimony Miller has complied with the law.

The presumption of the law is, that Miller is of sound mind and it stands until he is adjudged to be otherwise by a court of competent jurisdiction. There is no competent evidence in the record to justify the department in finding that this entryman is incapable of taking care of his estate. On the contrary, the evidence shows that Mr. Miller is ordinarily industrious and has improved his land as fully as his circumstances will justify. Again, the question as to whether he is "idiotic and incompetent" to transact business is one which I think is not within the province of this department to decide. This is a question that should be determined under the laws of the State in which the claimant resides. I am not satisfied that this entry should be canceled upon the showing here made, hence your judgment is affirmed.

PRACTICE—APPEAL—RULE 48.

GRASS *v.* NORTHRUP.

Where an appeal from the local office is dismissed as insufficient the decision below as to the facts should not be disturbed except under the provisions of Rule 48 of practice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 25, 1892.

On the 27th of November, 1885, Jessie L. Northrop made timber culture entry for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and for lots 1, 2, 3 and 4 of Sec. 22, T. 18 S., R. 1 W., S. B. M., Los Angeles land district, California, which was contested by Gerhard Grass on the 2d of May, 1889, alleging that Northrop had not complied with the timber culture law.

A hearing was appointed, the testimony in the case being taken before the county clerk of San Diego county, who was appointed a commissioner for that purpose. After considering the evidence, the local officers, on the 23d of September, 1889, united in a decision in favor of the claimant, and recommending that the contest be dismissed. A re-hearing was applied for, which was denied by them on the 12th of December, 1889.

An appeal from the action of the local officers was taken to your office, which, upon motion of the claimant, was dismissed by you on the 23d of December, 1891, as not having been taken in time. After dismissing the appeal, you examined the evidence in the interest of the government, and on the said 23d of December, 1891, reversed the decision of the local officers, and held the entry of Northrop for cancellation. An appeal on his part, from that part of your decision holding her entry for cancellation, brings the case to the Department.

In the notice of appeal it is claimed that the dismissal of the appeal to your office, closed the case, and that under rule 48 of the rules of practice, the decision of the local officers then became final as to the facts, and could not be disturbed by you, no fraud or gross irregularity being suggested on the face of the papers; the decision not being contrary to existing laws or regulations; the local officers having joined therein, and the party against whom the decision was rendered having been duly notified of the decision and of his right to appeal therefrom.

No appeal is taken from that part of your decision of December 23, 1891, in which you dismissed the appeal of Grass from the decision of the local officers. When that appeal was dismissed, the case was in the same situation as if no appeal had been taken or attempted. The only question in this case is that of fact, as to whether Miss Northrop had or had not complied with the law under which her entry was made. Upon this question the local officers conclude their decision by saying:

The testimony is conflicting, but the weight of the evidence goes to show a compliance with the law by claimant. We therefore recommend that this contest be dismissed.

In the case of *Farris v. Mitchell* (11 L. D., 300), it was held that in the absence of an appeal, a decision of the local office is final as to the facts, and will not be disturbed by the Commissioner, except under the provisions of rule 48 of practice. The provisions of rule 48 I have already given in substance.

In the case of *Hazard v. Swain* (14 L. D., 230), the case of *Farris v. Mitchell* was cited, and rule 48 was quoted, and your decision was set aside, because you had reversed the decision of the local officers on a question of fact, without an appeal. In that case, your decision awarded the land to Hazard, while the local officers had awarded it to Swain, and Hazard had not appealed from their decision.

The position of the Department is, that as between the parties to a controversy, the decision of the local office is final as to the facts, in the absence of an appeal. There having been no proper appeal from the decision of the local officers in the case at bar, the contest of Grass against the entry of Northrop was thereby ended.

This fact, however, did not preclude you from reviewing the decision of the local officers, the case being considered as between the claimant and the Government. This was held in the case of *Curtiss v. Simmons* (6 L. D., 359). That case also held that in such a case the entry should

be held intact, if it does not appear illegal, or that the entryman has acted in bad faith.

In the case before me, I do not find that the entry was illegal, or that the entryman has acted in bad faith. After carefully examining the whole record, I concur in the conclusion reached by the register and receiver, that although the testimony is conflicting, the weight of the evidence goes to show a compliance with the law by claimant. The entry of Miss Northrop is therefore held intact, and that part of your decision of December 23, 1891, from which she appealed, is reversed.

DECLARATORY STATEMENT—SECOND FILING.

JAMES H. CARTER.

One who files a pre-emption declaratory statement, and transmutes his claim to a homestead entry, exhausts thereby the pre-emptive right even though title is not acquired under said entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 24, 1892.

On October 2, 1888, James H. Carter made pre-emption cash entry (No. 15,485) covering the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12 and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 13, T. 18 N., R. 12 W., M. D. M., at San Francisco, California, and final certificate and receipt were issued to him.

In his final proof submitted September 22, 1888, before the county clerk of Mendocino county, California, the claimant testified—

I made a pre-emption filing on a quarter-section of land in Oregon and changed the same to a homestead, and had to leave it before I proved up on account of the sickness of my wife. The doctors advised me to leave for her health. She had consumption and died afterwards.

By your letter of May 12, 1891, you held that this evidence proved that he had exhausted his pre-emption right before filing upon his present claim under section 2261 of the Revised Statutes, and directed that the claimant and any known transferee be notified to show cause within thirty days from notice why said entry should not be canceled.

On September 11, 1891, the local office reported that notice of said letter was given to Berry Wright, the grantee of said land, the claimant being dead. And the affidavits of said Wright and others were forwarded for your consideration.

By letter of October 19, 1891, you directed the entry to be canceled, citing the cases of Alfred B. Sanford (6 L. D., 103) and Orrin C. Rashaw (*Ibid.*, 570).

An appeal now brings the case before me.

Said section 2261 provides that—

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file at any future time a second declaration for another tract.

This section was construed by the Department in the cases of J. B. Raymond (2 L. D., 854) and Allen *v.* Baird (6 L. D., 298), which are cited with approval in Sanford *v.* Sanford (139 U. S., 642, 649). In that case it is said that—

The prohibition of the statute is without qualification or exception, and the rights of the pre-emptor must be measured by it.

Inasmuch as Carter had exhausted his pre-emption right before he made the entry now in question, the allowance of the same by the local officers was illegal, and your judgment is affirmed.

—

TIMBER CULTURE APPLICATION—ACT OF MARCH 3, 1891.

LINDGREN *v.* FRISKOPP.

A timber culture application in which the preliminary affidavit is executed outside of the district in which the land is situated is defective, but such defect may be cured by amendment, in the absence of any adverse claim, which will relate back to the date of the original application.

The act of Congress approved March 3, 1891, repealing the timber culture law, does not preclude the allowance of an application, filed as of that date, under said law.

Acting Secretary Bussey to the Commissioner of the General Land Office, November 1, 1892.

I have considered the case of Anna M. Lindgren *v.* Swan J. Friskopp arising upon the appeal of the latter from your decision of November 19, 1891, rejecting his application to make timber-culture entry of the SE. $\frac{1}{4}$ of Sec. 20, T. 13 N., R. 43 W., Sidney land district, Nebraska.

It appears that Friskopp's application was received at the local office at 9 o'clock a. m., March 3, 1891, but returned "for the reason that the affidavit was not sworn to within the limits of Sidney land district." A proper affidavit was made, and on March 10, 1891, the application was again presented, but rejected, "for the reason that the timber-culture law was repealed March 3, 1891."

Friskopp appealed on April 10, 1891.

On March 31, 1891, Anna M. Lindgren filed homestead entry for the same tract; and on July 8, same year, she filed an affidavit alleging that Friskopp had brought the contest for speculative purposes. On this allegation a hearing was had, as the result of which the local office and your office found that the charge was not sustained. I concur in your conclusion in this respect.

There remains only the question whether Friskopp's application to enter was made before the repeal of the timber-culture law?

The execution of the application and preliminary affidavit outside of the State in which the land is situated renders a timber-culture void-

able; but such defect may be cured, where good faith appears and no adverse claim exists, by amendment, which will relate back to the date of the original entry. (See Griffith W. McMillan, 8 L. D., 478; Lewis Holmes, 6 L. D., 762; Albert D. Boal, 7 L. D., 50.)

I therefore concur in your conclusion that the application should be considered as having been presented on the 3d of March, 1891.

If filed on March 3, 1891, it should have been accepted. (William J. Miller, 15 L. D., 142.)

Your conclusion that an application filed March 3, 1891, should have been rejected, was incorrect; and because of this error, your decision is reversed.

PRACTICE—NOTICE OF HEARING—APPEARANCE.

COLE *v.* SHOTWELL.

An attorney who files a motion for a new trial, on behalf of the defendant, on the ground that due notice of the former proceedings was not given, subjects thereby his client to the jurisdiction of the local office; and if said motion is granted, notice to the defendant of the time fixed for trial is sufficient if given to his attorney.

Acting Secretary Bussey to the Commissioner of the General Land Office, November 1, 1892.

I have considered the case of Omer V. Cole *v.* George C. Shotwell, arising upon the appeal of the latter from your decision of December 1, 1891, holding for cancellation his timber-culture entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 28, T. 38 N., R. 8 E., Del Norte land district, Colorado.

The facts of record are sufficiently set forth in your decision. At the first hearing had the defendant defaulted; but it was held that he had not received due notice, and a rehearing was granted. At the second hearing he again defaulted. The testimony adduced on the part of the contestant made a *prima facie* showing of failure to comply with the requirements of the law; but the defendant again alleged that he had not received due and legal notice of the hearing, inasmuch as such notice had not been served upon him personally, but upon his attorney.

You decided that the notice was sufficient, and held the entry for cancellation.

The appeal is based upon the one ground, that you erred "in deciding that the register and receiver had jurisdiction in the case, service having been had upon defendant's attorney, and not upon defendant in person."

After the first hearing, (which was had on June 19, 1889) counsel for defendant, on August 17, same year, filed a motion for a *new trial*, on the ground that his client had not received due and legal service of the

former hearing. By making said motion he subjected his client to the jurisdiction of the court; and when the attorney of record was duly notified of the day that had been fixed for the trial that had been granted in accordance with his request, notice to him was notice to his client. (*Clark v. Shuff et al.*, 7 L. D., 252).

Your decision is affirmed.

TIMBER-CULTURE CONTEST—RELINQUISHMENT—APPLICATION.

EDWARDS v. KEMP ET AL.

Two entries of the same land should not be allowed of record at the same time. An allegation that the entryman has executed a relinquishment, if established, does not call for a judgment of cancellation in the absence of fraud or bad faith on the part of the entryman.

The rights secured by an application to enter, filed with a timber culture contest, depend upon the establishment of the charge, and if the contest fails the application falls with it.

Acting Secretary Bussey to the Commissioner of the General Land Office, November 3, 1892.

On the 25th of April, 1881, William Harrison Taylor made timber culture entry for the NW. $\frac{1}{4}$ of Sec. 14, T. 3 N., R. 28 W., McCook land district, Nebraska.

Over nine years thereafter, to wit, on the 23d of May, 1890, Ephraim W. Edwards filed an affidavit of contest against said entry, alleging that Taylor made said entry for speculative purposes, and not in good faith, and that he had sold his rights to the same. He accompanied his contest affidavit with an application to make entry for the land. His application to enter was rejected, on account of the existing entry of Taylor, but a hearing was appointed for the 12th of September, 1890, to determine the truth of the charges contained in his contest affidavit.

On the 27th of May, 1890, Edwin Kemp filed the relinquishment of Taylor for the tract, and his own application to make timber culture entry therefor. His application was accepted, and his entry allowed, subject to any rights which Edwards might have to the land on account of his contest. On the said 27th of May, Edwards renewed his application to enter the land, which was rejected on account of the prior entry of Kemp. From the action of the local officers Edwards appealed to your office.

On the 25th of August, 1890, you approved the action of the local officers in rejecting the application of Edwards to make entry for the land, in view of the fact that the hearing appointed on the filing of his contest affidavit had not yet been held, and he had not shown that the relinquishment of Taylor was the result of his contest. You also di-

rected the local officers to notify Kemp of the hearing, and allow him to be heard in support of his entry.

From your decision of August 25, 1890, Edwards appeals to the Department.

The hearing appointed to determine the truth of the charges contained in the contest affidavit of Edwards against the entry of Taylor, took place in September, 1890, and resulted in a joint decision by the local officers, in which they recommended that the contest be dismissed. No appeal was taken from such decision, and after considering the case, you affirmed the action of the local officers on the 3d of March, 1892, and closed the case.

The only question presented by the appeal before the Department is, did the local officers and your office err in rejecting the application of Edwards to make entry for the land in question, while the entry of Taylor was in force? In the case of *Swims v. Ward* (13 L. D., 636), it was held that an entry properly made, at a time when the land is subject to appropriation, must remain of record until it is properly canceled, or results in a patent, and that two entries for the same land could not be allowed of record at the same time. Applying that rule to the case at bar, and it is clear that it would have been error to have allowed his entry, when his application was presented, on the 23d day of May, 1890. Taylor's entry remained of record until May 27, when it was canceled by relinquishment, and the entry of Kemp immediately allowed.

At this time the contest proceeding of Edwards against the entry of Taylor was pending, having been initiated on the 23d of May, 1890, four days prior to the entry of Kemp. Notice of contest, however, was not served upon Taylor until the 28th of June, 1890. Kemp knew nothing about the contest, until he went to the land office to file Taylor's relinquishment and make his own entry. Notice of the hearing was accepted by him on the 25th of August, 1890. Both the contestant and Kemp were present at the trial, at which no attempt was made to show that the timber culture law had not been fully complied with, during the nine years in which Taylor's entry remained in force.

A relinquishment filed during the pendency of a contest, renders the land subject to entry, but the entryman will take the tract subject to the rights of the contestant. If his charges are sustained by the evidence submitted at the hearing, he will be entitled to a preference right to enter the land, and the intermediate entryman will be required to show cause why his entry should not be canceled.

The relinquishment of Taylor was dated April 1, 1890, nearly two months before Edwards initiated his contest. It is clear, therefore, that it was not the result of such contest. This fact, however, could not interfere with the right of Edwards, had Taylor failed to comply with the law. In the case of *Mitchell v. Robinson* (3 L. D., 546), it was held that the preference right of entry accorded the contestant,

rests entirely upon his success in the contest he has initiated, and that right may not be defeated by means of a relinquishment, dated prior to the contest, but filed during its pendency. The same doctrine was repeated in the case of Sorenson *v.* Becker (8 L. D., 357), which held that in case of a timber culture contest, accompanied by an application to enter, the right of the contestant depends upon the establishment of the default alleged against the entryman; but such right cannot be defeated by a relinquishment filed after the initiation of the contest.

On the part of Edwards it is contended that his application to enter the land, filed with his affidavit of contest, operated to reserve the land in his favor, whenever it became subject to entry, no matter from what cause. The case of Kiser *v.* Keech et al. (7 L. D., 25), is cited in support of this doctrine. That case fails to sustain such claim. In that case it is said: Kiser having presented his application to enter the land in question, along with his contest filed March 13, 1886, such application operated, *upon the ascertainment of the default*, to reserve the land, etc.

In the affidavit of contest in the case at bar, there was no default charged against the entryman. It was simply charged that the entry was made for speculative purposes, because nine years after his entry the entryman sold his improvements for \$2,000 and executed a relinquishment.

The facts brought out upon the trial, were that Edwards, as agent for one J. W. Dolan, had sold to J. J. Kemp, the father of Edwin, a tract of land embracing a thousand acres or more. The land embraced in Taylor's entry was so situated in connection with this thousand-acre tract, that Kemp wanted that included in his purchase. Edwards, or Dolan, undertook to secure Taylor's relinquishment, and the land was accordingly included in the sale to Kemp. This was in March, and in April the relinquishment was secured.

It seems that Dolan paid Edwards the commission agreed upon for making the sale, but he also wanted Kemp to pay him \$550. This Kemp declined to do. Both Edwards and Kemp were residents of Lexington, Illinois. Kemp gave the relinquishment to his son, Edwin, who was taken sick soon after, and was unable to make the journey to Nebraska until in May. Edwards saw the young man on the 20th of that month, and asked him when he was going out to file the relinquishment, and Edwin told him he should start on the 22d. Upon ascertaining this fact, Edwards started for Nebraska on the evening of the 20th, and filed his contest on the 23d. After doing this, he informed the Kemps that when they paid him his claim of \$550 he would withdraw his contest, which he had brought for the purpose of securing such payment.

In his contest affidavit, Edwards alleged that Taylor made his entry "for sale and speculation." At the trial, no evidence was offered in support of this charge. He also alleged that he had executed a relinquish-

quishment of his entry. This charge was true, but it is not such a charge as calls for the cancellation of an entry, when unaccompanied by fraud or bad faith on the part of the entryman. No fraud or bad faith is shown on the part of Taylor, and none is charged or shown on the part of Kemp. Taylor complied with the timber culture law for nine years. This certainly evidences his good faith. Kemp paid \$2000 for Taylor's relinquishment, because he wanted that land to complete his other purchase. This indicates good faith on the part of Kemp-Edwards, as the agent of Dolan, secured the relinquishment for Kemp, and because the latter would not pay him \$550, he instituted a contest. This is the first evidence of bad faith which appears in the case. In *Dayton v. Dayton* (6 L. D., 164), it was held that no preference right of entry can be acquired through a contest which is shown by the evidence to have not been prosecuted in good faith. See also *Turner v. Payne et al.* (14 L. D., 383).

It is unnecessary, however, to discuss this case at greater length. The rights which Edwards secured by his application to enter, depended upon his ability to sustain the charges contained in his affidavit of contest. His contest having failed, his application to enter failed with it.

The local officers did not err in rejecting the application of Edwards to enter the land, while the entry of Taylor was intact. Neither did they err in accepting the application of Kemp to make entry, upon the filing of the relinquishment of Taylor. Kemp made his entry, subject to the rights of Edwards, and when Edwards failed to establish any rights, those of Kemp became complete. Your decision of August 25, 1890, in which you sustain the action of the local officers in rejecting the application of Edwards, and from which the appeal before me was taken, is affirmed.

HOMESTEAD ENTRY—WIDOW—SECTION 2307, R. S.

ADELIA S. ROYAL.

The widow of a soldier who makes homestead entry under section 2307 R. S., in her own name, and perfects title thereto, exhausts her right under the homestead law.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

On the 28th of October, 1887, Adelia S. Royal, widow of William H. Royal, deceased, made homestead entry for lot 2, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 13 S., R. 38 W., 6th P. M., Wa-Keeney land district, Kansas, under section 2307, Revised Statutes of the United States.

On the 13th of May, 1889, she made additional homestead entry, as such widow, for lot 3 of said section, under the provisions of section 5 of the act of March 2, 1889, (25 Stat., 854).

She made final proof to establish her claim to the above described land, before the clerk of the district court of Wallace county, Kansas, on the 5th of September, 1891, at which time she established the fact that she was the widow of William H. Royal, who died on or about the 29th of May, 1880, and who was in the military service of the United States during the recent rebellion, from the second day of September, 1861, to the 29th day of October, 1864, which time was deducted from the time heretofore required to perfect title under the homestead laws. Her final proof was accepted by the local officers, and final certificate issued, on the 7th of September, 1891.

On the 18th of September, 1891, Adelia S. Royal made application to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 27, T. 13 S., R. 38 W., 6th P. M., at the land district already mentioned. The blank used, stated that the application was made under section 2289, Revised Statutes. This application was rejected by the local officers "for the reason that the applicant has heretofore exhausted her rights under the homestead laws." An appeal was taken from that decision to your office. In her appeal, she recited the facts of her former entry, as the widow of William H. Royal, but claimed the right to still make an individual entry, under section 2291, Revised Statutes.

On the 5th of February, 1892, you rendered a decision in the case, and after briefly reciting the facts, said: Inasmuch as Mrs. Royal has already availed herself of the benefit conferred by the act of March 2, 1889, she has no further rights thereunder, and, therefore, your action is sustained. The case is brought to the Department by an appeal from your decision. The reason given for bringing the appeal is stated to be:

That the entry made by Adelia S. Royal, as the widow of William H. Royal, deceased, was not a personal right, but on the contrary, was made by virtue of section 2307 of U. S. Revised Statutes, and for the benefit of the heirs of a deceased soldier, and in so doing, she simply obtained what the soldier would have been entitled to had he been living, or had he died after making the entry, instead of prior thereto.

Had William H. Royal made homestead entry for a tract of land prior to his death, his widow would have been allowed to complete the entry, subject to the provisions of law. Not having made such entry during his life time, section 2307 of the Revised Statutes conferred that right upon his widow, if unmarried, giving her the full benefit of his military service; and if he had died during the term of his enlistment, the whole term of his enlistment would have been deducted from the time formerly required to perfect title.

Mrs. Royal availed herself of the provisions of that section of the statutes. She made an entry in her own name, as the widow of a deceased soldier, and she received full credit for his military service, in perfecting her title. This exhausted her rights under the homestead laws, as section 2298, of the Revised Statutes provides that: No person shall be permitted to acquire title to more than one quarter-section under the

provisions of this chapter. The chapter referred to is the one relating to homestead entries.

In the argument upon the appeal before me, it is urged that because the widow of a deceased soldier may complete the entry made by her husband prior to his death, and afterwards make an entry in her own name, that the widow of a soldier who died without making entry, ought to be allowed to make an entry as such soldier's widow, and also one in her individual right. It is urged that in the first case, the widow gets the benefit of two entries, and it is asked, why should she be denied this benefit, simply because her husband failed to make entry for the land before his death?

It seems to me that section 2298, of the Revised Statutes, already quoted, answers this question. Because two persons are each qualified to make homestead entry for one hundred and sixty acres of land, and one of them dies before exercising that right, that fact does not authorize the survivor to make two entries, although he is the sole heir of the deceased. The right to make homestead entry for land is a personal right. If a person possessing the right, dies without exercising it, the right ends. If such person is a soldier, the law gives to his widow, or orphan children, the benefit of his military services upon any homestead entry made by her or them. I am not aware however, of any provisions of law which authorizes the widow to make two entries, because her husband neglected to make one.

I think, therefore, that the application of Mrs. Royal to make homestead entry, on the 18th of September, 1891, after she had made final proof on her former homestead entry, was properly rejected. The decision appealed from is accordingly affirmed.

WILLIS v. MESSENGER.

Motion for review of departmental decision of April 7, 1892, 14 L. D., 631, denied by Secretary Noble, November 12, 1892.

SETTLEMENT RIGHT—FORFEITED RAILROAD LANDS.

STAPLES v. RICHARDSON.

The preferred right of entry accorded a settler under section 2, act of September 29, 1890 is not defeated by the fact that through mistake the settler's improvements are not on the land claimed, nor by an intervening homestead declaratory statement filed by one who makes no inquiry in the vicinity of the land as to its actual status.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

I have considered the above mentioned case, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 23,

T. 47 N., R. 9 W., Ashland land district, Wisconsin, on appeal by Staples from your decision of April 4, 1892, sustaining the action of the local officers in dismissing his contest.

This tract is a portion of the Wisconsin Central grant forfeited by the act of September 29, 1890 (26 Stat., 496), being opposite unconstructed road, and was opened to entry, after due notice by publication, on February 23, 1891.

On that day Hollan Richardson filed soldier's declaratory statement No. 79 for said land, and same day Staples presented his homestead application for the same land, which was refused, on account of the filing by Richardson, and he was advised that he would be allowed thirty days in which to apply for a hearing.

On the 29th of the same month he filed an affidavit as the basis for a hearing, alleging:

That he (Staples) moved upon said land in April, 1888, has never abandoned it, and still resides upon the same; that he has built a dwelling house and a log storehouse thereon; also dug a well and has cleared about two acres, upon one acre of which he has for the past three seasons raised crops of vegetables; that he has assisted in cutting a road through from said land to the Northern Pacific Railroad, a distance of about two miles, and that all of this has been done for his exclusive use and benefit as a homestead.

Hearing was duly ordered, and held on May 9, 1891, both parties being present, and from the testimony adduced the local officers held that the tract "has not been settled upon by the contestant, and that what improvements he has made on an adjoining forty would not entitle him to the rights of a prior *bona fide* settler."

Upon appeal, your office decision of April 4, 1892, sustained the local office, holding that:

Staples having neither settled upon the land in question, nor entered the same prior to Richardson's application and filing, Richardson had no notice; Staples is also without the right of any process to an amendment, since the right to amend, if ever existing, can not be made in the presence of an adverse claim (*Orvis v. Birtch*, 11 L. D., 477).

An appeal brings the case before this Department.

The question presented by the appeal is, whether Staples had such a claim to this land as entitled him to a preferred right of entry under section 2 of the forfeiture act?

Said section provides:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the homestead law and this act, and shall be regarded as such settlers from the date of actual settlement or occupation.

The act of February 18, 1891 (26 Stat., 764), amended the act of September 29, 1890 (*supra*)

So that the period within which settlers, purchasers, and others under the provisions of said act may make application to purchase lands forfeited thereby, or to

make or move to perfect any homestead entries which are preserved or authorized under said act, when such period begins to run from the passage of the act, shall begin to run from the date of the promulgation by the Commissioner of the General Land Office of the instructions to the officers of the local land offices, for their direction in the disposition of said lands.

Under date of January 16, 1891, you instructed the local officers to restore these lands after due notice by publication, in accordance with which they were offered to entry on February 23, 1891, as before stated, and on that day Staples offered his homestead application, which was refused by you, and he was required to contest the filing by Richardson allowed earlier in the day.

From the testimony it appears that in April, 1888, Staples went upon what he thought to be a portion of the land in question, and built a log house, in which he lived until January, 1891. During this time he cleared in the neighborhood of an acre around the house and cultivated the same, raising garden vegetables. In January, 1891, he was informed that his house was not upon the land claimed by him, and upon his own measurement discovered it to be one hundred feet south of the line and upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 23. This measurement also showed his garden to be upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. He at once began the erection of a new house, two hundred feet north of the first house, after clearing more land, into which he moved during that month.

This was the condition of affairs on February 23, 1891, when the lands were opened to entry and when he offered his application.

Richardson, who is an attorney, swears that he was informed on the evening before the opening that there were no improvements upon the land in question, and upon that information he made filing for the land, forwarding the same through the mail. He was never upon the land until March 6, 1891, and after that visit he had the land surveyed.

The surveyor employed had made a previous survey of the lines in the vicinity of this land just prior to the opening, and one of the parties assisting in this survey was Richardson's informant as to the condition of the land in question.

This second survey showed the second house built by Staples to be also off of the land claimed by him by about five feet, and in April, 1891, he built a third house, thirty-five feet north of the second house.

Accepting the survey made at the instance of Richardson as properly establishing the lines, there is some question as to whether any of the clearing, cultivation, or improvements made by Staples prior to the 23d of February, 1891, were upon the land in question, but they were all made upon the NW. $\frac{1}{4}$ of the section, in which one hundred and twenty acres of his claim lies.

That Staples was honestly seeking to acquire title to the land in question, and that from the time he went there in 1888 to the offer of his application he claimed none other than the tracts now applied for,

is not disputed, but your decision seems to be based upon the ground that he gave no notice of his claim, and that, consequently, Richardson acquired a prior right by reason of his filing.

It has been repeatedly held that the notice given by settlement and improvements extends only to the technical quarter section upon which they are located (*Pooler v. Johnson*, 13 L. D., 134, and cases therein cited), but, as to that quarter upon which they are found, it is held to be notice to the world.

Richardson never visited the land prior to filing for it, and he was surely not misled as to Staples' claim by the fact that his improvements were a few feet over the line. Had he inquired in the neighborhood he would undoubtedly have learned of Staples' claim, as he had been claiming the land for about three years.

From a careful review of the matter, I am of the opinion that Staples' claim is protected by section 2 of the forfeiture act, and therefore reverse your decision, direct the cancellation of Richardson's filing, and the allowance of Staples' application.

CONTEST—RELINQUISHMENT—CONTESTANT.

JACKSON *v.* STULTS.

The right of a contestant as against one claiming under a subsequent relinquishment attaches as of the date when the affidavit of contest is filed, if the charge therein is sustained.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

This case involves the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 10, T. 30 N., R. 21 W., Valentine, Nebraska.

On June 30, 1881, John M. Jackson (plaintiff's father) made timber-culture entry for the same.

On July 20, 1888, N. D. Stults filed his affidavit of contest, alleging that said Jackson

has wholly failed to plant or cause to be planted five acres of trees, seeds or cuttings during the third year and has failed to cultivate or cause to be cultivated the ground for the past three years and has not to exceed three acres of trees on said land, at the present time as required by law.

No notice appears to have been issued on said contest.

On August 17, 1888, the said entry was canceled on the relinquishment executed by said John M. Jackson the day before.

On August 27, 1888, Naman D. Stults made homestead entry for the land. The next day, August 28, 1888, a homestead application for the land by Luther E. Jackson, who alleged settlement thereon May 20, 1888, was rejected at the local office for conflict with the entry of Stults.

Jackson appealed, whereupon by letter "H" dated February 19,

1889, you remanded the case and directed that a hearing be had "to determine the truth of the allegations of contest and whether in fact said relinquishment was filed as a result of the contest."

Thereupon a hearing, at which the parties appeared with counsel and submitted testimony was commenced before the local officers May 1, and proceeded with until May 3, 1889, when it was concluded.

Upon the evidence adduced the local officers rendered their joint opinion "that Stults has sustained the allegations contained in his affidavit of contest and that Jackson has failed to show that the relinquishment was not filed on account of the contest."

On Jackson's appeal from this action, you, by decision dated October 19, 1891, found that when initiated Stults' contest was well founded, and that the relinquishment of John M. Jackson was filed as a result of such contest,

You accordingly held Stults' entry intact and rejected the claim of Jackson.

From this action Jackson appeals.

The testimony is sufficiently outlined in your said decision and need not be restated. Concerning Stults' charge that Jackson, sr., failed to properly plant and cultivate the land the evidence is very conflicting. But the testimony was taken before the register and receiver whose said finding in this regard, the question being one of fact, is, by reason of their opportunity to observe the witnesses and thus best judge their credibility, entitled to special consideration. *Morfev v. Barrows*, 4 L.D., 135; *Neff v. Cowwick*, 6 L.D., 660; also *Darragh v. Holdman*, 11 L.D., 409. And this finding, being concurred in by you, is conclusive, unless clearly wrong. *Darragh v. Holdman*, *supra*, and cases cited.

The evidence, considered in the light of the authorities cited, satisfies me that Jackson, sr., did not comply with the law in the matters of planting and cultivation.

The question of the plaintiff's (Jackson's) settlement and residence was not made an issue at the trial and testimony relating thereto is meager and unsatisfactory. He could, however, acquire no right by reason of such settlement until the cancellation of his father's entry. It being determined that the allegations made in Stults' affidavit of contest are sustained by the evidence adduced at the hearing had in pursuance of your instructions, I must hold that his rights thereunder attached as of the date when such affidavit was filed. *Webb v. Loughrey* (on review), 10 L.D., 440; also *Brown v. Henderson*, 14 L.D., 306.

The entry of Stults should, therefore, be sustained regardless of the question whether or not the relinquishment by Jackson, sr., was filed as a result of Stults' contest.

I deem it proper to add, however, that the testimony, although conflicting convinces me that Jackson, prior to the execution and presentation of his father's relinquishment had full knowledge of Stults' contest,

and this at least raises a presumption that it was filed in consequence thereof.

In view of the foregoing, I can see no reason for disturbing the judgment appealed from and the same is accordingly hereby affirmed.

Dec 19 1892
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RES JUDICATA—PREFERENCE RIGHT—APPLICATION—CORROBORATION**HYDE ET AL. v. WARREN ET AL. (ON REVIEW).**

A final determination as to the invalidity of a claim, in proceedings involving such issue, may be properly adopted in a subsequent case where another party sets up a claim to a part of the land involved.

A decision directing a hearing on a charge against the claim of another should not determine the right of entry in the event of cancellation, but leave such question for adjudication when the preference right of entry is asserted.

The sufficiency of a corroboratory contest affidavit is a question resting largely in the discretion of the Land Office, and, as a rule, the defendant only is entitled to be heard on objection thereto.

An application to enter land covered by the claim of another is not recognized as the initiation of a contest against said claim.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

Motions for review of departmental decision of May 31, 1892 (14 L. D., 576), in the case of Thomas W. Hyde *et al.* v. James H. Warren *et al.*, involving lot 7, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, T. 63 M., R. 11 W., 4th P. M. Duluth, Minnesota, have been filed as follows: one in behalf of Jesse G. Barrick, one in behalf of Joseph H. Chandler, two in behalf of James H. Warren, and one in behalf of Thomas W. Hyde.

It seems unnecessary to set out at length the facts in the case, and reference is therefore made to the decision complained of, for those facts and the statement of the various claims to the land.

The two motions in behalf of Warren, which will be taken up first, allege substantially the same grounds of error, and present no point that was not very fully discussed and considered when the case was pending before this Department, on appeal from your office. While one of these motions alleges that it was error to hold that the affidavit filed by Hartman, attacking Warren's location, was properly corroborated, the grounds mainly relied upon to secure the revocation of said decision, are that it was error to hold that the question as to Warren's place of residence could affect his right to locate the scrip in question, and that it was error to hold that said scrip was not assignable. The whole of the printed argument filed in support of these motions is devoted to these two points. This argument, however, does not present any new authority on the questions, and does not advance any argument that was not urged and carefully considered before the decision in question was rendered. I do not find it necessary to again go over

the same ground, or to reiterate the reasons so fully set forth in the decision complained of for the conclusion then reached. It is sufficient to say that a further consideration of the whole matter, in the light of the objections now urged, has not caused any modification of the views declared in said decision, but has, on the contrary, tended to confirm me in the position then taken. No reason is given in support of the allegation that it was error to hold that the affidavit of Hartman was duly corroborated, nor is any attempt made to point out the particular in which the corroboration was insufficient. The Department is left without any information as to the views of counsel on this point, and will not, therefore, attempt to answer this objection to the decision. The motions filed in behalf of said Warren are for the reasons herein given denied.

In the motion in behalf of Hyde the following assignment of errors is made:

1. Error in passing upon the rights of Hyde as a pre-emption claimant or otherwise, without giving him any hearing whatsoever in this case.
2. Error in holding that as to James H. Warren, and his scrip location, Hyde's right as a pre-emption claimant was *res adjudicata*.
3. Error in utterly disregarding Hyde's claim to the land in question.
4. Error in neglecting and refusing to give Mr. Hyde a hearing upon the merits of his claim in this case.
5. Error in holding that the Warren scrip location, or that the claims of any of the contestants, took priority of, or were superior to the claim of Hyde to this land.
6. Error in utterly and entirely failing to give Hyde his day and hearing in court as against the Warren scrip.
7. Error in holding that what occurred in another case, and between different parties to the record was *res adjudicata* as to the Warren claim in this case.
8. Error in holding that the fact that Hyde, as a successful contestant, had applied for a priority of entry to three other tracts, cut him off, or debarred him from asserting his rights in this case.

No argument has been presented in support of this motion. The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of *Hyde et al. v. Eaton et al.*, decided February 18, 1889 (not reported), and again on motion for review on January 28, 1891 (12 L. D., 157). It was there found that this settlement was not made in good faith, for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under such settlement, that is, his claim as a whole was held to be invalid after a full investigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person not a party to the former proceedings presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department holding it invalid. His rights as a con-

testant were not definitely disposed of in the decision attacked by this motion, but consideration thereof was simply postponed until the prior contests could be decided. The motion for review presents no specific objection to this action, nor could any objection thereto be sustained. For the reason given, the motion on behalf of Hyde is hereby denied.

The motions in behalf of Barrick and Chandler present exactly the same grounds, except that in that of the former it is alleged a mistake was made as to the date of the filing of Barrick's application to make entry for the land, stated in said decision as March 23, whereas it is claimed it should have been March 6. If, however, the conclusion reached in that decision shall be adhered to, this difference as to dates does not work any injury to Barrick.

In these motions, and in the argument in support thereof, it is contended that if Warren was not qualified to make such location, or if the assignment of his scrip was prohibited, then the location made in his name was absolutely void, and the applications of these parties attached at the time presented, to the exclusion of all subsequent applicants, and that the affidavit filed by Hartman, on which a hearing was ordered, was not properly corroborated, and therefore it was error to receive and act upon it. It is apparent that these motions, like the others, present no new questions of fact or law. It is contended that if either of the charges made against Warren's location shall be sustained, that it necessarily follows that such location, whether held to be void or voidable only, constituted no bar to the applications to enter, and that the decision complained of should have directed that in the event of the hearing resulting in the cancellation of such location, the applications to enter filed by Chandler and Barrick would be allowed *nunc pro tunc*. In the decision, however, no conclusion is reached as to the right of entry in the event of the cancellation of Warren's location, that question being specifically postponed until an application for the land shall be filed, claiming the preference right of entry. This disposition of that question was the only proper one to be made, and said decision will not be modified in that particular. Much attention is given in the argument filed in support of these motions in favor of the contention that Hartman's affidavit was not properly corroborated, and should therefore not have been given the preference of their affidavits, subsequently filed. This question was fully presented in the arguments on appeal as stated by counsel, but it is claimed that inasmuch as it was disposed of in said decision without any discussion of the principle involved, and without any reference to the authorities cited, the possibility of inadvertence in the decision upon this point suggests itself, and that therefore no hesitancy is felt in asking a re-examination of the question. It does not by any means follow that because some point in the case is not discussed at length in the decision, that therefore it was not thoroughly examined and fully considered. I do not find in the argument now made any sufficient reason for changing the

conclusion heretofore reached. The question as to the sufficiency of the corroboration of an affidavit in the nature of an information, and indeed, of the affidavit itself, is one resting largely in the discretion of your office, and, of course, of this Department, if it comes here for consideration. It may be doubtful if these parties ought to have been heard at all, to object to the sufficiency of Hartman's affidavit, since, as a rule, the entryman only will be heard to make such objections. Jasmer *et al v.* Molka (8 L. D., 241), McClellan *v.* Crane *et al.* (13 L. D., 258). But since it was not thought proper to refuse to hear their objections on appeal, I will not now say they cannot be heard farther.

The corroborating affidavits in this case are somewhat loosely drawn, but it is not difficult to conclude that they aver the truth of the charges in the contest affidavit. After this further consideration of the question, I can but reaffirm the statement in the original decision, that this affidavit was sufficiently corroborated.

Neither do I find merit in the claim that the affidavits of Chandler and Barrick, attacking the legality of Warren's location, should be considered together with their applications to enter, as constituting an attack upon that location taking effect as of the date of the filing of the first papers. To so hold, would be to say that every application to enter land covered by a claim of another, initiates a contest against such claim. Such a practice has never obtained, has not the sanction of any rules or regulations of the Department, and would not, in my opinion, be a proper course to adopt.

While these motions were each open to the objection that they presented no question of either law or fact that was not fully presented and considered when the decision complained of was rendered, and might very properly have been denied upon that ground, alone, yet I have seen fit to take up and consider again the various points raised. After such examination and consideration, I find no good reason for revoking or changing that decision, and said motions are each hereby denied.

MINING LOCATION—RESERVOIR SITE.

JOHN U. GABATHULER.

A mineral location, made after the repeal of the act of October 2, 1888, and prior to the selection of a reservoir site, defeats the selection as to the land in conflict. Mineral lands are not excepted from the operation of the act of October 2, 1888.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

On the 18th of June, 1890, the Buena Vista Placer, a mining claim, was located on the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5 T. 14 S., R. 78 W., 6th P. M., Leadville land district, Colorado, by John U. Gabathuler and five other persons. The several persons

interested in the claim conveyed their respective interests therein to Gabathuler, and on the 29th of December, 1890, he made application for patent for the land, under the mining laws of the United States, alleging that he had become the owner, and was in the actual, quiet and undisturbed possession of said claim.

After due publication, proof, and payment, final certificate was issued to him on the 14th of August, 1891.

On the 27th of February, 1891, the Director of the Geological Survey recommended that certain lands in the Leadville land district be selected as a reservoir site on Arkansas River, known as number 51. The N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 14 S., R. 78 W., was included in the lands recommended for such purpose. This proposed selection was under the act of October 2, 1888 (25 Stat., 526). On the 26th of January, 1892, you informed the local officers that the mining claim in question was located subsequent to said act, and directed them to advise the claimant that his mineral entry was held for cancellation to the extent of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 5. The case is brought to the Department by an appeal from your decision.

The act of October 2, 1888, reserved from sale as the property of the United States, all such lands as should thereafter be designated or selected for reservoirs, canals, ditches, etc., for irrigation purposes, until further provided by law.

The act of Congress, approved August 30, 1890, (26 Stat., 391), repealed so much of the act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation, and settlement, and allowed such entry and occupation to be made upon said public lands "in the same manner as if said law had not been enacted", adding, however, "Except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement, as provided by said act, until otherwise provided by law."

The land in controversy was not selected for reservoir purposes prior to the act of August 30, 1890, and therefore at the time Gabathuler located his claim and applied for patent, it was subject to entry and occupation in the same manner as if the act of October 2, 1888, had not been enacted.

Section 17, of the act of March 3, 1891, (26 Stat., 1095) provides that reservoir sites located or selected, and to be located and selected, under the provisions of the act of October 2, 1888, and amendments thereto, shall be restricted to, and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable, lands occupied by actual settlers at the date of the location of such reservoirs.

At the time the land in question was recommended for selection as a reservoir site, it was in the actual possession of Gabathuler, who had complied with the mining laws, rules, regulations and customs, and had

applied for patent therefor, in conformity with the provisions of chapter six of title thirty-two of the Revised Statutes of the United States.

Section 2322 of the Revised Statutes, gives to the locators of all mining locations, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, the exclusive right of possession and enjoyment of their locations, in all cases where no adverse claims existed on the 10th day of May, 1872. This right has been uniformly recognized by the courts, and by the Department. It seems also to have been recognized by your office, in your letter of March 21, 1892, with which you forwarded to the Department the schedule and abstract showing the status of the land in reservoir site on Arkansas river, No. 51. In that letter, you state that the land covered by the site was not withdrawn prior to the act of August 30, 1890, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 14 S., R. 78 W., being covered by the mineral location of Gabathuler, at the time of the selection of the site, cannot be reserved for reservoir purposes.

The case of George A. Cram (14 L. D., 514), in which the statutes relating to the selection of lands for reservoir purposes, were quite closely examined, it was held that the protection provided for settlement claims by section 17 of the act of March 3, 1891, as against the location of reservoir sites extends only to lands occupied by actual settlers at the date of such location. In that case, Cram made his homestead entry on the 8th of July, 1890, alleging settlement on the 10th of June, of that year, while the reservoir site which embraced his land was selected on the 8th of January. The reservoir selection having been made prior to the passage of the act of August 30, 1890, and prior to the entry of Cram, the Department was without authority to afford him relief.

The case at bar, however, presents a very different question. The act of October 2, 1888, had been repealed by the act of August 30, 1890, (except as to selections already made) before the site was selected for Arkansas river reservoir No. 51, and a mining claim had also been located on the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5,—the land in question,—prior to such selection.

In the notice of appeal before me, it is claimed that the act of October 2, 1888, did not authorize the selection of mineral land for reservoir sites. No exception of that kind was made in said act, and I am of the opinion that if the land in question had been selected for a reservoir site prior to the repeal of that act, or even prior to the location of a mining claim upon it, it would have been regarded as subject to reservation for that purpose.

In view, however, of the facts of this case, and of the provisions of section 2322 of the U. S. Revised Statutes, which relates to the rights of possession and enjoyment of locators of mining locations, who comply with the laws, and with local regulations not in conflict therewith,

I am clearly of the opinion that you erred in holding for cancellation the mining claim of Gabathuler for the land in question. The decision appealed from is therefore reversed.

CONFIRMATION—MOTION FOR REVIEW.

JAMES SLOCUM.

Section 7, act of March 3, 1891, does not provide for the re-instatement of canceled entries, and where cancellation has become final the entry is not confirmed by said section.

The denial of a motion for review terminates, on the date of such decision, all rights reserved by the pendency of the motion, and the judgment under consideration is thereupon final. The only right remaining thereafter to the losing party is an application to the supervisory authority of the Department.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

I have considered the motion for the review of departmental decision of March 28, 1892 (L. and R. Press Book, No. 239, page 132), denying the motion filed by James Slocum, Jr., transferee of Jennie Chandler, who made pre-emption cash entry No. 11,701, for the NE. $\frac{1}{4}$ of Sec. 26, T. 104 N., R. 62 W., Mitchell land district, South Dakota, on January 8, 1884, for the confirmation of said entry, under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

By departmental decision of September 10, 1890, your decision of October 6, 1888, holding said entry for cancellation was affirmed.

A motion was made for the review of the decision of September 10, 1890, which motion was denied February 18, 1891, although the parties were not notified thereof by your office, until March 9, 1891.

After the passage of the act of March 3, 1891 (*supra*), a motion was made for the confirmation of the entry under the provisions of section 7 of that act, which motion was denied March 23, 1892, for the reason that "the act in question does not provide for the re-instatement of canceled entries, and when cancellation has become final, the entry can not be confirmed under the 7th section of said act. Wiley v. Patterson (13 L. D., 452); James Ross (12 L. D., 446); George Hague *et al.* (13 L. D., 388)."

It is for the review of this decision that the present motion is filed.

There are but two questions raised by this motion meriting special attention, and they are as follows:

1st. When did the decision of February 18, 1891, denying the motion for the review of departmental decision of September 10, 1890, become effective, in so far as the status of the entry involved is concerned—the date of its rendition, or of its promulgation by your office?

2d. Has the defeated party the right to move for a re-review, having been unsuccessful in his first motion, and will such right, unasserted,

stay final judgment under an order of cancellation, so that the confirmatory provisions of the act of March 3, 1891 (*supra*), can be invoked and the entry thereby passed to patent?

The decision of September 10, 1890, canceled the entry by Chandler, but, under the rules of practice, the motion filed for the review of that decision acted as a supersedeas and stayed final action under said decision. This motion was, however, denied February 18, 1891, and while the time allowed the party, within which to take any further action, would not begin to run until duly notified of such denial, yet, so far as rights under the motion are concerned, they were at an end with the rendition of that decision.

The entry was therefore finally canceled prior to the passage of the act of March 3, 1891 (*supra*), unless some further right remained in the party after the denial of his motion for review.

It was held in *Neff v. Cowhick* (8 L. D., 111):

Motions for a second reconsideration of a decision should not be allowed, and the practice of permitting them to be filed is discontinued.

After disposition of a case on review, suggestions of fact, or points of law, not previously discussed or evolved in the case, may be presented by petition for such action as may be deemed appropriate by the Department.

It will be seen that no right remained after the disposition of the motion for review but to invoke the supervisory power of the Department, and no attempt was made even by this means to secure a further consideration of the case.

The entry was therefore finally canceled prior to the passage of the act of March 3, 1891 (*supra*), and the motion for confirmation of the entry under consideration was properly denied.

The motion for the review of that action is also denied.

SUIT TO VACATE PATENT—ARMED OCCUPATION ACT.

JOHN A. OSTEEN.

Suit by the government to vacate patent will not be advised on the application of a claimant under the "armed occupation act" who does not submit proof under his claim within the statutory period provided therefor, nor until after other disposition is made of the land under subsequent legislation.

Secretary Noble to the Commissioner of the General Land Office, November 12, 1892.

Acting upon the request made by J. Thomas Turner, in behalf of John A. Osteen, for the recommendation by this Department for a suit in the name of the United States to recover title to lot No. 6, Sec. 6, T. 11 S., R. 23 E., Florida, patented to said State as swamp land, you made due report, under date of June 24, 1890, refusing to recommend the institution of such suit.

Since said report was made, a further request has been filed in this Department having a like object in view. The facts upon which the request is based are as follows:

Under the act of August 4, 1842 (5 Stat., 502), providing for the armed occupation and settlement of the unsettled part of the peninsula of East Florida, Osteen, on May 25, 1843, received from the officers at Newnansville, Florida, permit No. 515, authorizing his occupation of lots 5, 6, 8, and 9, of said section 6.

On September 12, 1855, no further action having been taken by Osteen to complete his claim by making due proof as required by said act, the State of Florida made due selection of lots 5 and 6 of said section under the swamp land grant, and patents issued therefor September 4, 1857.

In 1874 Osteen made proof under his claim, the same being rejected by the local officers September 30, 1874, for the reason that he had not made proof within the time required by law, nor had he complied with the requirements of the act of June 15, 1844 (5 Stat., 671).

Your letter ("C") of March 6, 1882, held the proof to be sufficient, and therefore called upon the State to reconvey said lots 5 and 6.

The State made reconveyance of lot No. 5, but as to lot 6, it was stated, "that the State conveyed it to one Samuel J. Kennerly, August 20, 1868, and it is now impossible for the State to reconvey it to the United States."

On September 8, 1882, certificate issued to Osteen covering lots 5, 8 and 9 of said section, and patent issued thereon December 15, 1882.

The present request is made in order to make available to Osteen said lot 6 excluded from his entry and patent.

I deem it unnecessary to determine whether Osteen abandoned any claim to lot 6, by making entry and receiving patent for the balance of his claim, but refuse to recommend the suit, because I do not deem it to be a case where the name of the United States should be used.

The right to bring a suit in the name of the United States exists only when the government has an interest in the land, or fraud has been practiced on the government and operates to its prejudice; when it is under some obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action. *United States v. San Jacinto Tin Company*, 125 U. S., 273.

The act of 1842 required that the settler make proof within six months after the expiration of five years from the date of his permit. Under this act Osteen should have made proof before December, 1848.

The act of June 15, 1844 (5 Stat., 671), amended the act of 1842, and under that act Osteen might have purchased the land by showing compliance with the law of 1842 up to the date of his application.

The act of July 1, 1848 (9 Stat., 243), made further provision for the completion of claims under the act of 1842, and authorized the appoint-

mēnt of an agent to collect evidence and aid the completion of such claims. Said act provides: "that if any settler does not submit his proof to such agent within four months after reasonable notice, by advertisement of the times and places of his attendance to receive such proof, such settler shall not have the benefit of this act."

Osteen failed to take the benefits of either of said acts, and did not offer proof until 1874, as before stated.

The United States can have no interest in the land, for should the State's title be set aside, it must be on account of the claim of Osteen, and, hence, for his benefit.

The duty of the government to the public does not require that suit should be brought, as the right is a private one and not a public benefit, and lastly the United States is under no obligation to Osteen, who, notwithstanding the liberal legislation in the matter of the completion of such claims, failed to avail himself of the benefits thereby granted, until many years after the United States had made other disposition of the land under legislation subsequent in date to that in question.

This action in no wise precludes Osteen, or those claiming through him, from asserting in the courts his priority of right under his possession and improvement of the land, which was notice to the world of his claim, to the end that the legal title in the State and its transferees may be decreed to inure to their benefit.

HUNGERFORD v. BARNARD.

Motion for the review of departmental decision of June 10, 1892, 14 L. D., 626, denied by Secretary Noble, November 14, 1892.

PRACTICE—MOTION FOR REVIEW—PREFERENCE RIGHT.

ALLEN v. PRICE.

A motion for review will not be granted on the ground of newly discovered evidence where such evidence is merely cumulative in character.

On the successful termination of a contest the land embraced within the canceled entry should be reserved for the benefit of the contestant during the statutory period provided for the exercise of his preferred right of entry. If an application to enter is presented during said period, by a stranger to the record, it should be held in abeyance to await the action of the contestant. If a waiver of the preference right, duly executed by the contestant, is filed the tract will be thereafter held subject to entry.

Modification of practice in the matter of closing cases on final decision of the Department, or further consideration thereof on motion for review.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

I have considered the motion, filed by Price, for a review of departmental decision of March 16, 1892 (Press copy No. 238, page 263), in the

case of *William H. Allen v. William M. Price*, involving the NE. $\frac{1}{4}$ of Sec. 20, T. 8 S., R. 28, Oberlin, Kansas.

Said decision canceled the entry of Price.

The first alleged error is—

That the decision made in this case is against and contrary to the weight of the evidence and the law of the case.

The fourth, fifth and sixth grounds of error are of the same nature, but more specific in presenting the evidence which it is alleged should have caused a different conclusion to be reached.

No new question of either law or fact is presented in the motion, which was not before both the Commissioner and this Department at the time the decision of the former was rendered, and at the time the departmental decision of which review is asked, was reached; hence there is no good ground for review. *Stone v. Cowles* (14 L. D., 90).

The second and third grounds of error are, that the local officers erred in allowing an amendment of the original affidavit of contest at the time set for trial, and in not allowing the defendant more time to prepare for his defence and to procure witnesses.

These matters were in the nature of interlocutory motions and the determination of the same rested in the discretion of the local officers. No mention is made of the subject either in the decision of the Commissioner, or in the decision of which review is asked, and there is nothing to indicate that the local officers exceeded their authority, or abused the discretion vested in them.

The defendant produced eight witnesses at the trial; and the contestant five. I see no reason why the supervisory power of the Department should be exercised in the premises.

With the motion for review is filed the affidavit of David Shafer, who swears that certain parties would testify to certain facts, if a new trial is ordered, but the affidavits of the alleged witnesses are not furnished as required by the rulings of the Department.

The evidence thus set forth is at best, but cumulative of that introduced at the trial and hence it is not a sufficient ground for review. *Holloways Heirs v. Lewis* (13 L. D., 265).

The motion is therefore denied.

In connection with this case you transmit the papers relating to the application of W. H. Allen, the successful contestant of the entry of Price, to make entry for said tract of land.

It appears that as the result of departmental decision of March 16, 1892, the entry of Price was canceled on the records of the local land office on April 14, 1892, and Allen was notified of his preference right of entry for thirty days. On said day, however, the local officers allowed John H. Patterson to make homestead entry for the tract, and when Allen appeared within the thirty days allowed him, to make entry, they rejected his application for the reason that the land was embraced in said entry of Patterson.

Allen has appealed, and without disposing of the appeal, you transmit the case with a recommendation of a change of practice in connection with this case and those of a similar character.

Under the present ruling of the Department, when an entry is canceled upon a contest, the successful contestant is notified and allowed thirty days in which to make entry of the land; the land, however, is held subject to entry by the first qualified applicant, who upon application is allowed to make entry for the same, subject to the preference right of the contestant. The result is, that frequently the successful contestant, who has expended time and money in procuring the cancellation of an entry, finds his application to enter the land involved, presented within the time prescribed by the statute, rejected for the reason that a stranger to the contest record has been allowed to make entry for the same. He is thus forced to institute a new contest, or to wait until the government takes action to clear the record of the existing entry, and in either event, he is forced to protect his interest in said contest or action, and must wait its final determination before he can be allowed to make the entry which the law decrees that he has the right to make as a successful contestant.

This rule was established in the cases of *Shanley v. Moran* (1 L. D., 162) and *Alonzo Phillips* (2 L. D., 321), and has been followed since, resulting frequently in much hardship and loss to successful contestants.

The act of May 14, 1880 (21 Stat., 140), granting to a successful contestant the preference right of entry, and the act of July 26, 1892 (27 Stat., 270), granting to his heirs the same rights, it must be admitted, conferred a right upon such party, and when we consider that this right must be exercised within the limited period of thirty days, and that it can only be exercised upon a specified and limited tract of land, is it not reasonable to assume that it was the intention of such legislation to reserve from other appropriation, for the period specified, the designated tract of land, and thus enable the party intended to be benefited, to reap the reward of his diligence in procuring the cancellation of the prior entry.

Upon mature reflection, I am convinced that, to hold otherwise, is, by implication at least, to assume that Congress holds out inducements to a party to take certain action, but fails to protect him in the rights such action secures. To reserve the land for the time specified, will certainly be in the line of protecting the contestant's rights, and no other party can be seriously prejudiced thereby. Should an application to enter the land be presented by a stranger to the record, it can be held in abeyance to await the action of the contestant within the time allowed, and should he fail to exercise his right, said application or applications can be disposed of in accordance with the law and the rulings of the Department. Should a waiver of the preference right of entry, duly executed by the contestant, be filed, the tract should be held subject to entry.

In all future cases, let this rule prevail, and you will at once notify the local officers of the modification.

The case at bar must be governed by the rule now in force and the papers are returned for proper action by you in the premises.

It appears that within thirty days from the date of notice of departmental decision, given by the local officers, the claimant filed a motion for review. Had the Department granted this motion and finally determined that the entry should remain intact, it would have been met with the fact that said entry had been canceled and the land entered by another party, hence the question with reference to the finality of departmental decisions, in connection with the filing of motions for review and rehearing, arises.

Under the present practice, the local officers are notified of said decision, and instructed to report to you at the expiration of the time allowed for filing a motion for review, what action has been taken in that respect. In many of the local offices much delay is experienced in the matter of making such reports, and there is a consequent delay in the closing of cases, which should be closed as promptly as possible, but in which final action should not be taken until the time for filing motion for review has expired.

It is impossible to formulate a fixed rule which will govern every individual case which may arise, but I think a general rule may be adopted which will govern most of the cases which come before the Department, and the supervisory power of the Department can be exercised, if necessary, in the exceptional cases. We are met with the fact that in some cases there are resident attorneys who are notified by you of the departmental decision, at the same time notice is sent to the local officers, and of necessity this notice to attorneys is given a greater or less number of days before the notice is given to the parties in interest through the local office.

I think the rule which should be followed is this:

If at the expiration of the time allowed for filing a motion for review or rehearing, counting from the date of the notice given by you to the resident attorney, no such motion has been filed, you will promptly notify the local officers (giving the date of your notice to the resident attorney) and instruct them to close the case unless such motion has been filed with them within the time allowed, counting from the date of your notice to the resident attorney.

Should a motion be filed in your office, you will promptly notify the local officers to that effect.

In cases where no notice of departmental decision is given by you to a resident attorney, but the notice is given through the local office, the register and receiver should be instructed to close the case at the expiration of the time allowed for filing a motion for review or rehearing, unless such motion has been filed, and to report the fact to you. At the time of giving the notice to the parties in interest, the local officers

must also notify you of the date of such notice, in order that you may determine whether a motion for review has been filed in time, in the event that a party in interest employs a resident attorney to file such motion with you; and in order that there may be no mistaken action on the part of the local officers in such cases, the party, in order to protect his interests, must file notice with them that he has thus employed a resident attorney to file such motion with you, and the local officers will notify parties to this effect, at the time of giving notice. In no case should a case be closed until the expiration of the time allowed for filing a motion for review.

Blanks to carry out these instructions should be prepared, and it is believed that a strict observance of these rules will result in the correction of defects which now exist.

SWAMP LAND—EFFECT OF ARTIFICIAL DRAINAGE.

STATE OF CALIFORNIA.

A claim of the State under the swamp grant should be rejected where the evidence shows that the land will not be rendered fit for cultivation by artificial drainage, but that its chief value will be destroyed thereby, and that the State does not intend reclamation.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

This appeal is filed by the State of California from your decision of December 22, 1891, rejecting its claim under the swamp land grant of certain lands fully described therein.

These lands were claimed by the State as swamp and overflowed lands, and a hearing was had under the last clause of the 4th section of the act of July 23, 1866, providing that:

If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the maps or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, so to be taken before the surveyor-general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office. (14 Stat., 218.)

Upon the testimony taken at said hearing the surveyor general found that said tracts were not swamp and overflowed land, within the meaning of the grant of September 28, 1850, which decision was affirmed by your office, and from which the State appealed.

The surveyor-general found that:

The lands involved in this hearing are located on or near the summit of the Sierra Nevada mountains, at an altitude of from 6,000 to 8,000 feet, and that they are situated in small basins or flats, or along streams, surrounded by higher hills or mountains, upon which a great quantity of snow falls during the winter season, which when melting in the spring overflows the land in question, and continues then in

that condition until the snows disappear on the hill-sides, when the lands becomes more or less dry until the commencement of the following rainy season, and that during this time the lands are adapted for grazing purposes, though too wet for cultivation.

It further appears that there is no land cultivated in any of the townships in which the lands in question are situated, for the reason that owing to their high altitude, the seasons are too short for the maturing of any crop as is usually cultivated in an agricultural locality, and that all of the lands in these townships are suitable only for grazing purposes, and then only during a small portion of the year, after the snows have disappeared.

This finding is fully sustained by the testimony, as well as the further finding that "the lands in question are suitable only for grazing purposes, and that reclamation is not desirable, and, in fact, would render them of less value than they are in their natural condition."

You affirmed the finding of the surveyor-general, and rejected the claim of the State, substantially, upon the ground that the evidence showed that the land could not be reclaimed and made fit for cultivation by artificial drainage, and that it was therefore not of the character of lands contemplated by the grant.

The act of September 28, 1850, is entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and to enable said States "to *reclaim* the swamp and overflowed lands found therein," granted to said States, "the whole of those swamp and overflowed lands *made unfit thereby for cultivation*."

The fact that the grant was only of such lands as were, by reason of the swampy and overflowed condition, "made unfit thereby for cultivation," would seem to imply that Congress intended that only such lands should pass by the grant as might be rendered fit for cultivation by reclaiming them from their swamp and overflowed condition.

The *reclamation* of the land was the consideration for the grant to the State, and clearly it could not have been contemplated that lands, whose chief value was derived from the overflow, and whose value would be destroyed by drainage, were of the character described in the grant.

Counsel for the State insist that the question is simply this: "Is land which is clearly too wet for cultivation excluded from the swamp land grant by the fact that other characteristics make cultivation difficult or impossible?"

The question would be more correctly stated by adding: "and which could not be rendered fit for cultivation by artificial drainage."

It appears, however, from the testimony in this case, that the lands not only could not be rendered fit for cultivation, but that to reclaim them from their overflowed condition would destroy their value, and, hence, it can not be presumed that the State intends to reclaim them.

It is stated by counsel that the land in question is shown beyond doubt to be so wet, and so frequently overflowed, as to be of no value for agricultural purposes. Some grass grows upon it which serves for

the pasturage of a limited number of cattle for a few weeks of the year, but upon these tracts, or upon any other tract bearing so much water, the raising of crops is impossible.

This is conceded, but it is also shown that the land could not be reclaimed, and that its chief value is in the irrigated condition in which it is found, and which would be impaired by drainage.

These facts do not appear to be denied by the State, but it is contended that while the scheme declared by the act is reclamation, yet it does not mean that all swamp and overflowed lands must be reclaimed, but that the State might allow the tract to remain in its natural condition, if it is to its interest to do so, and that, if the doctrine of your decision is carried out to its logical extent, the State must show not only the actual character of every tract claimed, but also that it can be reclaimed, and will be reclaimed. This does not follow. When lands are shown to be swamp and overflowed, the presumption necessarily arises that the lands can be reclaimed and made fit for cultivation, and that the State will reclaim them. If the lands are shown to be swamp and overflowed, and *thereby made unfit for cultivation*, they will be certified to the State, and the government will not further interfere to ascertain whether the State has performed its duty in reclaiming the land. But in determining whether lands are of the character contemplated by the grant, all presumptions that may arise in favor of the States may be rebutted by proof.

A very liberal provision was made for the benefit of the State of California by the act of July 23, 1866, which enabled it to facilitate the adjustment of its swamp land grant, and thus avoid the delays attending the examination of the lands by the Secretary of the Interior. The act required the Commissioner to certify to said State as swamp and overflowed all lands reported as such upon the approved township plats, and it further provided that if the authorities of the State shall claim, as swamp and overflowed, lands not so represented, the right to the same shall be determined by testimony taken before the surveyor-general, with the approval of the Commissioner.

The onus was upon the State to show clearly that the lands claimed were rendered unfit for cultivation, and if it is shown by such evidence that the reclamation of the lands would not fit them for cultivation, but, on the contrary, would destroy their chief value, and that it was not the intention of the State to reclaim them, its claim should be rejected.

I am satisfied from the testimony that the lands are not of the character of lands contemplated by the grant, and your decision rejecting the claim of the State is affirmed.

WILSON v. BECK.

Motion for review of departmental decision of July 5, 1892, 15 L. D., 5, denied by Secretary Noble, November 15, 1892.

RAILROAD GRANT—CONFLICTING HOMESTEAD ENTRY.

GRINNELL ET AL. v. HASTINGS AND DAKOTA RY. CO.

Lands embraced within a subsisting homestead entry at the date of the grant of July 4, 1866, are excepted therefrom, although said entry may be canceled prior to the definite location of the road.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

I am in receipt of your letter of October 29, 1892, calling attention to the cases of George D. Grinnell and Calvin D. Perkins *v.* Hastings and Dakota Railway Company, together involving the SE. $\frac{1}{4}$ of Sec. 13, T. 115 N., R. 31 W., Marshall land district, Minnesota.

Said tract is within the primary limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to aid in the construction of the Hastings and Dakota Railroad.

At the date of the passage of said act, the land in question was embraced in the uncancelled homestead entry No. 2034, made by Phillip Shaw, Jr., on April 15, 1865. This entry was, however, canceled upon relinquishment August 4, 1866, and the land being vacant at the date of the definite location of the road, June 26, 1867, it was held to have passed to the grant. *Hastings and Dakota Ry. Co. v. McClintock*, 7 L. D., 207.

During the pendency of the case last referred to, the local officers permitted Grinnell and Perkins to make homestead entries for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section, respectively, and, by your decisions of September 13, and 15, 1890, said entries were held for cancellation for conflict with the grant for said company.

Upon appeal, this Department affirmed your decisions, but directed that said entries be not canceled until opportunity had been afforded the entrymen to secure the company's relinquishment of the lands, under the provisions of the act of June 23, 1874 (18 Stat., 194).

Your letter reports that the parties were duly advised, but that they have failed to secure the company's relinquishment, and that you have deferred final action upon their entries for the reason that, under the recent decision of the United States supreme court in the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), it would seem that the land was excepted from the operation of the company's grant, by reason of the entry by Phillip Shaw, Jr., if said decision is applicable to the grant for the Hastings and Dakota Railroad.

Said decision of the court has been rendered since the cases of Grin-

nell and Perkins were considered by this Department, and, as the cases have not been finally closed, I can see no good reason why they should not be protected in their rights, if any they have, under the construction of the law made in said decision.

Said decision held, in effect, that lands, which, at the date of the grant to the Northern Pacific Railroad Company, were segregated from the public lands within the limits of said grant by reason of a prior pre-emption claim to it, did not, upon the cancellation of such claim, although prior to the definite location of the road, pass to the company, but remained to the United States, subject to disposition as other lands.

While the construction made in that is of a different grant from that now in question, yet both grants are *in presenti*, and there is no material difference in their language, in so far as it affects the attachment of rights thereunder; hence, said decision would apply with equal force to the grant under consideration, and in its adjustment said decision should be followed.

You are therefore directed to apply the construction made in said decision to the cases in question, and, if in your judgment, the parties are protected thereunder, you will re-adjudicate the case.

In that event, however, due notice should be given the company of its right of appeal, as in all other cases made and provided.

FEES OF LOCAL OFFICERS.

There is no authority for allowing the local officers a one per cent commission, in excess of the maximum compensation, for their services in conducting the sale of town lots under the act of September 1, 1888.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

I have considered the appeal of the register and receiver at Blackfoot, Idaho, from your decision of August 2, 1892, declining to allow one per cent commissions to each of said officers upon the proceeds of sale of lots in the town of Pocatello, Idaho, in excess of the maximum compensation allowed by law to registers and receivers of local land offices.

The material facts are these:

By the act of Congress approved September 1, 1888 (25 Stat., 452), the agreement made with the Shoshone and Bannack Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall reservation, in the Territory of Idaho, for the purposes of a town site, etc., was ratified. The fifth section of said act provided that said land should be sold, and it was provided that the sale—

shall be conducted by the register of the land office in the district in which said lands are situate, in accordance with the instructions of the Commissioner of the General Land Office.

In accordance with this provision of law, you instructed the register and receiver to attend to the sale of said land, which duty they performed, and as compensation for such services, they present a claim of one per cent commissions on the amount received as purchase money for said land, in excess of their annual salary of \$3000, each.

This duty was performed in obedience to law. It is true that the receiver was not mentioned in the act as the party to conduct the sale, but it is clear that it was the intention of Congress that the sale should be conducted by the officers in charge of the local land office of the district in which the land was situate, and it was entirely competent for you to issue the instructions you did to said officers, and it was their duty to comply with the same, as a part of the duties of their office, and the compensation for said duties, must form a part of the total annual compensation of such officer, which compensation is limited by law to \$3000 per annum. This view is, I think, sustained by the provisions of sections seven and eight of said act, which provides that the Secretary of the Interior shall fix the compensation of the surveyor for surveying the land, and of the appraisers for appraising the same, and appropriates \$5000 to carry the act into effect, but no mention is made as to the compensation of the officers who supervise the sale of the land.

The register and receiver cite the case of the United States *v.* Brindle (110 U. S., 688), decided March, 1884, in support of their claim. In many respects there is an analogy between the two cases, but I think the claim in question is barred by the following provision of the act of August 4, 1886 (24 Stat., 239), as follows:

Hereafter all fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each year shall be covered into the Treasury, etc.

This would seem to be conclusive in the matter. I am, therefore of the opinion, that your action is correct, and the same is approved.

APPLICATION FOR SURVEY—MEANDED LAKE.

S. P. RANDOLPH.

Conceding that fraud or gross mistake in the original survey will warrant the extension of the surveys over a meandered tract (shallow lake), where the adjacent land has been disposed of, such action should not be taken, after the lapse of time, in the absence of proof of the most positive character.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

I have considered the appeal by S. P. Randolph from your decision of February 15, 1892, denying his application for the survey of a lake, in sections 23 and 24, township 23 north, range 4 east, W. M., Olympia land district, Washington.

The survey of this township was made and approved during the year 1862, the approval of the surveyor-general bearing date of November 10, 1862.

On July 8, 1863, L. V. Wyckoff made homestead entry of the land surrounding the lake in question, said lake embracing about fifty acres. Final certificate issued upon this entry September 4, 1868, and it was patented June 5, 1871.

This land is in the immediate neighborhood of the junction of the White and Black rivers.

On November 28, 1890, Messrs. Copp and Luckett, on behalf of Randolph, applied for the survey of this lake, alleging that in reality no lake actually existed, and that the survey was a fraud upon the government and made by the surveyor in collusion with the entryman.

When opportunity was afforded Randolph to sustain the allegations made, he furnished affidavits showing that the present condition of the alleged lake was, at best, a mere swamp, subject to overflow at times, but containing numerous stumps of heavy timber. As to the alleged collusion, he swears

that he is credibly informed and believes that L. V. Wyckoff, whose homestead claim surrounds said alleged lake, told several of said Wyckoff's friends and acquaintances, at the time said township 23 was about to be surveyed, that he (the said Wyckoff) intended to have a lake of about forty-five acres laid off on his land by the United States surveyor, and advised his (the said Wyckoff's) friends to have the same done for them on their land, for that they might as well have so much extra land, and that deponent's informants are ready to make oath to said information, if brought into court.

It appears that, acting upon this information, you authorized the appointment of a competent party to investigate the matters complained of, and one Lewis D. W. Shelton was designated by the surveyor-general. His report substantiates the allegations made as to the present condition of the lake, and further states that:

All the information I can get as to the character of the lake at the time of the survey indicates no material change since from natural causes, and that it was a low swampy tract of land almost entirely dry during the summer months, and covered with water at times during the fall, winter, and spring, to a depth from four to ten feet, according to the height of the water in the White and Black rivers, which sometimes submerge all the bottom lands of both rivers, etc.

Prior to the designation of Mr. Shelton to make this examination, the surveyor-general had received a letter from Edwin Richardson, who ran the official meander line of this lake, in which he repudiated any charge of collusion in the matter of the survey of this lake, and states that, if given an opportunity, he can prove beyond cavil that at the date of his survey, the water in this lake was from three to ten feet deep; that the height of the water in the river precluded all chances of drainage; that the area of the lake was more than forty acres, and that under his contract and the surveying manual, he was compelled to meander the lake. He further states that:

I was not aware, when I made the survey, and probably very few persons were then aware, that Struck river had long been discharging its waters into White river and increasing its depth above its natural volume; that since, the removal of drifts and artificial causes have prevented the egress of Struck river into White river, to which can be attributed the decrease of water in the lake in question, also a condition which has enabled the drainage of said lake; that since the clearing and plowing of Wyckoff's farm, the annual, swift freshets of White and Black rivers have rushed through the waters of the lake, and partly filled its depths with the surrounding alluvial soils.

Richardson was not advised of the investigation made by Shelton, but there is nothing in the latter's report tending to establish any collusion in the matter of the original survey of the lake.

The original entryman appears to have died, and the present holders of the land are not named.

Due to the lapse of time and the improvement of the country, the land in question, which was, perhaps, not particularly valuable at the date of the entry, is now quite valuable, and it is due to this increase in value that application is now made for the survey of the lake, so that it may be made available to the applicant who is desirous of making entry thereof.

Even if surveyed, it would seem that the proper way to dispose of the land would be to offer it as an isolated and disconnected tract, and not expose to entry under the homestead laws.

After a careful review of the matter, however, you hold that the showing is not sufficient to impeach the original survey, and under the decision of the United States Supreme Court, in the case of *Mitchell v. Smale* (140 U. S., 406), deny the application for the survey of the land.

It is urged that this is not a case of dried up lake bed, but of fraud or such gross mistake as to warrant this Department in disregarding the original survey under which this land was meandered as a lake.

Conceding that fraud or gross mistake in the original survey will warrant the extension of the surveys over a meandered tract, even where the land surrounding that meandered has been disposed of, yet after the lapse of time, as in this case, the proof should be of the most positive character.

In the present case, it will be noticed that the survey preceded the entry by more than seven months, and the proof of fraud is mere hearsay testimony.

I can see no reason to disturb your action denying the application for survey, and the same is accordingly affirmed.

PRACTICE—NOTICE—TIMBER CULTURE CONTEST—APPLICATION.**ELLIS v. ABBE.**

Where a contest is dismissed by the local office notice of such action should be given the contestant's attorney.

On the successful termination of a timber culture contest in which the contestant files an application to enter with the initiation of the suit, said application should be returned for allowance on due showing of qualification and payment of the requisite fees.

A timber culture application filed with a contest, and pending at the passage of the act repealing the timber culture law, is not affected by said repeal; and, on the successful termination of the suit, the contestant is entitled to complete his pending application.

Secretary Noble to the Commissioner of the General Land Office, November 16, 1892.

I have considered the motion filed by John S. Ellis, for the review of departmental decision of May 7, 1892 (L. and R. Press Book, 243, page 382), in the case of John S. Ellis *v.* Mary J. Abbe, involving the NE. $\frac{1}{4}$ of Sec. 20, T. 118 N., R. 76 W., Huron land district, South Dakota.

The facts in the case, briefly stated, are as follows:

On September 13, 1883, Mary J. Abbe made timber-culture entry of this land, against which Ellis initiated a contest in November, 1889, filing an application to enter the land as a timber-culture entry.

Notice issued under said contest, directing that the testimony be taken before the judge of the probate court of Potter county, on December 6, 1889, the final hearing to be before the local office on December 9, 1889.

Testimony was taken on the day named before the clerk of the circuit court for said county, the judge of probate having designated that officer on account of his inability to be at the county seat on that day, the defendant being in default.

On December 10, 1889, the local officers dismissed the contest, because the testimony was not taken before the officer designated by them. Notice of this action was given Ellis by registered letter, addressed to Gettysburg, South Dakota, which was returned uncalled for.

When the record in this contest was considered by your office, on October 7, 1890, you held that the testimony was properly taken under section 7 of practice rule 35, and, as it sustained the charge made in contestant's affidavit, the entry was held for cancellation thereon.

No appeal was taken, and the entry was canceled by your letter of February 11, 1891.

On February 16, 1891, the entry was canceled upon the local office records, and next day notice was sent by registered letter to John S. Ellis, care of his attorney of record, A. L. Ellis, at Gettysburg, South Dakota, advising him of his preferred right of entry.

On March 17, 1891, Ellis, through one S. M. West, his attorney, presented a timber-culture application for this land, which was rejected "for reason of repeal of timber-culture law, on March 3, 1891, and for further reason that affidavit is sworn to outside of State of South Dakota and not within the Huron land district."

An appeal by Ellis was filed April 6, 1891, in which he called attention to his application filed with his contest, and urged that his second application was made merely to show his present qualifications.

On March 20, 1891, three days after the presentation and rejection of his timber-culture application, Ellis, through his attorney, requested you to return his application filed with his contest, in order that he might complete it under his preferred right of entry accorded him as successful contestant.

By letter of April 10, 1891, you held that by his failure to appeal from the rejection of his contest, Ellis lost any rights thereunder and therefore refused to return the application. From this action he appealed, alleging the following grounds of error, viz:

First: The Honorable Commissioner erred in denying a preference right on the ground that no appeal had been taken from the decision of the local officers dismissing the contest, because neither the contestant nor his attorney of record received any notice of such action.

Second: The local officers erred in not sending the notice of dismissal of the contest to the contestant's attorney, A. L. Ellis, at his address, as the same appeared on the contest papers.

Third: That the Honorable Commissioner erred in not returning the contestant's application to enter the land, made and filed with the contest.

Fourth: Erred in holding contestant had waived his right by failing to appeal, for the reason that he has never had notice of dismissal of his right of appeal; therefore he has been denied his day in court; and for other errors apparent in the record.

It was this appeal that brought the case before this Department, resulting in the decision of May 7, 1892, which is now sought to be reviewed.

Said decision held

that the case at bar is controlled by the rule laid down in the case of August W. Hendrickson (13 L. D., 169), that a successful contestant, who delays his application to enter until after the passage of the act of March 3, 1881 (*supra*), the first section of which repeals the statute authorizing timber-culture entries, cannot make entry under the timber-culture law by virtue of his preference right.

The review is based upon the ground that the Hendrickson case is not in point, in that Ellis does not rest upon his application offered after the passage of the act of March 3, 1891, but upon that filed with his contest. It therefore becomes necessary to determine what rights Ellis gained by reason of his application filed with his contest.

It is clear that the entry by Abbe was canceled upon Ellis's contest, but it is held by you that he waived any rights thereunder by his failure to appeal from the erroneous decision of the local officers dismissing his contest. Was proper notice given him of such action, for if it was,

then, under the rulings of this Department, his failure to appeal from the rejection of his contest worked a forfeiture of any rights thereunder.

The record of the contest shows that one A. L. Ellis was authorized to represent the contestant and conducted the case before the local office. Notice of the dismissal of the contest should therefore have been given said attorney, as was done when advising the contestant of his preferred right of entry.

Under the last mentioned notice, the contestant offered his application, which was refused, resulting in the case now before the Department.

As stated in the first part of this opinion, the notice of the dismissal of the contest was mailed to the contestant and was returned uncalled for. This notice I deem insufficient, under the circumstances, and must therefore hold that the contestant is entitled to the fruits of his contest. By virtue of said contest he was entitled to a preferred right of entry for thirty days, and having filed an application to enter with his contest, the same should have been returned for allowance upon his showing that he was still qualified and the payment of the required fees and commissions, and, in the event of his failure to complete his entry within that time, the application filed with the contest would stand rejected. (See circular of August 18, 1887, referred to in case of *Smith v. Fitts*, 13 L. D., 670, also general circular of February 6, 1892, page 75.)

In the present case the application filed with the contest was not returned, but the contestant was advised of his preferred right of entry, and within thirty days tendered the fees and commissions, another application and an affidavit, which was defective, but, as alleged by him, this application and affidavit were filed merely to show that he was still qualified to make entry as originally applied for.

In the Hendrickson case (*supra*), an application was not filed with the contest, while in the present case the application filed by Ellis with his contest was pending at the date of the passage of the act of March 3, 1891, and, as held in the case of *Pfaff v. Williams* (4 L. D., 455), was equivalent to an actual entry, so far as the applicant's rights are concerned, and withdraws the land from other disposition until finally acted on. Ellis's right to complete his pending application was an "accruing" right, and under the terms of the repealing act of March 3, 1891 (*supra*), was not affected thereby.

I must therefore recall and vacate the decision of May 7, 1892, reverse the decision of your office, and direct that Ellis be allowed thirty days within which to complete the application filed with his contest, which should be returned for that purpose.

RAILROAD GRANT—MINERAL LAND.

CASEY ET AL. v. NORTHERN PACIFIC R. R. Co.

Land is mineral in character, and as such excepted from the grant to this company, where the development and its results display such promise that a prudent and reasonable man would be justified in expending money and labor in legitimate mining operations.

Secretary Noble to the Commissioner of the General Land Office, November 15, 1892.

On January 10, 1891, George H. Casey, for himself and co-claimants Francis T. McBride and James E. Jacobs, tendered in the local land office, at Helena, Montana, application for patents for the "Annie Long," "Lone Tree," and "Sin Bad T." lode claims, designated as surveys Nos. 2974, 2975, and 2976, located in Sec. 21, T. 3 N., R. 7 W.

Said application was rejected, for the reason that said land is in an odd numbered section, within the limits of the grant to the Northern Pacific Railroad Company, and was returned by the surveyor-general as agricultural land, therefore *prima facie* subject to the operation of said grant, and was partly included in said railroad company's selection list No. 11.

On January 28, 1891, the said applicants filed an affidavit and petition, duly corroborated, alleging that said land is mineral in character, having numerous quartz leads, extending through the same, which said leads bear gold, silver, and copper, and have been generally known to exist for a long time, and the surface indications are marked and distinct, the said leads cropping in said ground in numerous places, and large portions of said ground being covered with float; that said ground is not agricultural land. The petitioners therefore prayed for a hearing, in order that the character of the land might be determined. Thereupon testimony was ordered to be taken, March 14, 1891, before a notary public, in Butte, Silver Bow county, Montana, and a hearing at the local office on March 21, 1891.

The mineral claimants appeared with counsel and witnesses. The railroad company appeared by its counsel, who offered no witnesses, but cross-examined those offered by the mineral claimants.

On April 30, 1891, the local officers decided, in effect, that said tract is mineral land within the meaning of that term, and therefore was not included in the grant to said company. On appeal, you affirmed their decision, by letter of December 23, 1891. An appeal has been taken by said company to this Department.

The chief contention of said company is that it is not proved that said lands contain mineral of "sufficient quantity and promise to justify expenditure for its extraction and for their further exploration," and therefore it does not appear that they are more valuable for mining than for agricultural purposes.

The 3d section of the act of July 2, 1864 (13 Stat., 365), excludes "all mineral lands" from the operation of the act making the grant to said company.

It is a fair presumption that the above contention by the company presents the issue as favorably for their interests as the law permits. It is sufficient therefore to determine the issue as thus presented, without passing upon the question whether or not it states an accurate rule for determining what is "mineral land" within the true meaning and intent of said provision. It is not easy to lay down a rule that would fit all cases.

The local officers stated their understanding of the term "promise," as used in the company's contention, as follows:

Where the development and its results display such *promise* that the prudent, reasonable man would be justified in expending money and labor in legitimate mining operations, untainted by an appearance of speculation, the land must be held mineral, within the meaning of that term, as used in the granting act. If it was held otherwise, the mining industry, so far as it pertained to odd sections within the grant, would be paralyzed. The rule is that paying mines are only shown to exist after years of labor and much money are expended in their development. Prospectors don't find riches on the surface. Profit is not received from the grass roots down. They must have an opportunity given them to open the mine as their means will permit.

Applying this understanding to the company's contention, the local officers found that the evidence established the fact that said lands contain mineral of "sufficient quantity and promise to justify expenditure for its extraction and for their further exploration" within said contention, and were mineral lands within the meaning of said act.

I do not see that the company was wronged by this construction, either of their contention or of the meaning of said act.

The facts are fairly stated in your decision, and the following conclusion is reached:

In my judgment the evidence shows the existence of mineral in all the claims of sufficient quantity and promise to justify expenditure for its extraction and for their further exploitation, and therefore that the land embraced in the Lone Tree, Annie Long, and Sin Bad T. mining claims is mineral land in the sense that that term is used in the act granting land to said railroad company.

It thus appears that the local officers and yourself concur in opinion that the evidence in the case establishes the fact that the lands in dispute are "mineral" within the contention of the company and within the meaning of said act, and are excluded from the company's grant.

Such concurring opinions should be held conclusive by this Department, unless clearly wrong. I fail to see that any wrong has been done to the company in those decisions.

Your judgment is affirmed.

RELINQUISHMENT—PREFERENCE RIGHT.

TALBOT v. ORTON.

A preferred right of entry is not secured by the purchase of a relinquishment.

Secretary Noble to the Commissioner of the General Land Office, November 16, 1892.

I have considered the case of *Cordelia Talbot v. J. A. Orton*, involving the SW. $\frac{1}{4}$, Sec. 1, T. 15 N., R. 22 W., North Platte land district, Nebraska, on appeal by Orton from your decision of November 25, 1891, awarding Talbot thirty days preference right within which to make entry of said land, and holding timber-culture entry by Orton for said land subject to such right.

This tract was formerly embraced in the timber-culture entry of one Peter Mickle, made December 5, 1883, against which an affidavit of contest was filed by Orton, on November 14, 1888, the hearing being set for January 21, 1889.

On December 5, 1883, Mickle's relinquishment was filed in the local office, and thereupon his entry was canceled, and on the same day Orton was advised of his preference right of entry by reason of his pending contest. On the following day he made timber-culture entry No. 12,584 for the land, which is still of record.

On January 8, 1889, Talbot filed a contest against the entry by Orton alleging that she had purchased Mickle's relinquishment for \$500; that its filing was not the result of his (Orton's) contest; that Mickle had complied with the law to the date of the contest, and that Orton's contest was not filed in good faith, but for the purposes of speculation.

After several continuances, the case was heard upon said affidavit, resulting in the decision of the local office dismissing the contest, from which Talbot appealed to your office.

Your decision of November 25, 1891, reversed that of the local officers, holding that the relinquishment was an independent transaction, and not the result of Orton's contest; that the evidence failed to sustain the charges made in said contest against Mickle's entry, and therefore awarded Talbot thirty days preference right of entry.

The grounds of error alleged in the appeal from your decision are as follows:

1. The Commissioner erred in awarding the preference right of entry to Cordelia Talbot, because she had previous to the filing of Mickle's relinquishment purchased same.

2. Error in not holding that Orton acquired the first legal right to the land by virtue of his entry made on December 6, 1888, after cancellation of Mickle's entry, irrespective of any contest under the act of May 14, 1880, or any right awarded him thereunder; the land being public land of the United States after Mickle's relinquishment, subject to entry by the first legal applicant, and Orton being such first applicant.

3. Error in finding and holding that Talbot acquired any legal right to the land in controversy by inducing Mickle to relinquish to the United States, even admitting, as found by the Commissioner, that the filing of said relinquishment was an independent transaction, and not the result of Orton's contest.

4. Error in not holding that in order to acquire *any* right of entry, it was necessary for Talbot to present an application to enter after the cancellation of the prior entry of Mickle and prior to any other legal applicant.

5. Because there is no authority of law permitting the Commissioner to award a preference right of entry for thirty days to other than a contestant under the act of May 14, 1880, and Cordelia Talbot is not such contestant.

6. Error in assuming, in the absence of service and of the notice of contest from the record, that no service was made on Mickle, in view of the statement by the local officers that "personal service" was made.

7. Error in reversing the decision of the local officers.

8. Because said decision is in other respects contrary to the facts and the law.

After a careful examination of the record, I am of the opinion that the appeal is well taken, even to admit that Orton gained nothing by reason of his contest, yet I must reverse your decision, as the only ground upon which rests your award in Talbot's favor is that she had purchased Mickle's relinquishment. She did not gain a preference right of entry by that transaction, and as the land was subject to entry upon the filing of Mickle's relinquishment, it must be held that the allowance of Orton's entry was proper.

It is true that he was notified of a preferred right of entry, and acting under said notice made entry of the land, but if it be conceded that it was wrong to award him a preferred right of entry, yet this in nowise benefits Talbot. More than one month after his entry was allowed she sought to contest it, and upon what ground?

The only allegation made therein that would defeat his right under the entry allowed is that recognized by you, viz: that the purchase of the relinquishment gave her a preferred right of entry.

That a purchaser of a relinquishment can acquire no rights by virtue of his purchase has been repeatedly ruled by this Department. Had she tendered an application for the land with the relinquishment of Mickle's entry, or before Orton made entry of the land, and appealed from its rejection, she would have then been in a position to have questioned his rights under his entry.

So far as the records show, she stands alone on her contest, which must, for the reasons stated, be dismissed.

Your decision is therefore reversed, and Orton's entry will stand.

SETTLEMENT—PREFERENCE RIGHT—WAIVER.

CUTLER *v.* HENDERSON.

A settlement made subject to the right of a successful contestant defeats the subsequent entry of another who files a waiver of the contestant's preferred right.

Secretary Noble to the Commissioner of the General Land Office, November 16, 1892.

This case involves the NW. $\frac{1}{4}$ of Sec. 34, T. 19 S., R. 23 W., Wa-Keeney land district, Kansas.

Philip M. Henderson made homestead entry of said tract April 2, 1888, and on the 7th of the same month Joseph H. Cutler initiated a contest against said entry, alleging prior settlement on the land and at the same time filed application for said tract under the provisions of the act of May 14, 1880 (21 Stat., 140).

At the day set for hearing, July 10, 1888, both parties appeared with counsel and witnesses and submitted testimony in the case.

The local officers found for the contestant and recommended the cancellation of Henderson's entry, whereupon the defendant appealed and under date of October 15, 1891, you reversed the judgment below and dismissed the contest.

The record shows that one Boggs had successfully contested a previous entry covering said land; that the defendant on Saturday, March 31, 1888, entered into an agreement to purchase of said Boggs the improvements upon the land consisting of a house, well and several acres of land broken for \$300, Boggs to relinquish or waive his preference right of entry; that on Sunday morning April 1, 1888, defendant went upon the land and examined the same; that he found no one occupying the land in question; that he immediately started for the local office at Wa-Keeney and on Monday morning April 2, as soon as the office was opened, Boggs executed waiver of his preference right and the defendant was allowed to make homestead entry of the land.

Sunday afternoon April 1, 1888, after the defendant's visit to the land, plaintiff established a residence upon the tract with his family; that they occupied a tent while erecting a house; that on April 2, the house was far enough advanced to admit of occupancy by the family; that on April 4, the house was completed and on April 7, following, plaintiff filed application at the local office to enter the land under the homestead law.

The question in this case is simply: which of these applicants has the prior or better right to the land in dispute.

It is shown by the evidence that the contestant was actually an occupant of the land April 1, 1888, whereas the entry of plaintiff was not made until April 2nd.

It is a well settled principle that the preference right of a successful

contestant is personal and can not be transferred. *Welch v. Duncan et al.* (7 L. D., 186).

Therefore the defendant in the case at bar acquired no preference right to enter the land by reason of his agreement and purchase from Boggs, while on the other hand, a prior settlement right must be recognized.

There is no question that the settlement of the contestant was subject to the preference right of Boggs, but when said Boggs waived all claim to said preference right, the settlement right of the contestant took effect immediately and the entry of the defendant therefore must give way to the superior claim of the contestant.

I find nothing in the record presented showing bad faith on the part of the contestant and therefore can not sustain your views on that point. The fact that the contestant was aware that there were other parties striving to make entry of the land at the date of his settlement should not militate against him; such cases are common and there can be no just reason or presumption that a fraud was intended. Furthermore, I see no bad faith on the part of the contestant in seeking to enter the land in dispute, under the homestead law, notwithstanding the fact that he had formerly contested an entry and filed an application to enter the land in controversy. There is no limit to the number of entries a person may contest, and if a person contest an entry and subsequently decides not to wait for his preference right but make entry of another tract, I can see no reason, if he is properly qualified, why he should not be allowed to do so.

With this finding in the case, your decision is reversed, and the entry of defendant should be canceled and the application of plaintiff accepted.

PURCELL *v.* NORTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of May 28, 1892, 14 L. D., 574, denied by Secretary Noble, November 19, 1892.

CONTEST—APPEAL—CHARGE OF FRAUD—CONFIRMATION.

LEVESQUE *v.* ARMSTRONG.

Under a contest that is held speculative by the local office, and on appeal results in an order of the General Land Office cancelling the entry without passing on the right of the contestant, no appeal from said decision is required for the protection of the contestant's interest.

A final entry should not be canceled on a charge that it was made in the interest of another except upon evidence clearly establishing said charge.

Where a contest is dismissed upon its merits a motion for confirmation under section 7, act of March 3, 1891, filed therein, will not be considered.

Secretary Noble to the Commissioner of the General Land Office, November 19, 1892.

This case presents the spectacle of a man having made entry for a tract of land under the pre-emption laws, which he transfers to others, and, after the lapse of several years, now appears as the chief witness in support of a contest to prove that he took the land for those to whom he transferred, instead of himself, upon which two hearings have been had, at which the nominal contestant did not appear, and the real parties can not be discovered.

The land is very valuable, and from the liberal use of money and the general character of the witnesses presented, it is difficult to arrive at a proper understanding of the facts.

On December 29, 1881, Armstrong filed declaratory statement No. 2434, for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 7, and the S. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 8, T. 62 N., R. 14 W., Duluth land district, Minnesota, alleging settlement thereon August 10, 1881, and, in accordance with published notice submitted proof, upon which cash certificate No. 6316 issued, April 10, 1883.

On May 25, 1883, he, together with his wife, conveyed by warranty deed, an undivided half interest in and to said land to Margaret Lonsdorf, and on said day conveyed the remaining undivided half interest in the land to the Minnesota Iron Company. In each deed the consideration mentioned is \$500.

On October 20, 1886, your office ordered a hearing upon an affidavit of contest, sworn to by Levesque, alleging that Armstrong did not comply with the law in the matter of residence and improvements, and that his entry was not made for a home, but for speculative purposes.

Hearing was had, February 9, 1887, at which Armstrong appeared, and upon the testimony adduced the local officers recommended that the entry be canceled, but in their opinion it is stated, referring to Armstrong, "at the time he appeared before us and gave his evidence in the case at bar, it was very clearly evident that he was recovering from a spree or debauch of so long duration that his nerves were totally unstrung, and he was unable to sign his name or hold up his head like a man."

On the application of Margaret Lonstorf, based upon the ground that she had no notice of the former hearing, a rehearing was ordered by your office, which took place on September 5, 1888.

Upon this second hearing, the local officers found that the contest is entirely lacking in good faith, is speculative, illegal, and fraudulent, and should be dismissed.

As to the entry, it was held:

Here is a property of very great value, in the immediate neighborhood of which its owners have expended millions in development and improvement since this entry was made, a property presumed to have been acquired in good faith and for valuable consideration, that is made the subject of what is, from any point of view, a vile conspiracy by parties unscrupulous and reckless as to means for success. Such title can not be overthrown in any case, save by proof clear, reliable and convincing. Such testimony has not been tendered here, and we recommend that the contest be dismissed and that said entry be not canceled.

Upon appeal, your office decision of May 2, 1890, held that Petter Armstrong took this land for the Minnesota Iron Company, and you thereupon canceled the same, without considering the rights of the contestant, and directed that the parties be notified, giving the usual time for appeal.

From your action appeals are taken on behalf of Margaret Lonstorf and the Minnesota Iron Company.

Since your decision, numerous applications have been made to locate the land with scrip and to enter the same under the homestead laws—all of which have been rejected by the local officers and are now pending on appeal from such rejection.

The contestant did not appeal from your decision, and it is urged, in a brief filed in support of the Minnesota Iron Company's appeal, that by such failure he is no longer in the case. With this I am unable to agree.

Your office decision quotes from several opinions, to show that where a contest is fraudulent and speculative, no rights are acquired thereby, but that the government is not prevented from taking advantage of the facts proven at the hearing.

Thereupon, the entry is canceled, but the recommendation of the local officers that the contest be dismissed is not passed upon, nor is there any finding on the part of your office that the contest is speculative or fraudulent.

I am therefore of the opinion that an appeal was unnecessary in order to protect whatever rights Levesque gained by reason of his contest, and that he is now before this Department.

The testimony taken at the hearing shows that Etienne Levesque is an ignorant French Canadian, not speaking English; that he was induced by others to swear to the affidavit of contest for a consideration; that he was not present at either hearing and could not be induced to appear, after great efforts on the part of the defense, unless he was paid the enormous sum of \$25,000.

Several parties are suggested as the real instigators of this contest, but, as to who they are, it is unnecessary to inquire. It is apparent, however, that money has been freely used in maintaining this contest, and that the nominal contestant is not the real party.

This will not deprive the government from taking advantage of the facts disclosed at the hearing, for it has been repeatedly held that "the government is a party in interest in every contest and will take care, so far as possible, that every applicant for public lands shall show good faith in every act." (*Dayton v. Hause et al.*, 4 L. D., 263.)

The records show that on October 27, 1881, prior to the filing by Armstrong, Mills B. Hinsdale, by Jacob Zimmerman his attorney in fact, located his soldier's additional homestead right upon the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 7, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 8, T. 62 north, R. 14 west, being part of the land in dispute.

The testimony shows that Zimmerman had been prospecting in this country, and selected the tracts just mentioned, upon which he settled intending to pre-empt the same. Learning that he was disqualified, he attempted to secure the land by the location of scrip, in connection with Nicholas Lonstorf (husband of one of the present claimants), and afterwards by the location of the additional homestead right just referred to.

Armstrong was permitted to file for the land, under the practice then prevailing, notwithstanding the additional homestead location made prior thereto, he having alleged settlement prior to such location. After this filing Zimmerman sold out to Lonstorf.

Armstrong made proof and certificate issued April 10, 1883.

Prior to filing for this land Armstrong, in company with others, in the employ of persons who afterwards incorporated the Minnesota Iron Company, had been prospecting in search of lands containing iron ore. Such employment ceased in September, 1881, and at the instance of one of his companions, Armstrong filed for the land in question. In the spring, following his filing, he moved his family upon this land, and to date of proof, and for about a month thereafter, they continuously resided thereon and improved the land.

Lonstorf did not appear and protest when Armstrong offered proof, but on June 18, 1883, he executed a quit-claim to the United States, and applied for the return of the soldier's additional homestead certificate in the name of Hinsdale. Prior to this time—to wit: May 25, 1883—Armstrong conveyed an undivided half of his claim to Margaret Lonstorf and the remaining half to the Minnesota Iron Company.

There can be no question but that the conveyance to Mrs. Lonstorf was the result of a compromise and that the withdrawal of the additional homestead location was, at least, a part consideration.

As to the connection between Armstrong and the Iron Company, it is shown beyond question that, while living upon this tract, he was furnished with provisions at the company's store, but it appears that he

was duly charged with the same in his own name upon the books of the company. This was the only store in the vicinity of the land, and, having been in the company's employ, the fact that credit was given him for goods purchased at the store, and the account after the purchase of the land by the company transferred to some general company account, is, as held by the local officers, nothing more than "an ordinary business transaction, not to be held otherwise unless on reliable testimony." Armstrong swears that he was in the employ of the company all the time that he was holding this land, at a salary of \$50.00 and provisions, and that the entry was made at its instance and for its benefit. His testimony, at the time of the offer of proof and at the hearing, shows him to be unworthy of belief.

The local officers find from his character as shown by himself, that no conscientious motive influenced him in appearing in these proceedings, and that he was secured by the promise, or payment, of a reward commensurate with the immense value of the property which developments, made since the entry, have shown it to possess.

There are certain circumstances that would seem to corroborate Armstrong in his testimony given at the hearing, the chief one of which is the fact that the company offered no testimony at the hearing and made no attempt to sustain the entry.

After deeding the land, Armstrong moved upon a farm belonging to the company, where he continued to reside until after the institution of this contest, when, of his own accord, he left their land to live elsewhere.

As against the testimony of Armstrong, his wife swears that when going upon the land she supposed they were taking it for a home for themselves. As to just when she found out otherwise the testimony is confusing, but it would seem to be about the time of deeding the land to the company and after the submission of final proof.

There is no question but that Armstrong and his family lived continuously upon the land for about fourteen months. This, of itself, is a circumstance in favor of the entry, for it is well known that entries made in the interest of others usually show but scant compliance with the requirements as to residence.

In this instance, at the time of making entry, the land here involved was in a wilderness, many miles from a settlement, and it is not reasonable to suppose that a man would take his family through the hardships necessary to a residence in such a place, for the consideration alleged to have been promised.

The record does not show that wages were paid as alleged.

There is no corroborative testimony worthy of serious consideration. None of the witnesses, aside from Armstrong, give any positive testimony that connects the company, or any individual in its employ, with the making of this entry. They are all willing to express their opin-

ions, but it is evident that they are under the same influence as the entryman.

The opinion of your office does not review the facts, but seems to rest upon the ground that Armstrong's testimony is uncontradicted.

The opinion of the local officers, of January 10, 1889, upon the second hearing, is based upon a very carefully prepared review of the testimony, which was taken before their office, and much weight is given thereto.

I am unable to find from this record that the Minnesota Iron Company unlawfully procured Armstrong's settlement and entry of this land, or that their purchase from him was otherwise than a *bona fide* transaction.

While bad faith may be suggested by the record, yet, as two hearings have been had, and the principal witnesses are shown to be under the influence of others and unworthy of belief, it is deemed inadvisable to order a further investigation.

A motion has been made in this case for confirmation of the entry under section 7 of the act of Congress approved March 3, 1891 (26 Stat., 1095), but as the contest should be dismissed on its merits, I must decline to pass upon the motion. *Colburn v. Pittman*, 12 L. D., 497.

The contest by Levesque is therefore dismissed, and the order of your office canceling the entry is set aside, and you will reinstate the same upon the records. All applications presented since your order of cancellation will stand rejected.

ENTRY—EXCESSIVE ACREAGE—APPROXIMATION.

JAMES HAMPTON ET AL.

Approximation will not be required under a re-survey, where, under the approved survey existing at date of final certificate, the acreage included is not in violation of the rule. The patent in such case should issue in accordance with said final certificate.

Secretary Noble to the Commissioner of the General Land Office, November 18, 1892.

I have considered the appeal by the Winfield Mortgage and Trust Company, mortgagee of James Hampton, who made Osage entry, application No. 8838, certificate No. 21,378, for lots 3 and 4, Sec. 7, and lots 1 and 2, Sec. 18, T. 33 N., R. 10 W., Wichita land district, Kansas, from your decision of July 15, 1890, requiring that the entry be approximated to one hundred and sixty acres.

This case was first transmitted on appeal November 13, 1890, but was returned that said company might disclose its interest in the land.

Under this requirement the treasurer of said company made affidavit

to the following effect: that on or about January 1, 1887, the said James Hampton mortgaged the land in question to said company for \$450, the company relying upon the record title, and that all of said loan is now due and unpaid.

Although said mortgage was executed prior to March 1, 1888, yet it was prior to the final payment upon said entry, and under the holding in the case of the Colonial and United States Mortgage Company (15 L. D., 348), the confirmation provided for by section 7 of the act of March 3, 1891 (26 Stat., 1095), can not be invoked.

In the present case, however, I am of the opinion that the entry should be patented under the certificate as issued, and that an approximation is unnecessary.

The final payment was made upon said entry, and certificate issued February 17, 1887.

This township was first surveyed and the plat approved July 13, 1871. Under this plat Hampton paid for and received certificate for the land, the total acreage being 170.96 acres.

The allowance of the entry was regular as the excess was but 10.96 acres, while to eliminate either lot, under the survey of 1871, would leave the entry more than thirty-two acres short of one hundred and sixty acres.

It appears, however, that on April 27, 1887, or more than two months after Hampton had paid for and received certificate for this land, a second plat of survey of this township was approved by you. Under this second plat all of the lots in question were increased in area, so that together they aggregate 204.58 acres, and were the entry now made, under this second plat, approximation would be necessary.

Hampton's entry was, as before stated, completed prior to the approval of this second plat, and the mere fact that, due to the volume of business, or other causes, a patent was not issued thereon before the approval of said plat will not authorize your action in requiring the approximation of said entry thereunder.

Your action is therefore reversed, and patent will issue upon said entry, in accordance with the certificate already issued.

HANSCOM v. SINES ET AL.

Motion for review of departmental decision of July 9, 1892, 15 L. D., 27, denied by Secretary Noble, November 18, 1892.

CONTEST—CONTRACT—FRAUD—OKLAHOMA LANDS.

HAGAN v. SEVERNS ET AL.

A party who seeks to rescind a contract for the withdrawal of a contest, and defeat a dismissal based thereon, on the ground that said contract was procured through fraud and misrepresentation, should establish the charge by clear and irrefragable evidence, and tender return of the consideration received.

One who is lawfully within the territory of Oklahoma at the opening thereof but takes advantage of his presence to secure land in advance of others is not qualified to perfect title.

Secretary Noble to the Commissioner of the General Land Office, November, 18, 1892.

I have considered the case of Hagan v. Severns involving the SE. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 2 W., Guthrie, Oklahoma.

On April 22, 1889, Perry Twichell filed through his agent, a soldier's declaratory statement for said land, and on April 23, 1889, James O. Severns made homestead entry for the tract.

On May 18, 1889, John H. McGuire filed an affidavit of contest against the homestead entry of Severns, alleging illegality, also disqualification on the part of the entryman, etc.

On December 13, 1889, Horace H. Hagan filed an affidavit of contest against the said entry of Severns, based upon the same charges.

After a trial at the local office, the register and receiver rendered a decision in which they recommended that the homestead entry of Severns, and the soldier's declaratory statement of Twichell, be cancelled; and the contest of John H. McGuire be dismissed, and that the preference right of entry be awarded to Horace H. Hagan. On appeal, you, on February 23, 1892, rendered a decision, in which you held the homestead entry of Severns for cancellation, also the soldier's declaratory statement of Twichell, dismissed the contest of Horace H. Hagan, and awarded the right of making homestead entry to John H. McGuire.

Severns, Twichell and Hagan appealed.

On April 19, 1892, counsel for Hagan filed the relinquishment of Perry Twichell of all his right, claim, and interest to the tract in question. His appeal is therefore dismissed, and the only remaining parties in interest are Severns, McGuire and Hagan.

On February 25, 1892, John H. McGuire, the successful contestant under your decision, filed in the local land office the following dismissal of his contest, and waiver of any and all claim of interest as a settler or contestant, to the land in question:

In the United States Land Office, Guthrie, O. T.

HORACE H. HAGAN et al. }
v.
JAMES O. SEVERNS et al. }

Dismissal of Contest.

Comes now John H. McGuire one of the parties to the above action, and dismisses his contest heretofore filed in said cause, and hereby waives any and all claim of

interest as a settler or contestant in and to the southeast quarter of section 5, township 16 north, range 2 west, and asks that this dismissal be filed of record.

JOHN H. MCGUIRE.

Subscribed in my presence this 25th day of February, 1892.

JOHN J. DILLE,
Register.

and the same was duly transmitted to you by the local officers.

On March 3d, 1892, McGuire, by telegram, requested you not to receive his dismissal of his contest, stating that the same was obtained through fraud and misrepresentation, and while he was drunk.

On March 4, 1892, McGuire filed in the local office his application for a re-instatement of his contest. This application was supported by his affidavit in which he states,—

That through fraud he was induced on the 25th day of February, 1892, to execute a waiver of his contest, a copy of which is as follows:

GUTHRIE, O. T., Feb'y. 25th, 1892.

\$2,000.

For and in consideration of the sum of two thousand dollars I hereby dismiss my contest to the SE.^{1/4}, Sec. 5, T. 16 N., R. 2 W., filed in the General Land Office now pending before the Hon. Commissioner, General Land Office, Washington, D. C., and I hereby waive any and all interest in and to said land by virtue of said contest or my settlement on said land. I reserve the right to at any time within four months remove my improvements placed by myself on said land and agree to surrender the cultivated portion of said land which I now have possession of, about forty-five acres, to Horace H. Hagan by August first, 1892, except eight acres rented to Dan'l Fagen and said eight acres to be surrendered when crop is harvested.

Witness my hand this 25th day of February, 1892.

(Signed) JOHN H. MCGUIRE.

(Witness) FRANK DALE.

He further states that this dismissal was obtained through fraud and misrepresentation of Harper S. Cunningham, attorney for Horace H. Hagan and Frank Dale and H. V. Jones. He proceeds at length as follows:

That on the 25th day of February, 1892, H. V. Jones came to this affiant while harrowing ground on the tract in contest and said that Frank Dale wanted this affiant to come to him (Dale's) office on important business, that affiant asked what business Dale wanted with him, to which Jones said that he did not know that after this affiant accompanied Jones one half way, said Jones said to this affiant that he thought "they" meaning Harper S. Cunningham and Frank Dale wanted to buy this affiant out. This affiant then and there stated to said Jones that they could not do that, for he would not sell, Jones advised this affiant to sell to them because they had an abundance of money and would law this affiant ten years. That on reaching the land office he met Frank Dale and he took me out behind the land office and said he had been persuading Harper S. Cunningham to buy this affiant off, and that the Hagans were very rich, and could get \$2,000 now if this affiant would withdraw his contest. This affiant told him (Dale) that he did not want to sell, that he had received a letter from the Commissioner informing this affiant that his case would be reached in ten months, and that he would not give up his home. That this affiant left Dale and Jones heretofore referred to followed this affiant still advising this affiant to sell. That this was about twelve o'clock February 25, 1892, at which time this affiant asked the clerk of the land office if there was any news from the Com-

missioner regarding the decision in his case. The reply was that no information was as yet received. That this affiant then left and went home after being treated to beer by Jones. That Dale and Jones had this affiant to agree to come back to town after dinner. That this affiant tenaciously refused to part with his right to said land and all these times for any money and so told them. That on arriving home this affiant felt very sick and having whisky in the house partook of the same. That this affiant then went back to town and was met by Jones who treated this affiant to beer and that this affiant evaded Dale and Jones and went into DeFord's gambling rooms on Second street in the basement of the DeFord building. That this affiant was again confronted by Jones who induced this affiant to go with him, that he, Jones, took this affiant to Frank Wyatt's saloon on the corner of Harrison and Second streets, and again treated this affiant to beer. That this affiant became drunk and continued so the remaining of the afternoon, and after drinking with Jones in Wyatt's saloon this affiant was met by Dale who said to this affiant, where have you been, I (Dale) have been hunting you, further saying come and go with me to my office, and while going up the steps to Dale's office, Dale said I have got \$2,000 in my pocket for you. This affiant then said that he did not want the money, Dale said that if affiant would take the money that it would be the best day's work the affiant ever done, and that they will beat you. Dale saying that I am getting this money for you. This affiant said that he did not want money but that he wanted his home. Dale then said that would be impossible and that this affiant had better take the \$2,000. That this affiant at that time was full of whisky and beer and was mentally helpless. While thus under the influence of liquor he signed what was a dismissal of his contest and a waiver of all his rights. That the signing of said instrument was not a voluntary act of this affiant with the purpose of dismissing his preference right to said tract of land. That said tract of land is worth \$25,000 and that he as the Hon. Commissioner found was the only legal settler ever on said tract of land.

On the back of this application is the following indorsement:

I, Harper S. Cunningham, attorney for H. H. Hagan acknowledge service of copy of the foregoing papers, but state that no tender of offer to return the \$2,000 paid J. H. McGuire for his relinquishments and improvements has been made. 3, 4, 92.

HARPER S. CUNNINGHAM,
Atty. for Hagan.

On May 17, 1892, Alfred N. Mitchell made affidavit that he was with McGuire "on or about the 24th day of February, 1892, between the hours of three and four o'clock p. m., and that he took several drinks with the said McGuire the said drinks consisting of beer and whisky"—that about four o'clock McGuire left saying that he was going up to Frank Dale's office stating that Dale had sent for him requesting that he call and see him as he (Dale) wanted to see him on business, that

"the next time I saw McGuire was the next day following and he informed me that he had been prevailed upon to sign a relinquishment of his claim while he was intoxicated. That in my judgment when the said McGuire went to Dale's office he was under the influence of liquor and unable to perform any business properly."

Mitchell does not state when he formed this opinion, whether at the time they were drinking together, or nearly three months subsequent.

On May 17, 1892, A. A. Millis made the following affidavit:

Personally appeared before me the undersigned A. A. Millis who upon his oath deposes and says that he is acquainted with John H. McGuire and that he was in

company with the said John H. McGuire at Sunfield's saloon, Guthrie, O. T., on or about the 24th day of February, 1892, affiant avers that he took several drinks of liquor at the time above stated with the said McGuire and Al. Mitchell, that McGuire left the saloon to go to lawyer Dale's office, stating that Dale wanted to see him on business. Affiant further avers that the said McGuire was under the influence of liquor at the time he left the saloon to go to Dale's office. Affiant further avers that it was to the best of his recollection about four o'clock in the afternoon of the day above named.

Under the circumstances, the question might be raised as to Millis' ability to form a correct estimate as to the condition of McGuire at the time named. It will be observed that the day fixed by these parties is one day earlier than the day the dismissal of the contest was executed. On May 6, 1892, Martha J. McGuire made affidavit that she is the wife of John H. McGuire, that on February 5, 1892, about two o'clock said McGuire complained of being sick and went to the safe and took a pint flask of whisky and drank about half of it, that when he came home about five o'clock he was drunk and did not seem to know what he was doing. Rebecca Paester corroborates this statement.

This is all the evidence introduced by McGuire in support of his allegation that he was drunk when he executed the dismissal of his contest; and this evidence, except his own statement, was not furnished until some months after the transaction took place. It is unsatisfactory in the extreme and is far from convincing that McGuire was in such a condition that he was not fully aware of the nature of the act performed by him.

The instrument in question was acknowledged in due form before the register of the land office, and it is but reasonable to assume that said officer would have refused to have taken his acknowledgement had McGuire's appearance indicated that he was not in a proper condition to perform so important an act.

In the record before me the signature of McGuire appears many times; the one to the instrument in question in no way indicates that it was written by a drunken man. Again in that instrument signed by McGuire on February 25, 1892, it will be observed that he was careful to reserve to himself the privilege of removing his improvements in four months from date and surrender the possession of the cultivated land August 1st, 1892, all except eight acres rented to Daniel Fagen, which was to be surrendered when the crop was harvested. These details do not indicate the act of a drunken man who can be held irresponsible for the acts performed by himself.

Frank Dale was the person who negotiated the purchase of the relinquishment in question. He makes affidavit that he saw McGuire on the morning of February 25, and at no time during the day until after he signed the relinquishment, "did he have the appearance of being intoxicated or in the least being under the influence of liquor."

In my opinion, McGuire has wholly failed to sustain the allegation made by him, that at the time he dismissed his contest and relinquished

his claim, he was in the condition of mind which prevented a just realization of what he was doing.

The only evidence that his relinquishment was obtained through fraud and misrepresentation, and that it was the result of a conspiracy against him, carried out by Harper S. Cunningham, Frank Dale and H. V. Jones, consists of the statements made by him in his affidavit heretofore quoted. This of itself could not be taken as conclusive evidence of so grave a charge even if it was not contradicted; but it is contradicted in the most positive manner by the parties to the alleged conspiracy. It will be recalled that the decision of the local officers was adverse to McGuire. H. S. Cunningham, attorney for Hagan, has made affidavit in which he states:

Harper S. Cunningham of lawful age being first duly sworn on his oath says: that he has been the attorney of Horace H. Hagan in the above entitled cause ever since the trial thereof began: that frequently since the decision of the local office he has been approached by emissaries of John H. McGuire who had for their purpose the selling of said John H. McGuire's interest in said land to said Horace H. Hagan; that he has understood from said persons that McGuire was at all times ready and willing to sell his interest in said land for the sum of two thousand dollars; that at the time he accepted his proposition to sell his interest for the sum of two thousand dollars he did not know that the case had been decided in favor of McGuire; that there was no collusion or conspiracy to defraud McGuire in any way, but that said purchase was consummated by simply accepting what had been a long standing offer on the part of McGuire that when the said McGuire served notice of his application to reinstate his contest case he did not tender or offer to pay said sum of two thousand dollars or any part thereof, but has stated repeatedly as affiant is informed and believes that he did not intend to return the money but proposed to beat Hagan out of both the money and the land and affiant charges upon such information and belief that such is the fact.

Frank Dale, the party who negotiated the purchase of the relinquishment, states in an affidavit, that during the month of December, 1891, McGuire came to him and requested his assistance in procuring a compromise with Hagan through Cunningham his attorney McGuire to relinquish all his claim to said land as contestant or settler; that Cunningham told him that he would advise his client Hagan to pay a small sum for the same, but Dale, having understood that McGuire wanted \$2,000 for his claim, came to the conclusion that nothing could be done in the matter. On February 24, 1892, Cunningham asked him (Dale) to see McGuire and procure a relinquishment of his contest. That on the morning of February 25, he asked H. V. Jones to tell McGuire that he (Dale) wanted to see him. That McGuire came to the land office where he (Dale) was trying a case, and he told him that Cunningham desired to procure his relinquishment and that he thought it might be best to consider the matter as they, Hagan and Cunningham, were in a mood to buy, and that he (McGuire) could procure a reasonable sum for such relinquishment; that McGuire said that he would sell if he could get what he thought his interest was worth, viz., \$2,000, also that he had planted some crops and rented a portion

of the land and he could not very well give up possession at that time; that he (Dale) informed him that he thought he could obtain for him the right to remove his improvements, also the use of the land under cultivation, about forty-five acres; that he (Dale) saw Cunningham and submitted the proposition made by McGuire; that Cunningham desired time to telegraph Hagan;

I stated to McGuire that Cunningham desired time to telegraph to his client for instructions, that I could not tell whether his proposition would be accepted or not, that Cunningham stated that he would probably get a reply in the course of two or three hours; I told McGuire to go home and return in the course of that time; about two o'clock p. m., McGuire came to the land office and asked me if I had heard anything further; I stated that I had not but probably would in the course of a short time, he then stated to me that he would be around the land office or the principal corners of the streets near the land office, and when I heard from the parties to let him know; about three o'clock of the same afternoon Cunningham came to me and told me that he had instructions to accept the proposition of McGuire and I stated to him to get me the money and I would close the deal; he gave me the money, not seeing McGuire, I asked one Eben Preston to go and tell him I wanted to see him; he returned with McGuire in a very few minutes; I stated to McGuire that the proposition had been accepted and that if he would come with me to my office I would write up the relinquishment and pay him the money; we went to the office, sat down and with Judge Thomas, my partner present drew up the relinquishment which was afterwards filed with the land office, and the special agreement in regard to his right to remain on the land and remove his improvements; Mr. McGuire read both instruments and after reading the same signed them; I then counted the money—two thousand (\$2,000) dollars; Mr. McGuire recounted the same and we then went to the land office and called the attention of the register to the relinquishment; the register asked Mr. McGuire if that was his signature, Mr. McGuire said it was—that he relinquished his claim to the land.

That at no time from the time I first saw McGuire in the morning and until after he had filed his relinquishment did he have the appearance of being intoxicated or in the least being under the influence of liquor; at no time did he express a desire not to have the matter closed in accordance with his proposition; at no time did he express any regret about selling; after he had received his money he inquired of me as to the condition of the banks in town and where he had better deposit his money. I gave him my judgment and he said he would act upon it in depositing his money; I desire to state that I had no knowledge at the time I was called upon to negotiate the purchase of McGuire's relinquishment that a decision had been rendered in the case by the Commissioner of the General Land Office; in the evening following the day upon which the relinquishment was filed I saw Mr. McGuire and he stated to me that he had won the case before the Commissioner of the General Land Office; I replied that I had read the decision that afternoon; he stated that he thought that Cunningham and Hagan had taken an unfair advantage of him; I replied that I thought that he had gotten all that his interest in the claim was worth; he stated that it was all right, that he thought his interest would have brought more if he had known the decision had been rendered:—this conversation was had in the presence of John C. Henderson and H. V. Jones near the corner of Second and Oklahoma Avenue; on the 3d of March, 1892, McGuire came to my office to see me and stated that he was about to file an affidavit to get re-instated in the case; in reply I stated to him that I had heard that he was dissatisfied with the deal and that I had gone to Judge Cunningham and requested him as a favor to me to re-instate him (McGuire) in the case and that Cunningham had agreed so to do provided McGuire would return the two thousand (\$2,000) dollars and that if he wished to get re-instated that it was only right that he should return the money he had received; in reply McGuire

stated that he did not intend to give the money back until he got re-instated and further said that he had made an affidavit for the purpose of getting re-instated which I might take some exceptions to; that he didn't want me to file any affidavit in reply to his, but desired me to remain neutral in the matter: I stated to him that if he would make an affidavit which would simply show the truth that I would make no affidavit in the matter, but that I could not afford to remain silent if he filed such an affidavit as I had been informed that he intended to, because such a statement would not be the truth; in reply he stated that he did not intend in any manner to reflect on me in his affidavit and would state in that affidavit that he did not believe that I knew that he had won the case before the Commissioner at the time the trade was made; I stated to him that I had understood that he intended to allege in his affidavit that he was drunk at the time he executed his relinquishment, in reply to which he said that he had drank a little, but that he was not drunk but very much distressed on account of the condition of his leg and was suffering so much pain that he was not at himself just right. I then stated to him that I had never seen him when I thought that he understood himself better than he did at the time he made that trade and his only reply to the statement was that he ought to have consulted his wife before he consummated the trade and that if he had done so he would never have made the trade; that at the time McGuire and myself agreed upon the terms of sale, McGuire stated to me that if I would, in addition to the two thousand (\$2,000) dollars procure for him the use of the forty-five acres for the present crop season, and the right to remove his improvements off the tract, he (McGuire) would pay me the sum of fifty (\$50) dollars for negotiating the trade, and at the time the money was paid to him he asked me to take the fifty dollars out of the two thousand (\$2,000) which I did and the sum of fifty (\$50) dollars is all the money I have received for such service.

A charge so serious as fraud and misrepresentation must be sustained by convincing evidence before it can be admitted. McGuire has wholly failed to produce such evidence. The whole transaction appears to have been one that he was as eager to complete as were the agents of Hagan; nor does this appear strange, for at the time he was face to face with a decision by officers of the land department adverse to him, and was confronted by determined and wealthy adverse claimants, and it was not strange that he should have considered the sum of \$2,000 cash in hand, a reasonable compensation for the surrender of a claim involved in so much uncertainty and doubt.

In *Ludington v. Renick* (7 West Virginia, 273), it was held that "A party seeking the rescission of a contract on the ground of misrepresentations, must establish the same by clear and irrefragable evidence." McGuire has failed to place himself within this just and proper rule.

McGuire charges that a conspiracy was formed to defraud him. No direct evidence is submitted on this point, but he seeks to convey the impression that the parties who obtained his relinquishment had a knowledge of your decision in his favor, which he did not possess. This is expressly denied by both Cunningham and Dale. The relinquishment was executed two days subsequent to the date of your decision. The report of said decision could not have reached Guthrie by mail at the time the relinquishment was executed, and if any party possessed knowledge of the decision, it must have been obtained by means of the telegraph, and no doubt through counsel; at all events, McGuire had

it in his power to obtain by the same means the same information that Hagan or his agents may have possessed. In *Slaughter's Administrator v. Gerson* (13 Wall., 379), the court said:

Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentation.

In the case of *Farnsworth v. Duffner* (142 U. S., 47), the court say:

This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained.

Applying this well established rule to the case at bar, it must be held that McGuire is not entitled to relief by the rescission of the contract.

It is a fundamental principle, both in law and equity, too well established to call for the citation of authorities, that a party seeking relief must do equity—that he must put the other party as far as possible, in the position he was in before the transaction complained of. One, and the most important evidence of good faith on the part of a person seeking a rescission of a contract is an offer to thus place the other party in the same position as before the transaction and where money has been paid, to tender the repayment of the same, and this at the time he asks the rescission of the contract. From the statements of Cunningham who furnished the money, and the statements of Dale, who paid the same, it is evident that McGuire has never made a tender of the \$2,000 or in any way exhibited any intention of doing equity.

It is true, that in an affidavit dated June 16, 1892, more than three months after his application to have his contest re-instated, McGuire swears that he told Dale that he would give him the money back, and when Dale told him to give it to Cunningham, he (McGuire) said that he had no right to give him any money—that he did not know where Dale got the money; that it might have been his own (Dale's) so far as he knew. In view of the statements heretofore made by McGuire, in view of the fact that he knew that his relinquishment was procured by Cunningham in the interests of Hagan, the evasive quibble above recited, together with the fact that the tender of the money has not yet been made to the party in interest, would seem to indicate an attempt to impose upon or to trifl with, the Department.

To recapitulate:

First: In my opinion, the preponderance of evidence is to the effect that McGuire was fully conscious of the agreement he was entering into; that he believed it was for his interest to enter into said agreement at that time, but that this opinion was changed by subsequent developments, viz., the knowledge of the fact that your decision was in his favor, the opposition of his wife to the sale of his claim, etc.

Second: He possessed the same means of ascertaining the exact status of the case before your office as was possessed by the opposite party, and by the exercise of a reasonable foresight these means might have been employed to ascertain the status of the case, and,

Third: McGuire has utterly failed to place himself in the position of one who has a right to claim special equitable protection at the hands of the tribunal before whom he appears he having failed to do equity, or to do the fundamental act indicative of good faith, or shown any good or sufficient reason why his own acts should not remain in full force and effect. I can not, however, close this branch of the case without the observation, that after a careful consideration of the evidence submitted at the hearing, I am by no means convinced that the decision of the local officers, holding that McGuire was not a qualified claimant by reason of entering the territory prior to 12 o'clock noon, on April 22, 1889, is not correct. The evidence is simply irreconcilable, one side or the other, swears to that which is false. The local officers had the advantage of knowing who the witnesses were, their characters, etc.; they saw them on the witness stand, and heard them testify and marked their demeanor. Under these circumstances the finding of facts by the local officers, is entitled to great weight.

The application of McGuire to be re-instated as a contestant is, therefore, denied, and the case will be considered upon its merits, as between Severns and Hagan.

Both the local officers, and you, found that Severns' entry was illegal for the reason that he took advantage of his presence in this territory of Oklahoma, prior to 12 o'clock noon, on April 22, 1889, to make entry of the land in question.

The evidence shows that Severns was a deputy U. S. marshal, and that he lawfully entered the territory of Oklahoma prior to April 22, 1889, and was lawfully within said territory at 12 o'clock noon, on said day.

Resident counsel for Severns cite the case of *Taft v. Chapin* (14 L. D., 593), and claim that under said decision the entry of their client must stand. His local attorney says:

That Severns is a qualified entryman we feel satisfied, as he made no settlement whatever upon said tract on April 22, 1889, but claims all his rights under his homestead entry No. 7, and his subsequent compliance with the letter and spirit of the homestead law.

His homestead entry was made on the morning of April 23, nearly twenty-four hours after the land was declared open to settlement.

In the case of *Taft v. Chapin*, *supra*, it was found that from the time the land was opened to settlement up to the time Chapin first made his application to enter, a period of more than twenty days, the land he entered was subject to entry by any other qualified claimant, without let or hindrance on the part of Chapin, and hence that Chapin took no advantage of his presence in the territory at 12 o'clock noon, on April

22, 1889, to assert a claim to the tract; that his claim was asserted long after others had an opportunity to enter the tract, and it was found that Chapin was not disqualified from making entry by the mere fact that he was lawfully within the limits of the territory at the hour the lands were opened to entry, and prior to that hour.

What are the facts in relation to Severns? He swears that he first made up his mind to take land in Oklahoma in the forenoon of April 22, 1889; that he went upon the tract in question about five minutes after 12 o'clock; that he had made up his mind before starting in that direction to take a claim on that bottom land if an opportunity presented itself. From Severns' own testimony, and from the testimony of others, it is clearly shown that he started from the vicinity of the local land office a few moments before 12 o'clock; that he drove to the tract in question, and when he reached it, that he fired his pistol, took a spade out of the hack in which he had ridden, and commenced to dig a hole, and said to the man who had driven him there, that he wanted him to witness the fact that this was his (Severns') homestead; that he told another party who was on the land that he (said party) was there too soon and that if he remained he would lose his rights but that if he moved on he would not lose his rights, he assuming to act at this time as a U. S. deputy marshal to prevent illegal settlements.

No further citation or argument is necessary to establish the fact that Severns took advantage of his presence in the territory to assert a claim to, and to take possession of, the tract in dispute, before any one who had complied with the requirements of the law, and the conditions of the President's proclamation, could reach the land to assert a claim thereto.

This being the fact, neither the proposition of his resident, nor local counsel can be admitted as correct.

Severns' entry is illegal and must be canceled. Townsite of Kingfisher *v.* Wood *et al.* (11 L. D., 330); Guthrie Townsite *v.* Paine *et al.* (12 L. D., 653); Oklahoma City Townsite *v.* Thornton *et al.* (13 L. D., 409).

So far as the record before me shows there is no reason why Hagan should not be permitted to make entry for the land, and your decision is modified accordingly.

Reversed 215
RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

SOUTHERN PACIFIC R. R. Co.

18 L
Indemnity selections under the act of June 22, 1874, can not be made of alternate reserved sections within the primary limits of a grant.

Secretary Noble to the Commissioner of the General Land Office, November 17, 1892.

The Southern Pacific Railroad Company, through its resident attorney, has moved a reconsideration of my action, taken under date of April 30, 1892, in returning to you, unapproved, selection list No. 3,

made under the act of June 22, 1874 (18 Stat., 194), embracing 237.40 acres, for the reason that "to permit such selections would in effect increase the rights under the grant, in violation of the act of June 22, 1874."

The assigned ground for the reconsideration is a palpable mistake of fact in presuming that the tracts selected lie upon the rim of a meandered lake or slough.

This is correct, as an error was made in the examination of the plats of survey, the original plat showing but a blue tint upon the meander line of what, by the later plats, is shown to be swamp lands.

The lines of the survey in the original map did not extend over the swamp which was meandered.

In withdrawing this list, for temporary use in connection with the motion, it is learned, however, that the selected tracts embrace portions of even-numbered sections within the primary, or granted, limits of the grant for the Southern Pacific Railroad Company, made by the act of July 27, 1866 (14 Stat., 292).

While I am aware that heretofore, in the administration of the act of 1874, the railroads have been permitted to make selection of even-numbered sections within the primary limits of its grant, where the odd-numbered sections were granted, yet, in view of the decision of the Supreme Court in the recent case of the United States *v.* Missouri, Kansas and Texas Railway Company (141 U. S., 358), I am clearly of the opinion that such practice is erroneous and should be discontinued.

By the act of July 27, 1866 (*supra*), the even-numbered sections within the primary limits of this grant were reserved to the United States, and the 3d section, in granting the indemnity privilege, provides:

Other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, *and not including the reserved numbers.*

The act of June 22, 1874 (*supra*), permitting the selection of other lands within the limits of the grant, in lieu of those tracts relinquished in favor of settlers, provides:

That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad, *or to extend to lands reserved in any land grant made for railroad purposes.*

The privilege granted by the act of June 22, 1874, is in the nature of an indemnity, and under the terms of said act, the companies were to receive title to the lands selected thereunder "as though originally granted."

The act of 1866, like the other acts making grants to aid in the construction of railroads, makes no provision for indemnity in lieu of disposals made *after* the definite location of the road, and the sole purpose of the act of 1874 would seem to have been to authorize selections in

lieu of those tracts relinquished by the company to which it had by law the better right, and that it might not seriously interfere with the adjustment of its rights under its grant, such selections were not, as it was generally done, limited to alternate sections. The even sections within the primary limits having been specially reserved by the particular acts making the grants, a further right of selection, in the nature of indemnity, can not be construed to embrace them, unless the language granting such additional right clearly shows such a purpose on the part of Congress. This act was designed solely for the relief of settlers, and its provisions were not mandatory upon the companies.

Their relinquishments were voluntarily made, and no doubt in many cases they received, of the settler benefited, an equivalent for their relinquishments.

In the case of the United States *v.* Missouri, Kansas and Texas Railway Company (*supra*), said company, under the act of July 26, 1866 (14 Stat., 289), which provided that indemnity might be taken "from the public lands of the United States nearest to the sections above specified," selected even-numbered sections within its indemnity limits and also within the primary limits of the grant for the Lawrence, Leavenworth and Galveston Railroad Company, which selections were certified on account of the grant, and for the recovery of the same the suit by the United States was instituted.

The court held:

As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain. But, in order that the government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted—the title to which vested in the State or the company upon the definite location of the line of the road, and, by relation, as of the date of the grant,—the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes expressly declared, segregated them from the body of the public lands of the United States. Being thus devoted to specified objects, they were reserved to the United States, and could not be selected by the State either under the act of 1863 or under that of 1866 for other and different objects. They could not be selected as indemnity lands under the act of 1863, because the lands to be selected under that act were restricted to odd-numbered sections; nor under the act of 1866, because, at the date of its passage they were reserved for the special purposes indicated in the second section of the act of 1863.

The price of the even-numbered, or reserved, sections within the primary limits of the grant for the Southern Pacific Railroad Company was increased to two dollars and fifty cents per acre, by virtue of the act of March 3, 1853 (10 Stat., 244), now found in section 2357 of the Revised Statutes.

By the 6th section of the act of July 27, 1866, (*supra*), the operation of the homestead and pre-emption laws was extended to these even-numbered sections, but the pre-emptors were by law required to pay

two dollars and fifty cents per acre, and under the homestead act of 1862 the party was limited to eighty acres of such land.

The disposition was therefore similar to that required to be made of the even-numbered sections by the act of March 3, 1863 (12 Stat., 772), before the court in the case referred to. The decision in that case would therefore seem to apply with equal force to the case now in hand, and if these special provisions segregated the even, or reserved, sections "from the body of the public lands of the United States," selection can not be made of them under the act of June 22, 1874 (*supra*), for the reason that they are not a part of the "public lands" within the meaning of said act, and for the further reason that, having been reserved by the act making the grant, they are specially excepted from the operation of the act of 1874, under which these selections are made.

I must therefore again refuse to approve said list No. 3, and it is herewith returned.

RAILROAD GRANT—MINERAL CHARACTER OF LAND.

BERRY ET AL. v. CENTRAL PACIFIC R. R. Co.

The location of a mine on a tract prior to a railroad grant does not establish the fact of its mineral character, and operate to except the same as such from the grant, where it appears that mineral does not exist in paying quantities and that mining operations have been consequently abandoned.

Secretary Noble to the Commissioner of the General Land Office, November 19, 1892.

Twenty acres of land embraced in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$, and the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 1, T. 9 N., R. 8 E., M. D. M., at the Sacramento land district, California, are the lands involved in this case.

The tracts are within the primary limits of the grant to the Central Pacific Railroad Company, under the acts of July 1, 1862, (12 Stat., 489), and July 2, 1864 (13 Stat., 356), and are embraced in lists 3 and 8 of selections made by said railroad company.

Section one, above mentioned, was surveyed in 1856, and was returned by the surveyor general as agricultural land. On the 31st of March, 1890, you directed a hearing to determine the character of the twenty acres in question, upon the application of William Berry and P. S. Cram, who alleged that they were the owners of the Cram and Berry quartz mine which was situated partly within each of the legal subdivisions above described, and was originally located in 1854, and was very valuable, and that the possessory right to the same had ever since such organization been maintained by the said claimants and their grantors, by due compliance with law.

The hearing took place on the 9th of May, 1890, and on the 26th of June of that year, the register and receiver united in a decision in which they said:

The register and receiver being fully advised in the premises find the following acts:

The SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 1, T. 9 N., R. 8. E., M. D. B. and M., possess a positive value for agricultural uses, and possess little or no value for mineral purposes.

The register and receiver hold: 1. That this action be dismissed. 2. That lists No. 3 and list No. 8 of selections of the Central Pacific Railroad Company in so far as they affect said tracts shall remain intact, and that patent shall issue to the company in due course. They so decide.

From that judgment an appeal was taken to your office, and on the 25th of October, 1890, you rendered a decision in which you declared yourself satisfied that the petitioners had shown, by a clear preponderance of the evidence, that there is a well defined vein or ledge of quartz bearing gold extending throughout the entire length of said mineral claim, and held "that said railroad lists, to the extent of the conflict with said quartz claim, will be canceled in case this decision should become final." The case is before me upon an appeal from your decision, taken by one John H. Tong, the assignee or purchaser of the interest of the Central Pacific Railroad Company, in the lands in question.

The surveyor general returned the land in section one, as agricultural, and in *Tinkham v. McCaffrey* (13 L. D., 517), it was held that "a contestant, who alleges the mineral character of land that is *prima facie* agricultural, must show affirmatively the existence of mineral in sufficient quantity to make the land more valuable for mining than agricultural purposes." In *Royal K. Placer* (13 L. D., 86), it was held that in any case where the character of land embraced within a mineral application is placed in issue, it must appear as a fact that mineral can be secured from such land *in paying quantities*. In that case quite a number of departmental decisions are cited, holding the same doctrine.

The supreme court has considered this subject, and while it has not determined what amount of gold will constitute "valuable deposits," it indicated in *United States v. Iron Silver Mining Company* (128 U. S., 673), that the deposit must be of substantial value, and such as can be secured *with profit*.

The United States circuit court for the district of Oregon, in the case of *the United States v. Reed and another*, (28 Federal Reporter, 482) after an exhaustive discussion of a like question, say— (p. 487)

The statute does not reserve any land from entry as a homestead, simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without any reference to the fact of whether there are any paying mines on it or not. Nothing short of known mines on the land, capable, under ordinary circumstances, of being worked at a profit, as compared with any gain or benefit that may be derived therefrom when entered under the homestead law, is sufficient to prevent such entry.

One of the latest expressions of the United States supreme court upon the question, was in the case of *Davis v. Weibbold* (139 U. S., 507). On page 519, it expressly said that the exception of "mineral lands" from grants in aid of railroads is "not held to exclude all lands in which minerals may be found, but only those where the mineral is in

sufficient quantity to add to their richness, and to justify expenditure for its extraction," etc.

In *Alford v. Barnum* (45 California, 482), which was a case before the supreme court of that State, in which the question arose as to the meaning of the term "mineral lands" in the acts of Congress of July 1, 1862, and July 2, 1864, excepting lands from the grants made by Congress to aid in the construction of the railroad in question, the court after reciting the circumstances of that case, said:

The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land, within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purposes, and we cannot think this was the intention of Congress.

In the case of *Dughi v. Harkins* (2 L. D., 771), it was held that "the proof of the mineral character of the land must be specific and based upon actual production of mineral, and must show that the mineral value of the land is greater than its agricultural value." Similar views were expressed in the case of *Samuel W. Spong* (5 L. D., 193), which was a case in which the acts of July 1, 1862, and July 2, 1864, were construed. In *Cleghorn v. Bird* (4 L. D., 478), and in *Commissioners of Kings Co. v. Alexander* (5 L. D., 126), the decision in the case of *Dughi v. Harkins*, is referred to with approval, and followed. Rulings to the same effect upon applications for mineral patents are found in decisions of the Department for many years. They are all to the effect that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. In *Magalia Gold Mining Co. v. Ferguson* (6 L. D., 218), this proposition is stated in these words: "The mineral character of the land as a present fact is an essential matter of proof where it is sought to defeat an agricultural entry upon land returned as subject thereto." That doctrine is also held in *Nicholas Abercrombie* (6 L. D., 393); *John Downs* (7 L. D., 71); *Cutting v. Reininghaus* (*ibid.*, 265); *Creswell Mining Co. v. Johnson* (8 L. D., 440); *Thomas J. Laney* (9 L. D., 83).

In *Colorado Coal and Iron Co. v. United States* (123 U. S. 307, 328), a bill was filed to set aside patents issued for agricultural lands on the ground that it was known at the time of their issue that the land contained mines of coal. The court said:

To constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as

a mine. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines," capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed.

This Department has determined that it is not necessary that "known mines" should exist at the time of the grant, upon lands within the limits of a railroad grant, in order to except such lands from the operation thereof, but that "the discovery of the mineral character of land at any time prior to the issuance of patent therefor, or certification where patent is not required, effectually excludes such land from a railroad grant which contains a provision excepting all mineral lands therefrom." This was held in the case of the Central Pacific Railroad Co. *et al. v. Valentine* (11 L. D., 238).

The grant to the Central Pacific Railroad Company by the act of 1862, is in the following language:

That there be, and is hereby, granted to said company, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act. (Section 3, act, 1862.)

The act of 1864, which was amendatory of the act of 1862, enlarged the grant from five to ten sections per mile on each side of said road, and provided, among other things, that the term "mineral land" whenever used therein, or in the original act, should not be construed to include "coal and iron land," and that no lands granted by that or the original act, should include any mineral lands (Sec. 4, act 1864).

In the case at bar, the contest is between John H. Tong, purchaser of the interest of the railroad company in the land, as an agricultural claimant, and Berry and Cram, as mineral contestants.

On the part of the mineral claimants, the evidence submitted at the trial, was to the effect that from five to seven thousand dollars had been expended upon the land comprising the mineral claim, in shafts, cuts, inclines, whims and other works for its development, and that in the years 1876 and 1877, about \$1,000 worth of gold was mined therefrom. You found that this amount was mined in each of those years, but the testimony is to the effect that \$1,000 represented the result of the two years' work. This was accomplished by Berry, one of the claimants, who still resides upon the land, and cultivates an acre or two as a garden. Prior to that time, one J. F. Work had worked the mine for Cram, the original claimant, and in 1861 he took out about \$2,000. He then bought the mine, but does not state the price he paid. His mining efforts on his own account do not seem to have been crowned with success, as he sold the claim to some Idaho men in the year 1863,

for \$150, and has known nothing about the value of the property for mining purposes since.

Berry, who has resided upon the land since 1870, has not worked the mines since 1877, but has made his living by working in other mines, and for farmers in the neighborhood during the harvest seasons. The mining structures erected on the claim have become nearly worthless, except the blacksmith shop, which is furnished with an anvil, hammers, tongs, etc., worth in all \$25 or \$30. Some of the shafts have filled up with water, and others have caved in, or filled up with soil. The claimants and their witnesses, however, insist that the twenty acres in question, are more valuable for mining than for agricultural purposes. On the other hand, Tong and his witnesses place the value of the land for farming purposes at ten dollars per acre, and its value for mineral purposes, at nothing. It was also shown that the lands in section one, including those in question, are good farming lands for crops, hay, and pasture.

According to the authorities cited, the fact that a mine has been located upon the land in question prior to the grant to the railroad company did not establish the fact that it was "mineral land" within the meaning of the grant, as construed by the Department, and by the courts which have considered the subject. The mineral claimants, in their application for a hearing to determine the character of the land, alleged that their mine was very valuable, but their evidence upon the trial failed to show that working it was profitable. In fact it was shown that more than two dollars had been expended for every dollar secured from the mine, and that for the twelve years immediately preceding the hearing no attempt had been made to work it.

In your decision you say: "I am of the opinion, and so decide, that the mineral claimants have duly established that the land embraced in the Cram and Berry quartz mine as a present fact is more valuable for mineral than for agricultural purposes, and that therefore it should be excepted from the grant to said railroad company." To my mind that fact is not established by the evidence in the case, and I cannot concur in that 'opinion.'

The preponderance of the evidence is that the mine upon the land is a pocket mine, and that the result of the required labor is too uncertain to warrant further operations. This is the opinion of Tong and all of his witnesses, and from the fact that the mining claimants have ceased for so many years to work the mine, and have allowed their mining structures to become valueless, it would seem that they had reached the same conclusion.

From all the facts and circumstances of the case, I concur in the conclusion reached by the register and receiver, that the land in question "possesses a positive value for agricultural uses, and possesses little or no value for mineral purposes." The decision appealed from is therefore reversed.

RESERVOIR SITE—APPLICATION—CONFLICTING CLAIMS.**LEAMINGTON WATER AND LAND CO.**

The bed of a stream may be appropriated as a reservoir site where it appears that said stream is dependent for its water supply upon melting snows, and that during the season when irrigation is most needed there is no water contained therein. The case of the Penasco Reservoir, 13 L. D., 682, cited and distinguished.

An application for a reservoir site, apparently in conflict with claims under the railroad right of way act, and the townsite laws, should not be approved without due opportunity given for presenting objections to the approval of said application.

Secretary Noble to the Commissioner of the General Land Office, November 19, 1892.

I am in receipt of your letter of October 7, 1892, transmitting the articles of incorporation and certificate of organization of the Leamington Water and Land Company, a corporation organized under the laws of the Territory of Utah, with a certified copy of the laws of said Territory relating to corporations, together with a map and field notes in duplicate of a reservoir located by said company in San Pete county, in said Territory.

The papers in the case are substantially in compliance with law, are approved, and will be placed on file. The map and field notes tend to show that the survey was carefully made and noted.

The initial point of the meander line of the reservoir is on the west line of section 22, T. 17 S., R. 1 W., 5127 feet south of the northwest corner of said section. The perimeter of the reservoir is 29.864 miles, the area being 23.97 square miles, containing 15,350.80 acres. It is over thirteen miles long, and from one to two and a half miles wide. It is formed by damming the Sevier river, and flowing it back and over the low lands along its banks.

It was held in the Penasco Reservoir case (13 L. D., 682), that a person could not be permitted by damming a river, overflowing the adjoining land, surveying this "back water," and calling it a reservoir site, to become sole proprietor of the natural source of supply. To meet this condition, the company has caused to be filed an affidavit, tending to show that the Sevier river at the point where it is proposed to erect this dam, and above this point, is dependent upon melting snow in the mountains for its volume of water; that in the season when water is needed for irrigation and other purposes, the river is simply a dry way or "bed of a stream," that is of no value to adjoining inhabitants, and that the company intends to store the water that comes down in the wet season, and hold it until it is valuable for irrigation and other purposes. This state of facts was not shown in the Penasco Reservoir case, and you are right in distinguishing this case from that.

But there is another matter which can not be passed without mention: the Oregon Short Line and Utah Northern Railway Company

filed in this Department its map of definite location of its line of road along this valley, and on July 29, 1890, the Secretary of the Interior approved the same, and thus granted it a right of way across all the public land lying along its route. An examination of the records of your office shows that this railroad line enters the land proposed to be flooded at a point in section 28, T. 17 S., R. 1 W., and conforming to the topography of the valley, passes out of the contemplated reservoir in section 25, T. 19 R. 1 W. So that the flowing of the land would render the right of way thus granted entirely worthless. You say in your letter, that "The Leamington Water and Land Company has filed an affidavit, however, which is submitted herewith, alleging that said railroad company made a resurvey of their (its) line of route, and that the location of their (its) road as subsequently constructed, is several miles distant from this reservoir", etc. I do not so read the affidavit; it says: "but said company have (has) not performed any work on said proposed railroad at any point that can in anywise interfere with the proposed line of location of the reservoir site of said Land and Water Company, nor does said railroad company at present attempt to control any line of road running within several miles of said reservoir site." Then it cites the Statutes of Utah Territory, Par. 2358, which provides that the railway company shall within two years after filing its articles of association, begin the construction of its road, and shall complete the same and put it in operation within ten years, and, *arguendo*, it claims that the railway company has forfeited its right. This is a matter for the courts and legislature of Utah Territory.

If the railway company should insist upon its right of way heretofore granted it, the approval of the map here presented would result in litigation, to say the least. If, however, it has made a resurvey of its line of road, and abandoned the line along the valley of the river, it could not do the railway company any wrong to approve the map here presented, but it does not appear that the railway company has been notified of the present application, and the affidavit filed herewith is so drawn that it avoids saying anything satisfactory upon the matter.

This map further shows that the meander line of the reservoir runs through the town of Fayette. Whether this town is merely a townsite on paper, or is actually an inhabited town, does not appear. Nor does it appear that the townsite authorities have been notified of the pendency of this application.

You will, therefore, notify the said Oregon Short Line and Utah Northern Railway Company of the pendency of this application; also notify the authorities of the town of Fayette, and you will give them sixty days from notice in which to file any objections which they, or either of them may have to the construction of said reservoir.

Upon the expiration of said time, or as soon as the said parties respond to your notice, you will notify the Department of what action, if any, has been taken by them, or either of them.

Overruled L. P. 168, 268
EIGHT OF WAY—MAP OF CANAL—RESERVOIR—RIVER.

THE PECOS IRRIGATION AND IMPROVEMENT CO.

The map of a canal, in an application for a right of way, should definitely and accurately show the lines of the canal, and the width thereof.

A reservoir site can not be acquired by damming a river and overflowing the adjoining land, where the stream in question carries a strong volume of water through all seasons.

Secretary Noble to the Commissioner of the General Land Office, November 19, 1892.

I am in receipt of your letter of June 13, 1892, transmitting a copy of the articles of incorporation and due proof of the organization under the laws of Colorado, of "The Pecos Irrigation and Improvement Company" of Colorado Springs, El Paso county, Colorado, together with a copy of the laws of said State relative to incorporated companies, also the following maps in duplicate, to wit, the "northern" canal, "southern" canal, reservoirs No. 1, and reservoirs No. 2 and 3. The said canals being mapped in sections of ten miles, and being two sections each, the two last named reservoirs being on one map. These present really five cases in one, but as it is the same company, and there is no adverse claimant, they will be considered together.

The company has filed with the foregoing its application for approval by the Secretary of the Interior, of said papers and maps, that it may secure the benefit of sections 18 to 21 inclusive of the act of Congress of March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes" (26 Stat., 1095). It has also filed affidavits and exhibits in support of said application, all of which have been fully considered.

The papers relating to the incorporation, organization, etc. of the company, appear to be in all respects in conformity to law. They are approved and will be placed on file. From an inspection of the maps, I find: First, the "northern" canal is situate in Chaves county, New Mexico. It takes its water from the Hondo river across which a dam has been constructed on land owned by individuals. The initial point of this canal is on the line between the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of Sec. 31, T. 10 S., R. 25 E., N. M. Pr. M., which said point is S. 57, 53 N., 2876 feet from the north-east corner of said section 31. The canal bears east of south for about ten miles, then turns in a southern direction, running by curves conforming to the topography of the ground, to a point called "station 1056" on the line between the SE $\frac{1}{4}$ and SW $\frac{1}{4}$ of Sec. 31, T. 13 S., R. 26 E., which point is referred to the south-east corner of said section 31, it being N. 61, 05 W., 3537 feet therefrom. The distance is twenty miles, being in two sections.

It is stated on the map "Canal as shown on this map is of a uniform width of forty-five feet, except where otherwise shown. Red line rep-

resents center line of canal." As only the center line is given and no shore lines are marked, I assume that the canal at the bottom is of uniform width. It is stated in the application, however, that the canal is of "uniform size of thirty feet in width at the bottom thereof with an excavation of seven, and a double embankment of nine feet, crossing in its course small arroyos and one or two large ravines on flumes provided therefor."

As there is nothing in the statute limiting the width of a canal, it is immaterial whether it is forty-five or thirty feet in width, but it is important that the width be stated definitely and certainly before approval.

This canal, I am informed by the affidavits filed, was constructed from the dam in Hondo river southward twenty-five miles, by an incorporated company known as the "Pecos Irrigation and Investment Company" of which the present company is successor, the former company having been incorporated under the laws of New Mexico, and that the present company has constructed twelve miles in addition thereto. The present application is for two sections of ten miles each. The statute provides that a company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, file with the register of the land office for the district where such land is located, a map of its canal, and upon the approval thereof by the Secretary of the Interior, the same shall be noted on the plats of said office. Thereafter all lands over which right of way shall pass shall be disposed of subject to such right of way. The rights of settlers on the public domain are especially guarded. From this it will be seen that the Secretary may approve a map in sections of ten miles, but it will also be seen that the width of the canal should be accurately given that it may be noted, and that the officers of the government and the entryman of adjacent land may know the width of the strip of land thus appropriated when he makes settlement and entry for the tract thus encumbered.

As this canal is already completed beyond the point to which right of way is sought to be secured, it can readily be determined whether it is thirty or forty-five feet wide. I therefore return the map which seems in all respects correct, except that it conflicts with the sworn statement in the application as to its width, that it or the application may be corrected by a statement under oath by the engineer as to that matter upon which it will be approved as of its actual width.

Second. The "southern" canal commences at a point in a dam across Pecos river. Said point is in the SW $\frac{1}{4}$ of Sec. 12, T. 21 S., R. 26 E., N. 48, W. 2163 feet from the south-east corner of said quarter section. Thence its center line runs in a south-eastern direction, curving to conform to the topography of the ground to a point twenty miles distant in the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 24, T. 23 S., R. 27 E., which said point referred to the north-east corner of the SW $\frac{1}{4}$ of said section is S. 23 07 W., 1304 ft. therefrom. This canal was also constructed twenty-six

and a half miles by the former company, to which the present company has added sixteen miles. Only two sections have been surveyed and mapped, and presented herewith.

There is a statement on this map as to its width, similar to that on the map of the "northern" canal, except that it is shown that at a point four miles from the initial point, the canal forks and the main branch turning south crosses the river. The main canal is noted as forty-five feet in width throughout the first four miles. Then the southern branch that crosses the river is called the "southern" canal, and its width is given as twenty-five feet, the clause "except where otherwise shown" being written in the statement. The map submitted starting at the initial point of the main canal follows this "southern" canal. The other branch called "east side" is not mapped.

The center line of this canal appears to have been carefully surveyed and noted, and the field notes indicate that they have been carefully made up, but on the west side of the center line along the last three or four miles of the first section, and along about seven miles of the second section, the shore line of the canal is not surveyed, but a black line on the map indicating the shore line is drawn, evidently by mere estimates, but varying in places from one to about forty chains from the center line. At one point a small reservoir or pond or lagoon covers over one hundred acres of land. While I am not called upon to say that a canal shall or shall not be uniform width, or whether or not to constitute a canal berme banks should be constructed to confine the water in a channel, I am called upon to say that the object and purpose of the law in requiring a map of a canal to be filed, that its lines may be noted on the tract-book and records of the land office was that such map should accurately and definitely show the lines of the canal that they should be so marked and noted that a competent surveyor with proper instruments could go upon the ground and retrace the boundary line between the canal and the land of any adjoining proprietor.

The statute gives to the company not only the right to construct a canal across the public lands, but it gives them a perpetual easement for canal purposes in fifty feet on each side of such canal, the meander line being fifty feet from the high water line. If there is nothing to determine this line but the flow of water, the rise and fall, the seasons of drought and rainfall will be productive of litigation vexatious and interminable.

Section 2340 of the Revised Statutes protects vested and accrued water rights. The extent of those rights however, should be definitely settled. It is safe to say that throughout ten miles of the twenty presented, no person can tell how far it is proposed to flow the water out from the center line, and such a map filed in the local office would furnish no accurate or reliable information to the officers of the government, or to persons who might examine it with a view to making

settlement on the tract encumbered by this easement. It is said this canal runs through lands owned principally by private individuals. The map does not show what tracts, if any, are government land. While this Department has no jurisdiction over lands that have been patented, it is assumed that some of the tracts over which this canal passes are public land, or it would be useless to ask any approval of the map as to these tracts. The Department not only has the right, but it is its duty to see that the lines are so fixed and determined that the patentee may know what he is receiving of the government when he takes its patent for the land over which this canal is constructed. I, therefore, return this map without my approval.

3d. In the matter of these reservoirs, it is stated that the one numbered "two" being the one from which the "southern" canal is fed was built by the former company between 1888 and 1890. From the statements contained in the application and affidavits, the land overflowed was nearly all owned by private individuals. This reservoir is made by constructing a dam across the Pecos river in the SE. $\frac{1}{4}$ of Sec. 12, T. 12 S., R. 26 E. in Eddy county, New Mexico. It flows water back into section 5 of said township, over about five miles of river.

It is now proposed by the company to construct a dam across the Pecos river near the center of section 6 of the same township to flow the water back as far as section 10, T. 20 S., R. 26 E., covering about nine miles of the river, and another in the SE. $\frac{1}{4}$ of Sec. 2, and NE. $\frac{1}{4}$ of Sec. 11 of said T. 20 S., R. 26 E., to flow the water back to Sec. 30, T. 18 S., R. 27 E., covering over fourteen miles of the river, the water to be flowed out from one-half mile to a mile and a half from the banks of the river, and to be held there as in storage places. This back water, or the space proposed to be flowed, has been meandered by transverse lines and it is asked that these bodies of back water be recognized as reservoirs, and that the right be granted to overflow the government land therein, with the right to a strip of land fifty feet wide outside of the water line.

Counsel have called my attention to the statutes of the Territory of New Mexico, and claim that from time immemorial the right to dam the stream and carry the water away in canals and ditches for irrigation purposes has been recognized by the legislature and the courts of that Territory. I find upon an examination of the Territorial law, that "Aequias" have received a great deal of attention from the legislature of New Mexico. The first section of the first chapter of the laws of New Mexico (Compiled Laws, 1884) provides that:

No inhabitant of this Territory shall have the right to construct any building to the impediment of the irrigation of the lands or fields, such as mills or any other property that may obstruct the course of the water, as the irrigation of the fields should be preferable to all others.

This was passed in 1851. The seventeenth section of the act (passed at a later date) provides that all the inhabitants shall have a right to construct either private or common acequias "and to take the water

for said acequias from wherever they can," paying damages to the owners of the lands through which they construct these acequias. Condemnation is provided for where the parties cannot agree, and for flowing land to the injury of the owner, by making lagoons, they are liable to damages. It is not especially stated in any statutes that I have been able to find, that a stream may be dammed across, and the water thus stored, but by an act passed February 14, 1889 relating to the protection of fish, it is provided that any person damming a stream must make a way for the free passage of fish up and down the stream, unless such stream shall contain no food fish, or where the whole volume of water is used for irrigation purposes. This implies that the right to dam a stream and carry away the water is recognized by the legislature of the Territory. It appears from the record before me that when this dam was constructed that it was not in violation of the United States or Territorial law, but this is a matter for the Territorial authorities to decide.

Section 2339, Revised Statutes, provides for the protection of vested and accrued rights to the use of water when the same have been acquired, and are recognized under local customs, laws, and the decision of courts, "and the right of way for the construction of ditches and canals" is recognized and confirmed. The section following provides that patents granted shall be subject to any vested and accrued water right under the preceding section. See Huerfano Valley Ditch and Reservoir Company case (10 L. D., 171). But the act of March 3, 1891, is a stride in advance of all previous legislation toward encouraging the construction of reservoirs, canals and ditches. It gives the right of way for the latter with fifty feet of land on each side of the canal or ditch, the fee remaining in the government, the easement is perpetual. So of reservoirs; it grants an easement in all the public land a person wishes to flow with water, and then grants him fifty feet all around the meander line of his reservoir, or rather, it allows the meander line to be run fifty feet outside of the high water line of the reservoir, and this easement is to all intents and purposes as good as a patent, so long as the land is used for reservoir purposes. It gives the grantee of the easement exclusive control over the flowed land, and the marginal fifty feet strip, and there is nothing to prevent him fencing in the reservoir and retaining exclusive control over it, if granted under this act. Now take the case at bar. It is proposed not only to dam the river and flow the water back over between twenty-five and thirty miles of this river, but it is asked that the government call these bodies of "back water" reservoirs, and place all this river front in the sole and exclusive control of this corporation, cutting off from water about one hundred farms of one hundred and sixty acres each.

It must be borne in mind that this is not a mere, dry valley or river bed in the season of the year when water is most needed, but it is a strong, perpetually flowing river. Extracts from the Geological Survey

filed with the papers in the case show that the main Pecos is formed by the confluence of the Gallinas with the Pecos at La Junta, over one hundred and fifty miles north of the point where it is proposed to construct these dams, and while it is said that for some distance below La Junta the water at certain seasons disappears by evaporation and seepage, yet still below this it receives the water of various tributaries, so it is said that "it will be seen that the constant, never failing supply of water in the Pecos comes from springs which must receive their supply from a great distance." It was said in the Colorado Land and Reservoir Co. case (13 L. D., 681) that a person or corporation could not, by running a boundary line around a natural lake that is already a source of water supply, thereby become the sole proprietor of it, but it was further said: "If, however, these so-called lakes are merely depressions in the surface, which, although they may collect water in the rainy season, furnish no supply in the summer, there can be no good reason why they should not be utilized as reservoir basins." I am unable to see why this principle should not be applied to streams, thus distinguishing between streams that carry a volume of water through all seasons, and those which are "wet weather streams." If the bed of what is called a river or creek or arroyo is dry when the adjacent proprietors need water, it would be wisdom to dam such a stream, and store the water for use, and as no one's rights are injured by granting an easement in the land around a dry river bed any more than around a dry lake bed, such a stream would come within the intent of the statute, but it was held in the case of Penasco reservoir (13 L. D., 682) that "A person cannot be permitted by damming a river, overflowing the adjoining land, surveying this back water and calling it a reservoir site to become the sole proprietor of the natural source of supply."

It was not said nor intended to be said that a person might not dam a river and flow the water back and hold it as in store for the dry season, being answerable, of course, to adjoining proprietors for any damage he might do, but it was said in substance that while he may dam the river and carry away the water, the adjoining land proprietor along the shore of his back water shall have the right to go to that water and use it and water his stock in it as he could do in the river before he dammed it across.

The forty-ninth section of the laws of New Mexico (Compiled laws of New Mexico, 1884, p. 152) provides, among other things, that

All currents and sources of water, such as springs, *rivers*, ditches, and currents of water flowing from natural sources in the Territory of New Mexico shall be and they are by this act declared free, in order that all persons traveling in this Territory shall have the right to take water therefrom for their own use and that of the animals in their charge.

There is a proviso protecting private springs from persons traveling with *large number of animals*. The act provides for damages for injury to private property. It excepts *wells* of water, and it says, "This act

shall not be applicable to ponds and reservoirs of water that persons may construct for their own proper use and benefit;" and no person, under pretense of title shall embarrass or molest any transient person or traveler who takes the water "for his proper use, and giving water to his animals."

It does not appear from this that the law of New Mexico contemplated allowing a person or corporation to appropriate to his or its own use twenty-eight or thirty miles of a river, especially one as valuable to all adjoining proprietors as is the Pecos. It is quite clearly demonstrated that these immense dams will be of great value to that county in enabling the settlers in the valley of the Pecos to irrigate their lands. It is also stated that the great body of this land which it is proposed to overflow is owned by private parties, cattle companies, this applicant, and others. Over all such land, the government has ceased to have control. I know of no reason why the company may not construct dams No. 1 and 3 as No. 2 was constructed, and use the water for irrigation purposes hereafter as heretofore. The act of March 3, 1891, did not repeal or alter section 2339 or 2340, nor was it intended to take from the Territory the right to make local laws not inconsistent with the law of Congress, but were the maps to be approved, and these dams be established as reservoirs under the act of March 3, 1891, it would, in effect, set aside and annul, to a great extent, the laws of the Territory. It is said that there are only a few tracts of government land touched by the "back water" of these dams, but the principle is the same whether it flows upon one or a hundred government tracts. I fully appreciate the great expense of the works already constructed in the valley of the Pecos, and of the immense importance attaching to the completion of the work contemplated, and yet I do not see my way clear to approve these maps under the act of March 3, 1891. It may be said that the company will never attempt to cut off adjoining proprietors from going to this "back water," and using it for domestic purposes and for animals, as they can now go to the river, but unfortunately for that claim, this Department has no legislative authority, and it can not approve the maps with this proviso or condition, as it is not in the law. So it may be said the fifty feet outside the water line was to allow the company to build embankments and works to hold the water, and as this company builds no embankments except the dam, it would not need to use this strip. Nevertheless, the approval of the map gives it the fifty feet where the government land is not settled upon, and when it is settled upon, the approval of the map would not effect anything. So in any view I take of the cases, I find no reason for recalling or overruling the principle laid down in the Penasco case *supra*, and I return the maps of the reservoirs without my approval.

CALIFORNIA SCHOOL LANDS—ACT OF MARCH 1, 1877.

STATE OF CALIFORNIA *v.* NOLAN ET AL.

A school indemnity selection made and approved prior to the passage of the act of March 1, 1877, and erroneously based on land that prior to such selection had been identified by survey as school land, and was never included within a Mexican claim by any authorized survey, is confirmed by section 2, of said act, and the title to said basis thereby reinvested in the United States.

Secretary Noble to the Commissioner of the General Land Office November 19, 1892.

The question presented by this appeal involves the right to the E. $\frac{1}{2}$, the SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 36, T. 1 N., R. 9 W., Los Angeles, California, the title to which is claimed by the State of California as inuring to it under the grant to said State of the sixteenth and thirty-sixth sections for school purposes, but which the defendants claim is public land of the United States, subject to entry under their respective homestead and timber-culture applications.

The rights of the parties to this controversy depend upon the construction given to the second section of the act of March 1, 1877 (19 Stat., 267), entitled "An act relating to indemnity school selections in the State of California," there being no question as to the material facts in the case.

Said section is as follows:

That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-sixth sections in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

It is contended by the State that, when the township plat of survey was filed in the local office, the six hundred acres of the thirty-sixth section in controversy were not within the limits of a Mexican grant, and there being at the date of survey no legal impediment, the title of the State immediately attached and became a perfect legal title, prior to the passage of the act of March 1, 1877, which could not thereafter be divested by the government, or by the illegal selection of indemnity lands in lieu thereof, and that the act of March 1, 1877, did not confirm selections made in lieu of a sixteenth or thirty-sixth section, which

had been surveyed in place and the title to which had vested in the State prior to the date of said selection.

On the other hand, it is contended by the homestead and timber-culture applicants that while the section in controversy was excluded from the limits of a Mexican grant, which had been made and approved by the surveyor-general when the township plat was filed, a subsequent survey included said section, and it remained so included within the limits of said grant until excluded by final survey, and that while so included, the indemnity selections were made. They further contend that, if said section had never been included within the limits of a Mexican grant, the selection made in lieu thereof prior to the passage of the act of March 1, 1877, was nevertheless confirmed by said act.

The plat of survey of the southern part of this township was approved by the surveyor-general of California, July 28, 1865, and section thirty-six was shown to be public land in place. At this date the claimed limits of the Rancho San Jose addition, under the survey made by Deputy Surveyor Hancock, in 1858, and approved by the surveyor-general in January, 1860, did not include said section.

Application was made by the grant claimant for a resurvey of this claim, which was refused, and the surveyor-general, on May 6, 1868, was directed to make publication of the Hancock survey, as required by the act of July 1, 1864 (13 Stat., 332). Instead of proceeding under the Hancock survey, a new survey was made by Deputy Surveyor Thompson, under orders of the surveyor-general, in August, 1868, and was approved by the surveyor-general September 18, 1868, and forwarded to the Commissioner of the General Land Office for his action. On May 8, 1869, the Commissioner rejected the Thompson survey, and again directed that proceedings be had under the Hancock survey, as required by the act of July 1, 1864, *supra*.

The Hancock survey was published in the manner required by said act, and upon objections being filed thereto, a prolonged controversy resulted, which was terminated by the decision of the Department of September 20, 1872, ordering a new survey of this rancho, and under this decision the final survey of this rancho was made and approved by the surveyor-general, May 22, 1874, which also excluded the thirty-sixth section in controversy.

On July 20, and 24, 1869, the State of California made indemnity school selections of the E. $\frac{1}{2}$ of Sec. 21, and the W. $\frac{1}{2}$ of Sec. 23, T. 2 N., R. 4 W., in lieu of the E. $\frac{1}{2}$, the SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 1 N., R. 9 W., S. B. M. (the land in controversy), alleging said basis to be within the limits of a Mexican grant. Said selections were approved by the Secretary, July 1, 1870.

From the foregoing statement, it will be seen that the claim of the State that this section was not within the limits of a Mexican grant when the selections were made and approved, and that it was never within the limits of a Mexican grant, as shown by any authorized sur-

vey, is sustained. It also appears that when the township plat of survey was filed in 1865, the Mexican grant had been surveyed, showing said section to be in place, and no impediment then existed to prevent the title of the State from attaching. But it does not follow from this admission that said selections were not confirmed by the act of March 1, 1877, and that the title of the State to the thirty-sixth section was not thereby divested. The fact is undisputed that selections of indemnity lands were made by the State in lieu of this section, and were approved to the State upon the claim that said section was within the limits of a Mexican grant, which claim was evidently based upon the erroneous Thompson survey. It can make no difference, however, whether the sections was ever embraced in a Mexican grant or not. It is sufficient if the selection was invalid from any cause whatever. The claim of the State is predicated upon the theory that its title became complete upon the designation of the tract by the approved plat of the township survey in 1865, and that there was no authority, prior to the act of 1877, for the selection of indemnity lands, except where the specific section could not be obtained. It therefore concludes that while the indemnity selection might be confirmed by Congress, the United States can not by said act be re-invested with a title that passed to the State to lands in place prior to the passage of said act and the date of the indemnity selections.

This is precisely what the act contemplated. It was known that the State had made selections of indemnity lands, in lieu of the sixteenth and thirty-sixth sections, that were afterwards found to be in place and to which the title of the State had attached, and that the title to many of the indemnity selections, which the State had sold, was in doubt, because of the delay in the settlement of Mexican claims. To quiet the title to such lands, the State invoked the aid of Congress, and to this end the act of March 1, 1877, was passed. The purpose of the act was to confirm all defective and invalid selections, and to allow the United States to take in lieu of them the bases, whether such bases were indicated as school sections prior or subsequent to the passage of the act. The act did not enlarge the grant to the State, but provided for an exchange of lands, so that when the State had made a selection upon a basis that properly belonged to the State under its grant, the defective or illegal selection was confirmed to the State, and the government took in exchange for it the sixteenth or thirty-sixth section, which would otherwise belong to the State.

This act has been so thoroughly construed by the supreme court in the case of *Durand v. Martin* (120 U. S., 366), and its purpose and intent so clearly defined that, to use the language of the court in that case, "the statute has to us no uncertain meaning."

Referring to the history of the times and the circumstances that prompted Congress to pass the act for the protection of the State's title to the indemnity lands, the court observes that it was a full and com-

plete ratification by Congress of the lists of indemnity school selections, which had been certified to the State prior to the passage of the act, no matter how defective or invalid they might be. By the first section of the act all certificates were confirmed where the State was entitled to such indemnity, and "where the only objection to their validity is that a selection was made before the Mexican grant within which the original school section was actually situated has been surveyed and the survey finally approved."

The second section of the act refers to cases where the selection was invalid because the State was entitled to the bases. Referring to this class of cases, the court says:

In the second section cases were provided for in which the selection failed: 1, because the school section in lieu of which indemnity was claimed and taken was not actually within the limits of a Mexican grant; and 2, because it was "otherwise defective or invalid." This language is certainly broad enough to include every defective certificate; and, in order that the United States might be protected from loss, it was provided that, if the sixteenth or thirty-sixth section, in lieu of which the selection was made, should be found outside the Mexican grant, the United States would accept that in lieu of the selected land, and confirm the selection. If, however, there was no such sixteenth or thirty-sixth section, and the land certified was held by an innocent purchaser from the state for a valuable consideration, such purchaser would be allowed to purchase the same from the United States at the rate of one dollar and twenty-five cents per acre, not exceeding three hundred and twenty acres for any one person.

The plain and obvious import of this language is that the act confirmed all selections where the State was entitled to the original school section, and it can make no difference whether the title had actually vested prior to the passage of the act, or whether the section was not designated by survey until after its passage. To render their meaning clear and unmistakable, the court, after stating that the statute related to and embraced all defective selections certified to the State, enumerates the classes of cases provided for by the act, as follows:

1. Cases where the state was entitled to indemnity, but the selection was defective in form;
2. Cases where the original school sections were actually in place, and the state was not entitled to indemnity on their account; and
3. Cases where the state was not entitled to indemnity, because there never had been such a section sixteen or section thirty-six as was represented when the selection was made and the official certificate given.

Can there be any reasonable doubt that lands to which the State had an absolute title at the date of the act, and for which it had received indemnity, are of the character referred to as the second class. "Cases where the original sections *were actually in place*," must refer to lands to which the State's title had vested, either when the selection was made, or at the date of the passage of the act. Speaking of the effect of the act upon this class of selections, the court says:

As to the second, the selection was confirmed, and the United States took in lieu of the selected land that which the State would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the State Under these circumstances,

it was a matter of no moment to the United States whether the original selection was invalid for one cause or another. If the state was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the state claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the State had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States.

The State not only invoked the passage of this act, but has accepted its provisions in the adjustment of its school grant. The acceptance of indemnity lands in lieu of the school sections to which its title had attached, and its acceptance of the terms of the statute confirming such selections, was the act of the State that divested its title to the school sections, and re-invested it in the United States as effectually as might have been done by a formal deed of conveyance.

If the title of the State had vested in the specific section, and it had parted with such title prior to the passage of the act, it could not be divested without the consent of the purchasers from the State, and an indemnity selection made thereupon would not be confirmed, but, having accepted the terms of the act and having received the benefit of its provisions, the State is thereafter estopped from claiming title to lands for which it has received indemnity, and this estoppel operates equally against all of its privies who purchased after the exchange or transfer of title.

The State has cited, in support of its claim, the decision of the Department in the case of D. C. Powell, 6 L. D., 302, holding that the act excepted from confirmation "those selections made in lieu of a sixteenth or thirty-sixth section, which had been surveyed in place and the title to which had vested at the date the selections were made. The case of Watson *v.* California, 6 C. L. O., 193, cited in support of this ruling, was decided in 1880, prior to the decision of the supreme court in the case of Durand *v.* Martin, *supra*, which held that "the language of the act is certainly broad enough to include every defective certificate," including those selections where "the original school sections were actually in place." Upon motion for review, the Department adhered to its former ruling, that the selection was confirmed by the act, but placed its decision upon the broad ground laid down by the Supreme Court in the case of Durand *v.* Martin, above referred to, and held that it is "immaterial when the right of the State attached to the school section, having selected other lands in lieu of it, and the act of March 1, 1877, having confirmed such selection, it amounted to an exchange of lands binding upon both the government and the State."

The ruling, that a selection is excepted from confirmation, if made in lieu of a sixteenth or thirty-sixth section, to which the title of the State had vested prior to the passage of the act, is clearly in conflict with

the principle ruled by the supreme court in the case of *Durand v. Martin*, and of the Department in the review of the case of *D. C. Powell*. It was not necessary to a decision in the Powell case, and should not be followed. See also *Hambleton v. Duhain*, 71 Cal., 141; *Daniels v. Gualala Mill Co.*, 77 Cal., 300.

In the case at bar, the State at the date of the act had a complete and perfect title to the thirty-sixth section in controversy, with full power to convey to any qualified grantee. An equal quantity of land had also at that date been selected by the State and certified to it by the Secretary of the Interior, as indemnity in lieu of the thirty-sixth section. The selection being invalid and defective, because the thirty-sixth section was in place, the State acquired no title to the selection, but the act of March 1, 1877, authorized the State to exchange its school section for the indemnity, and the exchange was made, not only as to this tract, but as to all school sections to which the State was then entitled, and for which it had received indemnity. The acceptance by the State of the provisions and benefits of the act completely divested it of the title to the school section and re-invested the title in the United States. It must follow that the State could not thereafter, as it attempted to do, convey the land to another.

The grantees of the State purchased with notice that the State had no title, having exchanged the school section for the indemnity selection, which it is alleged has also been sold. The fact that the purchasers from the State have conveyed to others, and that extensive improvements have been made, can make no difference.

It is clearly my duty to dispose of this section as public land of the United States, and the appellants must look to the State for relief.

Your decision is affirmed.

APPLICATION—RAILROAD LANDS—PRE-EMPTION CLAIM.

NESTER ET AL. *v.* TORGESON ET AL.

No rights are acquired by an application to enter lands that are reserved for the benefit of a railroad grant.

A pre-emption settlement on railroad land included within the forfeiture act of March 2, 1889, and existing at the date of said act, becomes at such time a lawful settlement, and as such constitutes a claim excepted from the operation of the act repealing the pre-emption law, and the filing thereunder having been tendered prior to said repeal the claim may be perfected as though said act had not been passed.

Secretary Noble to the Commissioner of the General Land Office, November 21, 1892.

I have considered the appeal of Kittil Torgeson, John J. Stearns, Patrick Nester, and William W. Black, from your decision of November 7, 1891, finding that James Fielding was the first settler on the SW. $\frac{1}{4}$ of Sec. 13, T. 47 N., R. 40 W., and that his pre-emption declaratory

statement for said land, tendered October 10, 1887, at Marquette, Michigan, should be placed upon record.

Fielding alleged settlement on the land September 12, 1887.

It appears from the record that there were several claimants for this land, whose claims may be described as follows:

On May 4, 1885, Kittil Torgeson, by J. W. Fordney, his attorney in fact, under a power of attorney executed October 29, 1884, applied to enter the north half of said southwest quarter, under the provisions of section 2306 of the Revised Statutes. Said application was rejected by the local officers, because said land "is in an odd numbered section within the twenty (20) miles granted limits of the Marquette and Ontonagon Railroad (act of March 5, 1865), and withdrawn by office letter of April 28, 1865. Withdrawal continued for the Houghton and Ontonagon Railroad by office letter ('F') May 1, 1871." An appeal was taken and forwarded to the General Land Office, May 8, 1885, and the papers were returned to the local office, January 19, 1889.

On said May 4, 1885, John J. Stearns, by said J. W. Fordney, his attorney in fact, under a power of attorney executed March 31, 1884, applied to enter the south half of said southwest quarter under the provisions of said section 2306. Said application was also rejected by the local officers, for the same reason given for rejecting the application of Torgeson. Stearns took an appeal, and the same proceedings took place as detailed in the case of Torgeson.

Both the above applications were renewed October 10, 1887.

On January 27, 1885, Thomas Currie tendered his pre-emption declaratory statement for said southwest quarter, alleging settlement on December 4, 1884, which was rejected by the local officers, for the same reason given in the case of Torgeson. He took an appeal, and the papers were sent to the General Land Office, and were returned January 19, 1889. He has made no new application, and is not now a party in the case.

On October 10, 1887, Patrick Nester made application to enter said southwest quarter as a homestead, alleging settlement September 13, 1887.

On November 9, 1887, William W. Black made application to enter said southwest quarter as a homestead, alleging settlement September 14, 1887.

A hearing was ordered to determine the rights of the several parties, at which all appeared in person or by attorney, and testimony was submitted.

On November 13, 1889, the local officers awarded priority of right to enter said land to said Torgeson and Stearns, according to their respective claims, on the ground that their first applications appropriated the land.

Appeals were taken by both Fielding and Nester, and, by letter of November 7, 1891, you reversed the decision of the local officers, and awarded the land to Fielding, as already stated.

By the act of June 3, 1856 (11 Stat., 21), section one, there was granted to the State of Michigan—

To aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin State line every alternate section of land designated by odd numbers, for six sections in width on each side of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from lands nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of said roads.

It thus appears that the granted lands extended to a width of six miles on each side of the road, and the indemnity lands extended to a width of nine miles outside of said granted limits.

By the act of March 3, 1865 (13 Stat., 520), section one, there was granted to the State of Michigan "for the use and benefit" of said roads—

Four additional sections of land, per mile, to that already granted by the act of Congress approved June 3, 1856, and joint resolution supplementary thereto, to be selected upon the same conditions, restrictions, and limitations, as are contained in the act of Congress, entitled "An act making a grant of lands to the State of Michigan, in alternate sections, to aid in the construction of railroads in said State," approved June 3, 1856: *Provided*, That the land to be so located by either of said roads shall be selected from the alternate sections, designated by odd numbers, within twenty miles of the line of said road.

It thus appears that said grant was increased four additional sections per mile, to be selected within twenty miles of the line of said road.

The land in dispute is situated more than fifteen and less than twenty miles from the line of the road now called the Marquette, Houghton and Ontonagon Railroad.

The grant made by virtue of said acts carried along with it, by necessary implication, the power in the land department, in the exercise of its discretion, to reserve from disposition the lands embraced in the grant. Julius A. Barnes, 6 L. D., 522.

By letter of April 28, 1865, the Commissioner of the General Land Office addressed the register and receiver of the Marquette land office, as follows:

Herewith enclosed, I transmit a diagram of the Marquette and Ontonagon Railroad, showing the six, fifteen, and twenty mile limits of the same, as directed by the Secretary of the Interior. You are hereby instructed to withdraw, upon the receipt of this letter, from sale, location, or claim, the vacant odd numbered sections and parts of sections between the fifteen and twenty mile limits of said road, until further orders from this office.

By the letter of the Commissioner, dated May 1, 1871, this withdrawal was continued in force for the use and benefit of the Houghton and Ontonagon Railroad Company, now the Marquette, Houghton and Ontonagon Railroad Company. This withdrawal was in full force on May 4, 1885, when Torgeson and Stearns applied to locate said land, as above recited.

So long as this withdrawal continued, the land embraced therein was not subject to entry. *Caldwell v. Missouri, Kansas and Texas Railway Company*, 8 L. D., 570; *Shire v. St. Paul, Minneapolis and Manitoba Railway Company*, 10 L. D., 85-88.

The said applications of Torgeson and Stearns to locate said land were therefore properly rejected by the local officers. The applicants acquired no rights by such illegal applications. *Goodale v. Olney*, 13 L. D., 498.

If the belt of land between said fifteen and twenty miles limits was intended by Congress for indemnity purposes, then its withdrawal was revoked by the order of August 15, 1887 (6 L. D., 93), which opened to settlement and entry lands withdrawn for indemnity purposes only. In that event, Torgeson and Stearns acquired no rights by their applications, made October 10, 1887, because they made no settlement on said land, while Fielding and Black both settled thereon in September preceding, and thereby acquired prior rights thereto. If said belt was not intended for indemnity purposes, then Torgeson and Stearns acquired no more rights by their second applications than by their first, or none at all, and for the reasons already given.

It is unnecessary therefore to determine the exact status of said belt of land, because, however it may be classed, the applications of Torgeson and Stearns must be rejected, while the rights of Fielding and Black as between themselves depend upon priority of settlement, and as between them and the government may be determined upon other and more satisfactory grounds.

As the land in dispute lies opposite to the uncompleted portion of the said railroad, it was forfeited to the United States by the act of March 2, 1889 (25 Stat., 1008). *Michigan Land and Iron Company*, 12 L. D., 214. This land is west of the terminal line established by that decision. By the first section of said act, it is provided that "all such lands are hereby declared to be a part of the public domain."

I concur in your opinion and in the finding of the local officers that "Fielding was the first and earliest settler on said land, and his settlement was made in good faith." It became a lawful settlement upon the passage of said act. This settlement constituted a "bona fide claim lawfully initiated," within the meaning of those terms as used in section 4 of the act of March 3, 1891 (26 Stat., 1095). His declaratory statement was tendered prior to the passage of said act, and his claim may now be perfected in the same manner as if said act had not been passed.

Your judgment is affirmed.

FOX v. CUMMINGS ET AL.

Motion for review of departmental decision of April 27, 1892, 14 L. D., 431, denied by Secretary Noble, November 22, 1892.

PRIVATE ENTRY—ERRONEOUS NOTATION.

NATHANIEL SISSON.

An erroneous notation of record in the local office showing the disposition of a tract withdraws the land covered thereby from private entry until duly restored.

Secretary Noble to the Commissioner of the General Land Office, November 22, 1892.

With your letter ("C") of April 9, 1892, you transmit the appeal of Nathaniel Sisson from your decision of February 13, 1892, in which you affirm the action of the register and receiver in rejecting his application to enter, at private cash entry, the SW. $\frac{1}{4}$ of Sec. 29, T. 48 N., R. 20 W., Boonville, Missouri.

The register and receiver rejected the application for the reason that the records in their office show the tract to have been entered in 1839 by Alfred Brock, per cash certificate 19,839.

It appears, however, from the recitals in the decision appealed from, that the tract books in your office do not show that the land has ever been appropriated in any manner, and that the same is vacant public land, and that said certificate No. 19,839 is not in the name of Mr. Brock, nor for said tract.

You reject the application, however, because the fact that the records show the tract to have been appropriated "withdraws the same from private cash entry, until duly restored by public notice."

It is presumed that the land was, prior to 1839, offered at public sale—a condition precedent to its disposal at private cash entry. But the register's notation of its sale to Brock, although it may have been erroneous, effectually served to withdraw or suspend the land from proper disposal.

In the case of John C. Turpin (5 L. D., 25) it is said:

When lands subject by law to private entry have been improperly withheld therefrom, if a considerable time has elapsed since the close of the sale to allow them to be entered by any particular individual without public notice that they are subject to private entry, would in most cases give such individual a preference over the rest of the community, and not be a faithful execution of the law.

In the case at bar, the land was noted as having been disposed of more than fifty years before this application was presented. Its allowance, therefore, without a restoration by public notice, would have given a preference to the applicant over the rest of the community. The application was properly rejected. (See 9th Regulation of January

1, 1836; Opinions and Instructions, 515; S. N. Putnam, 4 C. L. O., 146; Harlow Baird, 4 L. D., 311; James Steel, 6 L. D., 685; Richard E. Pairo, 9 L. D., 10.)

The decision appealed from is accordingly affirmed.

— Vacated,

ABANDONED MILITARY RESERVATION—ACT OF JULY 5, 1884.

MATHER ET AL v. HACKLEY'S HEIRS. 19 L. D. 48

No pre-emptive right under the act of April 22, 1826, can be acquired through an unauthorized settlement on public land.

The occupation and improvement of public land with a view to pre-emption does not operate to except such land from the effect of a subsequent reservation for military purposes.

The heirs of a settler have no claim that can be recognized or perfected under the pre-emption law, where the decedent has not himself acquired a pre-emptive right by acts performed in compliance with the law.

The occupation of land included within a military reservation by permission of the military authorities does not constitute a settlement that is within the protection accorded *bona fide* settlers by the act of July 5, 1884.

No right of entry can be exercised under said act of 1884 where the lands embraced within the reservation are not subject to entry under the public land laws at the time of their withdrawal.

Secretary Noble to the Commissioner of the General Land Office, November 25, 1892.

I have considered the case, in which Daniel Mather, the City of Tampa, the heirs of Louis Bell, deceased, also W. B. Henderson, Lizzie W. Carew, Julius Caesar, Frank Jones, E. B. Chamberlin, and Martha Lewis—*alias* Martha Stillings—are the appellants, and the heirs of Robert J. Hackley, deceased, are the appellees, upon the several appeals by the former from your decision, dated December 10, 1880, rejecting their claims for land within what is known as the Fort Brooke military reservation, in the State of Florida, and allowing the heirs of Robert J. Hackley, deceased, to perfect their claim to the land.

The status of said reservation has been frequently considered by this Department, and a brief reference to its history may not be inappropriate.

As early as November 5, 1823, the War Department issued an order to Colonel George M. Brooke, of the United States Army, to proceed to the then territory of Florida, and, in conjunction with James Gadsden, of said territory, to select a site for a cantonment or garrison of the United States troops in that vicinity. Pursuant to said order, a site was selected for a garrison at a point on the east side of the Hillsborough river, at its junction with the eastern arm of Tampa Bay, and some time in March, 1824, the United States took possession, and used the site so selected as a military post.

On December 10, 1830, said site was formally reserved by executive order, in which its limits were fixed at sixteen miles square.

On January 21, 1845, General Worth recommended the reduction of said reservation to "four miles square," which recommendation was concurred in by General Scott, on February 18, and approved by the Secretary of War on February 19, 1845.

On September 14, 1846, Major Whiting, commanding the post at Fort Brooke, acknowledged the receipt of a letter transmitting "an extract of the report of Major General Scott and the order of the Secretary of War, relative to a reduction of the reservation at Tampa Bay," and reported that he had decided, under said instructions, to reduce the reservation to the following limits, namely:

From the point where the poles on the north side of the "enclosed ground" strikes the east bank of Hillsborough river, running in a line with said poles to or near the first angle, thence in a more northerly direction, say seventeen hundred yards, more or less, to embrace the spring from which the whole garrison is supplied with water (good water can not be obtained at a nearer point in the village of Tampa), thence to the most convenient point on the bay, east of the "enclosed grounds," thence by the shore of the bay and river to point of departure.

This report was not submitted to the Secretary of War until March 22, 1848, when it was approved by him on the same day, and transmitted to the President, who approved the same on March 24, 1848.

By the act of Congress approved July 25, 1848 (9 Stat., 726), there was confirmed and granted to the county commissioners of the county of Hillsborough a location of one hundred and sixty acres, "for the county site of said county at Tampa, viz: beginning on the east bank of Hillsborough river, at the point where the reduced military reservation, as made by Major L. Whiting, September 14, 1846, strikes the same," etc.

On July 24, 1860, the Secretary of War advised the Secretary of the Interior, as follows:

SIR: Referring to the correspondence between the two Departments on the subject, I have the honor to inclose to you a report of the Quartermaster General, showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

On November 27, 1860, the Commissioner of the General Land Office returned to the Secretary of the Interior the letter of Senator Yulee, enclosing a proposition of one James M. McKay to rent said reservation, with the statement that he did not propose "at present" to recommend its sale, and saw no objection to its being rented to Mr. McKay, at a fair rental.

On December 3, 1860, the Secretary of the Interior consented to the occupancy of said tract by said McKay, upon his filing an agreement to take proper care of the buildings and grounds, and deliver the same on demand in as good condition as he received them, without cost to the United States, and for the faithful performance of said agreement was to give bond in the sum of \$1,000.

In January, 1861, McKay executed the agreement, gave the bond

required, and took formal possession of said land. The recital and condition of said bond are:

That whereas the said James McKay has received of and from the said Commissioner of the General Land Office the possession, custody, and control of the enclosed grounds of Fort Brooke, situate in the county and state aforesaid, with the appurtenances thereto belonging, as shown by an agreement of even date herewith, now, if the said James McKay shall well and truly perform all and every part of said agreement in manner and form as he hath agreed to do, then the foregoing obligation to be null and void, otherwise to remain in full force and virtue.

The agreement, as above stated, bound the said McKay, his heirs, executors, and administrators, to take good and proper care of the buildings, fences, grounds, and other improvements in and upon said premises, and to return them to the said Commissioner of the General Land Office, or his successors in office, in and (an) as good condition as they are when I receive them, without any cost or charge to the United States, whatever ordinary wear and tear excepted.

From 1861 until 1864 the reservation was held by the confederate authorities, when it was retaken by the United States, and occupied for a few days, and was again occupied in May, 1865, for a month, and again occupied by the United States in July, 1865, and garrisoned continuously until August 16, 1869, when the troops were withdrawn, but the custody of the reservation was with the War Department until February 16, 1874. (See letter of Secretary of War, dated March 16, 1874)

On April 6, 1870, the Secretary of War, in reply to a letter addressed to him by the Commissioner of the General Land Office, dated March 26, same year, "relative to the public lands occupied by this (his) Department for military purposes, at Fort Brooke, Florida," advised the Secretary of the Interior "that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject. The necessary orders have been given for the disposition of the movable public property at the post."

Afterwards, on August 31, 1870, the Adjutant General of the Army addressed a communication to the Commissioner of the General Land Office, saying:

Referring to your communication of April 9, 1870, I am directed by the Secretary of War to request that you will suspend for the time being any further action upon the letter of April 6, 1870, from the War Department relinquishing the Fort Brooke military reservation in the State of Florida, it appearing from recent reports from the Board of Engineer Fortifications that the reservation will be required for military purposes, in view of which measures are being taken to have it surveyed and lawfully declared and set apart by the Executive.

In reply to said communication, Commissioner Wilson, on September 2, 1870, advised the War Department:

That on the 9th April last the register and receiver of the U. S. Land Office, at Tallahassee, Florida, were informed of the above relinquishment (April 6, 1870), but directed to allow no entries of land within the reservation until further advised by this office. These officers, as also the surveyor-general, have this day been furnished copies of your letter, and instructed to allow no entries until further directed.

(See Records Surv. Div., Vol 2, 401-402.)

On January 22, 1877, the War Department requested the President to set apart by executive order, in accordance with the accompanying plat, three tracts as follows:

- I. Tract marked A, B, C, containing 127,417 acres.
- II. Tract marked "n, m, l, k," containing ten acres.
- III. Right of way between tracts I and II, marked B, n, K, P.

Upon said request, the President, the same day, made the following endorsement:

The within request is approved, and the reservation is made accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

This order was transmitted by the Secretary of the Interior to the General Land Office on January 25th same year. Afterwards, on May 29, 1878, the Secretary of War again requested "that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the executive." A plat of the reservation, with field notes, was transmitted, showing its area to be 155½ acres. On the same day the President made the following endorsement:

The within request is approved, and the reservation is made and proclaimed accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

On June 1st, 1878, the boundaries of said reservation were announced in General Orders No. 5.

On January 4, 1883, said reservation was relinquished and transferred by the Secretary of War to the Interior Department, and, on March 8th following, the Secretary of the Interior was advised that "the services of the quartermaster's agent, now in charge of the reservation, will be continued until the 15th instant, at which date he will be discharged."

On March 16, 1883, you transmitted to the local officers, at Gainesville, Florida, "an approved diagram of the subdivision" into seven lots, containing in all 148.11 acres, in sections 18 and 19, T. 29 S., R. 19 E., and section 24, T. 29 S., R. 18 E., which was received at said office on the 22d day of the same month.

On April 2d following, you sent a telegram to the local officers, directing them to allow no entries upon any land within said reservation. Prior to the receipt of said telegram, certain parties were allowed to enter and file for land under the homestead and pre-emption laws, and certain other persons applied to enter and file for said land, which applications were rejected by the local officers, on account of the prior entry and filings of record.

On December 17, 1883, you considered the several applications for land within the limits of said diagram, and rejected the same and held that the land was not subject to settlement and entry under the homestead and pre-emption laws, but must be disposed of under the provisions of the several acts of Congress, approved August 3, 1846 (9

Stat., 51, R. S. U. S., 2455), August 18, 1856 (11 Stat., 87), and July 2, 1864 (13 Stat., 374, R. S. U. S., 2364).

On January 22, 1884, you held for cancellation Edmond S. Carew's homestead entry No. 11,637, of lot 16, Sec. 18, lots 12, 13, and 14, Sec. 19, T. 29 S., R. 19 E., and lots 8, 9, and 10, Sec. 24, T. 29 S., R. 18 E., filed March 22, 1883, also the pre-emption declaratory statement No. 564, filed by Clifford Herrick on March 26, 1883, for the lands covered by said homestead entry, alleging settlement thereon March 21, 1883; and the pre-emption filing, No. 569, of Louis Bell, made March 30, 1883, for the same lands upon which he alleged settlement March 25, 1883, covering said reservation.

On May 16, 1884, Mr. Secretary Teller considered the several appeals filed from your decisions, and held that said act of 1856 and section 2364 of the U. S. Revised Statutes must be construed together, and they prescribe the manner of the disposition of military reservations in Florida; that claimants must take notice of the law upon the subject, and that said entry and filings having been prematurely made, your said decision holding the same for cancellation was correct and must be affirmed (2 L. D., 603-610).

On May 21, 1885, Acting Secretary Muldrow reaffirmed said decision, and called your attention to the provisions of section 2 of the act of July 5, 1884 (25 Stat., 103), relative to the rights of actual settlers upon said reservation. On April 30, 1885, Acting Secretary Muldrow affirmed your decision of June 13, 1884, rejecting the application of Enoch E. Chamberlain to make homestead entry of lot 14, or the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 29 S., R. 19 E., for the reason that at the date thereof the land was covered by homestead entry of Carew.

Afterwards, on May 10, 1887 (5 L. D., 632), Acting Secretary Muldrow considered the application of Daniel Mather to make pre-emption entry of lots 8, 9, and 10, of Sec. 24, T. 29 S., R. 18 E., lot 16, Sec. 18, and lots 12, 13, and 14, of Sec. 19, T. 29 S., R. 19 E., Gainesville, Florida, under said act of July 5, 1884, upon his appeal from the action of the local officers, rejecting the same because he had "no claim of record upon which proof can be made covering the land in question," and held that in the absence of an adverse claim, failure to file a declaratory statement will not prejudice the right of the settler to make final proof and payment; that said act of July 5, 1884, governs the disposal of all lands in abandoned military reservations, not otherwise disposed of, and protects the rights of settlers prior to January 1, 1884, duly qualified to make homestead entry; that said Mather, if his allegations be true, is "entitled to offer proof, and if in all respects qualified may make entry, provided there is no objection other than those discussed herein."

On May 17, 1889, you were advised that on June 4, 1887, Honorable Wilkinson Call, a United States Senator, from Florida, filed in the Department a request that said case of Daniel Mather be reconsidered,

for the reason that a person in the casual occupation of a house and lot upon a military reservation while the same was under the control of the military authorities could acquire no rights as a homestead settler thereon, and also because a bill had been reported upon favorably by the Committee on Public Lands at the "49th Session," to donate said reservation to the town of Tampa; that pending the consideration of said motion the Chairman of the Senate Committee on Public Lands referred to the Department, for its views thereon, Senate Bill No. 2712, "To donate to the town of Tampa in Florida the Fort Brooke military reservation for the benefit of the free schools and other purposes."

Attention was called to the report of Mr. Secretary Vilas upon said bill, dated May 10, 1888, relative to the status of said reservation, as to whether the same was, as alleged, within the limits of the city of Tampa, and you were informed that:

In view of this information that has been acquired by the Department, since the rendering of the decision in the case of Daniel Mather, and of the conflicting claim of the widow of Edward S. Carew, I have thought proper to direct that a hearing be ordered in the case of Mather, for the purpose of determining whether said land is included within the limits of an incorporated town, or occupied for the purposes of trade and business, and to determine the character of Mather's settlement, and whether it was simply as an occupant by permission of the military authorities, and to this end I return all the papers before the Department in the case of Mather and also in the case of Lizzie W. Carew.

The hearing was duly had, and on December 20, 1889, the local officers rendered their joint opinion upon the evidence submitted by the respective parties.

In their opinion the local officers state, that due notice was sent to Daniel Mather, S. W. Carew, Andrew Stillings Joel B. Myers, Richard Nash, G. W. Kirby, Frank C. Thomas, Henry W. Beach, John S. Havens, Julius Caesar, Louis Bell, W. B. Henderson, Clifford Herrick, E. B. Chamberlain, Marion M. Nelson, Wert S. Myers, and the heirs of R. J. Hackley, deceased, also the mayor and city council of Tampa, Florida; and that all of the said parties appeared by counsel and submitted their evidence in support of their respective claims.

The local officers first considered the claim of the heirs of said Hackley, and found that said R. J. Hackley entered upon the land claimed by his heirs included in said reservation in 1824, under the provisions of the acts of Congress approved February 5, 1813 (2 Stat., 797), and April 22, 1826 (4 Stat., 154); that said Hackley never relinquished his claim to said land; that "Hackley made entry in good faith and for the purposes of securing a home" under said acts of 1813 and 1826, and that his claim is superior, in the absence of any adverse claim, to the claims made after the abandonment of said reservation in 1883.

The local officers further find that said Mather went on said reservation with a man by the name of Ross, with no intention of making the land his home, that "Mather's declaratory statement was filed as a mere speculation in the joint interest of himself and Ross, without

intent on the part of either to locate permanently as a pre-emptor or homesteader on the land;" and that in 1885 Mather and Ross abandoned said reservation and have since lived in Tampa.

With reference to the claim of Mrs. Carew, the local officers report that her husband, Edmond S. Carew, made his said entry on March 22, 1883, which was canceled as above set forth; that in making said entry Carew was acting as the agent of said Senator Call, who furnished the money to pay the fees and Commissioners in making said entry, and intended that the entry should be for the benefit and use of the city of Tampa; that said Carew did not make said entry in good faith for a home, but under an understanding that a part of the land should be donated to the city of Tampa for a park, and the rest to be held jointly with other parties who were interested in advancing the interests of said city; that said entry was not made in good faith for the purpose of making the land his permanent home.

The claim of Louis Bell is found to be based upon his settlement made with the permission of the military, but on account of his good character, the local officers find that "the claim of his wife and children are entitled to more consideration from the government than any of the other claims filed in this case."

The claim of the city of Tampa is based upon the fact that in 1889 the State of Florida, by legislative enactment, merged the towns of Tampa and North Tampa into one corporation, under the name of the city of Tampa, and extended the limits of the city so as to include said reservation, and it is claimed that the city is entitled to said reservation for a public park, and such other uses as may be deemed necessary.

The local officers find that the incorporated town of Fort Brooke, having a mayor and council, adjoins said reservation, and has equal corporate rights with the city of Tampa; that on January 1, 1883, and also on July 5, 1884, the towns of Tampa and North Tampa did not include said reservation, but were contiguous thereto, and only included said reservation under said act of incorporation of 1889; testimony fails to show that any considerable portion of said reduced reservation was used and occupied for trade and business.

With reference to the application of William B. Henderson, dated Nov. 27, 1883, to locate Gerard scrip upon the lands included within said reservation, the local officers say—"It is not clear that Gerard scrip can be located upon other than public lands already subject to entry, and of the minimum value of one dollar and twenty-five cents per acre." The local officers did not consider it necessary to review in detail the evidence relative to the other claims filed for lands within said reservation, because "it would be merely a repetition of what has already been stated with reference to the other claims referred to at length."

The local officers, after commenting upon said acts of Congress, relative to the disposition of lands in military reservations in Florida, find

that the status of said reservation is the same as when it was relinquished to this Department in 1883; that until the necessary steps are taken it cannot be disposed of under the act of July 5, 1884, and that "those who were upon the reservation prior to or on the 1st day of January, 1884, were there as squatters, having no legal claim or right to any portion of the land." They further "recommend that all claims now pending, either contest, pre-emption, or homestead, excepting the claims of the heirs of R. J. Hackley and Louis Bell, be canceled, and that such relief as may appear best in the judgment and within the authority of the Department be granted in the two excepted cases just above named."

On December 10, 1890, you considered the several appeals filed from the decision of the local officers, which you quote and make a part of your own. You state that the Mather case partially determines the status of said reservation, and that he was entitled to offer his proofs, and, if qualified, make entry, "provided that there is no objection other than those discussed herein;" that the evidence shows that Mather settled upon said land with the permission of the military authorities, which was sufficient to identify him with the cantonment, and his subsequent removal to Tampa was an abandonment of any right he might have had by reason of being on the land at the date of the abandonment of the reservation; that in addition, other rights had attached long prior to Mather's claim; that Hackley's settlement, which was prior to the selection of said reservation, was also prior to all other claims, and is fully protected by the provisions of said acts of 1826, 1858 and July 5, 1884; that under the second section of said act of 1884, if a survey and appraisal be made and a public sale ordered, due notice thereof must be given, but where, under the proviso of said section, a settler is entitled to enter the whole reservation, there is no necessity for appraisal or notice, and the fact "that the land is now within the incorporated limits of Tampa does not affect the rights of settlers, acquired before the incorporation, nor does the fact that at different times business of different kinds was conducted on the tract and without his consent."

You accordingly rejected all the claims on this tract, except that of the heirs of Hackley, who were allowed in case your decision became final to make entry under section 2269, U. S. R. S., subject, however, to an application made by the Supervising Surgeon-General of the Marine Hospital Service that there be set apart a certain described tract containing five acres for the use of the United States Marine Hospital Service, which has not yet been considered by you.

Elaborate briefs have been filed by the appellants, and besides, the questions at issue were discussed in an oral argument had on September 5, and 6, 1892.

I do not deem it necessary to set out in detail the grounds of error alleged in the several appeals. It is urged on the part of those claim-

ing adversely to the heirs of said Hackley that his said settlement was illegal in its inception and not protected under the said act of July 5, 1884.

If Hackley's claim to the land be sustained, the others must necessarily fail. The facts relative to his settlement do not appear to be disputed. He went upon said land in 1823 and 1824, prior to the selection thereof for a military site by Col. Brooke, and was removed therefrom by the military forces in possession of the reservation in March, 1824; that in 1835 he filed in the local office at St. Augustine, Florida, proof in support of his claim, and afterward, on November 27, 1843, he filed in the Newmansville land office, same State, a notice that he claimed "the right of pre-emption to the tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved April 22, 1826;" that in 1845 said Hackley died at Tallahassee, in said State, where he had continued to reside after being removed from said land. On October 14, 1887, the administrator of the estate of said Hackley applied to purchase said lands, which application was rejected because the land applied for is embraced in said reservation. Upon a subsequent hearing, the local officers found that Hackley had the prior claim, and you awarded all the land in said reservation to his heirs.

Let us first inquire what rights Hackley acquired under said act of 1826. The first section of said act provides—

That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by the act entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen (2 Stat. 797).

By section two of said act of 1813, persons claiming a preference right of entry were required to file with the proper local land officers a notice particularly describing the quarter section which he claims, and any person entitled to a preference right of purchase, who shall fail to make entry of the land claimed by him at least two weeks before the commencement of the public sales, shall forfeit his right, and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs. Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (2 Stat. 445), act of March 30, 1822, Sec. 9 (3 Stat., 654). There can hardly be serious question, I think, that when the officers of the government selected the site of said reservation, Hackley had no right thereto. His settlement was

clearly illegal, and by the express terms of said act of 1826 said reservation, being rightfully claimed as a reservation, was excepted from its provisions.

In the case of *Frisbie v. Whitney* (9th Wallace, 187), the supreme court held that occupation and improvement on the public lands with a view of pre-emption, confer no vested right in the land so occupied; that such vested right is only obtained under the pre-emption laws, where the purchase money has been paid and the receipt of the proper land officer given to the purchaser, and that until this is done, Congress may legally withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. In the opinion of the court, p. 196 and 197, it is said—

The argument is urged with much zeal that because complainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashley* (6 Wallace, 142), that the rights of the claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.

This ruling was re-affirmed by the supreme court in the *Yosemite Valley* case (9th Wallace, 77), and in *Shepley v. Cowan* (91 U. S., 330-337).

In the case of *Atherton v. Fowler* (96 U. S., p. 513-517), Mr. Justice Miller said—

In the earliest stages of our land system no right or interest could be secured by the individual in any public land until it had been surveyed into legal subdivisions. Nor after this had been done was it subject to sale until, by a proclamation of the President, it was brought into market. . . . It often occurred that emigration, in advance of the readiness of the public lands for these sales had caused hundreds and thousands to settle on them; and when they came to be sold at public auction, their value, enhanced by the houses, fences, and other improvements of the settler, placed them beyond his reach, and they fell into the hands of heartless speculators. To remedy this state of things the pre-emption system was established. This at first was only applicable to lands which had been surveyed. But gradually this was changed, until, in 1862, pre-emptors were allowed, on unsurveyed lands as well as those surveyed. Act of June 2, 1862, 12 Stat. 418.

The government has never offered said reservation for sale. On the contrary, the War Department legally acting, presumably by direction of the President, took possession of said land and continued in possession thereof until it was relinquished to this Department for disposal under the laws then existing.

But there is another reason why the claim of Hackley's heirs must be rejected. As we have seen, he had no vested right to said land in his lifetime, because his settlement was illegal in its inception, and, at the date of his death, he had no interest in said land which could descend to his heirs. In the case of *Buxton v. Traver* (130 U. S. 232), the United States supreme court decided that a settler upon public land, in advance of the public surveys, acquires no estate which he can devise

by will, or which, in case of his death intestate, will fall to his heirs at law, until, within a specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law.

On page 237 of the opinion, the court says—

Section 226 of the Revised Statutes, upon which the plaintiffs rely, has no application to the case presented by them. That section was taken from section 2 of the act of March 3, 1843, 5 Stat. 620 ‘to authorize the investigation of alleged frauds under the pre-emption laws, and for other purposes.’ At that time no settlement on unsurveyed lands was permitted by the laws of the United States, and the second section was intended to secure to the heirs of the deceased pre-emptor a claim to the benefit of the pre-emption laws, which he had initiated, but not completed before his death, ‘by filing in due time all the papers essential to the establishment of the same.’ His executor or administrator, or one of his heirs was in that event allowed to file such papers. No claim of the deceased in this case was lost by any failure to file the necessary papers. The time for any papers to be filed did not arrive during his life.”

Any claim for injury on account of the removal of Hackley from said reservation in 1824 can be recognized only by the legislative branch of the government, for it is clear that the heirs have no claim for said land which can be recognized by this Department.

Having arrived at the conclusion that Hackley’s heirs have no claim for said land, it will be proper to inquire into the legality of the other claims for said land.

The effect of the filing of said diagram in the local land office on March 22, 1883, was fully adjudicated in said departmental decision of Secretary Teller (*supra*) affiruiing your action in holding for cancellation the entry of Carew and the declaratory statements of Herrick and Bell, and holding that the land cannot be disposed of until ordered into the market under the provisions of sections 2364 and 2455, R. S. U. S.

No further action was taken by the Department looking to the final disposition of said lands, and Congress, on July 5, 1884, passed said act relative to the disposition of abandoned military reservations. The first section provides for the transfer of abandoned military reservations to the Interior Department whenever they have, in the opinion of the President, become useless. Section two of the same act declares “That the Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands, or any part thereof, in such reservations, to be legally surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots, or both.” Said section two further provides for the appraisement of “each tract thereof” by a commission of “three competent and disinterested men,” and the sale of said lots to the highest bidder for cash at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre, after due publication of notice of said sale, with a proviso—

That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January

first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is, by law, entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions, *Provided, further,* That said lands were subject to entry under the public land laws at the time of their withdrawal.

By section three of the act provision is made for the appraisement and sale at public auction of the improvements, buildings, building materials and other property "upon any such lands, subdivisions or lots not hereafter sold by the United States authorities, with a proviso

That where buildings or improvements have been heretofore sold by the United States authorities, the land upon which such buildings or improvements are situate, not exceeding the smallest subdivision or lot provided for by this act, upon the reservation on which said buildings or improvements are situate, shall be offered for sale to the purchaser of said improvements and buildings at the appraised value of the lands, and if said purchaser shall fail for sixty days after notice to complete said purchase of lands, the same shall be sold under the provisions of this act.

The finding of the local officers and your office, that the entry of Carew and the settlement of Mather were not made in good faith, is supported by the evidence, and their claims were properly rejected. Nor will the occupation of the land while withdrawn by Louis Bell, with the permission of the military, constitute him a settler within the purview of said act of 1884. The application to locate Gerard scrip was rightly rejected, for the land at that time was segregated by said entry of Carew, and the local officers had been directed not to allow any entries or filings on said reservation.

It is clear that none of said claimants is entitled to enter any of the lands claimed by them under the provisions of said act of 1884, for the obvious reason that under the said second proviso the lands were not "subject to entry under the public land laws at the time of their withdrawal," and the Secretary of the Interior has not proceeded to execute the provisions of said act.

The reservation was not brought into market in 1860, but was rented by the Department to said McKay, for the reason that the Commissioner of the General Land Office did not propose, "at present," to recommend its sale.

No notice has ever been given that the reservation was subject to settlement and entry under the general land laws of the United States. Besides, when said executive orders of 1877 and 1878 were made, the action of the Department, relative to the disposition of said reservation, was suspended, and the local officers at Tallahassee were specially directed, on April 9, 1870, "to allow no entries until further directed." This order was never revoked prior to the issuance of said executive orders, the price of the land was never fixed as required by said act of 1864, and the Department expressly decided that, prior to 1883, the land in said reservation was not subject to entry and settlement, and that said filings and entry "were premature." It was also said that

"the 148.11 acres that only remain of this reservation" may rightly be regarded as an "isolated or disconnected" tract under section 2455, before recited, which might properly be ordered by you "into market after due notice," and exposed to sale. By reason of its long reservation and the settlement of the surrounding country, and the building of a town near by the tract in question has become valuable, and these numerous claimants and all others ought to have an equal opportunity of purchase," citing Public Domain, 249, and 3 Ops., 274. The same doctrine is announced in *Eldred v. Sexton*, 19 Wall., 189.

It is manifest, therefore, that the lands in said reservation were not subject to entry under the public land laws at the time of their withdrawal, and, hence, said claimants can not claim protection under said act of 1884.

Under the law as it now stands, said reservation will be disposed of, whenever "the Secretary of the Interior is of the opinion the public interests so require," under the provisions of said act of 1884.

Your judgment awarding said lands to the heirs of said Hackley is reversed, but affirmed in so far as it rejects the other claims to the land in controversy, and action looking to the disposal of said land will be deferred until you are further advised by this Department.

PRACTICE—MINING CLAIM—MILL SITE.

HARGROVE *v.* ROBERTSON.

Concurring decisions of the local office and General Land Office, where the evidence is conflicting, will not be disturbed on appeal unless clearly wrong.

A mill site may be legally located prior to the application for patent on the mining claim connected therewith.

Secretary Noble to the Commissioner of the General Land Office, November 25, 1892.

I have considered the appeal of Robert R. Hargrove from your decision dated January 18, 1892, dismissing his contest against the mineral entry of the John Arthur mill-site made by James C. Robertson on November 26, 1888, at the North Yakima land office in the State of Washington.

The record shows that on June 3, 1886, said Robertson located the John Arthur lode claim, and on January 11, 1887, the mill-site, both claims being on unsurveyed land in Okanogan county in said State; that the mill-site location was filed for record with the recorder of Salmon River mining district on January 17, 1887, stating in said notice that said mill-site was located for the John Arthur lode; that on July 6, 1888, said Robertson filed his application for patent, giving notice thereof from July 12, to September 13, 1888, and no protest or adverse claim was filed against said application during said period; that on

November 26, 1888, said Robertson entered said lode and mill-site, embracing lots numbered 37A and B., the same being about one mile apart from each other; that on September 26, 1889, said Hargrove filed his protest against the issuance of a patent for said mill-site, in which he alleged that the land embraced therein was at the time of its location occupied as the town site of Conconully; that at the date of said protest, there were upon said mill-site three stores, one livery stable, one barber shop, one hotel, one shoe shop, one restaurant, one drug store, one boarding house, and twenty residences; that said mill-site was fraudulent in its inception, because it was located for the purpose of speculation; that said Robertson surveyed said mill-site into town lots and offered the same for sale, and has also sold said claim to one T. J. McDonald; that the notice of application for patent was not posted in a conspicuous place, but at a point remote from the main traveled street, for the purpose of concealment. Upon said protest a hearing was duly had to determine whether said mill-site was actually located for mining or milling purposes, and whether since said location the land has been used and occupied as a mill-site in the manner contemplated by law. On April 14, 1891, the testimony having been forwarded to the Waterville office, the local officers rendered their joint opinion that the charges in said protest had not been sustained, and recommended that the contest should be dismissed and the mill-site passed to patent.

The contestant appealed from the decision of the local officers, alleging that said mill-site claim is illegal because (1) "the notices of location and of application for patent were not properly recorded or posted;" (2) that "no sufficient use of the land for mill-site purposes is shown;" (3) that the land had been appropriated for townsite purposes before any legal location was ever made for a mill-site; and (4) that "the application for patent was made for the purpose of getting title to town lots and not for mining or milling purposes."

In considering said appeal you found that the evidence clearly showed that, at the date of the mill-site location, the land was not occupied for townsite or other purposes; that at the date of said hearing the land in question was occupied substantially as alleged in said protest, but the occupants had notice of said mill-site claim, and neither said Robertson or his grantee, McDonald, gave permission for the occupation of said mill-site, except to one or two persons; that the allegation of fraud is not proven, nor is it shown that Robertson and McDonald laid out said mill-site in town lots and offered them for sale; that the notice of application for patent was sufficient, and was posted in "a conspicuous place," as required by law; that the ore obtained from the John Arthur lode is of such a low grade as to render it uncertain as to what kind of machinery is required to treat it properly; that the evidence fails to show that said mill-site was not used for mining or milling purposes, and you concur with the recommendations of the local officers that said contest should be dismissed.

The appeal from your decision contains ten specifications of error which may be summarized as follows:

(1) In holding that the notice of said application was duly posted. (2) in finding that the location of said mill-site was duly made, and at the date thereof the lands covered thereby were not occupied for town-site purposes. (3) In not finding that a location of a mill-site cannot be made apart from an application for patent upon the mining claim to which said mill-site is appurtenant. (4) In holding that it was not proven that claimant or his transferee consented to the erection of buildings on said mill-site and the same was located for speculative purposes, and not used for mining or milling purposes. (5) In holding that the burden of proof is upon the contestant to show that said mill-site was not used for mining and milling purposes, since the entry had been suspended and the entryman called on for proof upon this point. (6) In not holding that said location and entry were illegal because the location was not preceded by occupation of the land for milling purposes, and the entry was admitted by Robertson to have been made for the common use of several mining claims.

A careful examination of the testimony shows that the evidence as to the occupation of said mill-site for milling purposes is conflicting, and in such cases the concurring conclusions of the local officers and your office will not be disturbed, unless clearly wrong. *Creswell Mining Co. v. Johnson* (8 L. D., 440); *Chichester v. Allen* (9 L. D., 302); *Collier v. Wyland* (10 L. D., 96); *Cleveland v. North* (11 L. D. 344); *Darragh v. Holdman* (*id.*, 409); *Tyler v. Emde* (12 L. D. 94); *Watkins et al., v. Garner* (13 L. D., 414).

I do not deem it necessary or advisable to comment in detail upon the testimony of each witness in the case, for it does not appear that the findings of fact concurred in by you are "clearly erroneous." But counsel stoutly contend that the validity of said location is a question of law, and that you failed to rule upon that point made by them in their appeal from the local office, namely, "that the law makes no provision for the location of a mill-site, apart from or prior to the application for patent on the mining claim." This contention cannot be sustained. It does not follow that because you did not discuss the point made by counsel in his brief, as to the want of authority to locate a mill-site prior to application for patent, said contention was not considered. It necessarily follows, if your judgment be correct, that a location of a mill-site may be made prior to the application for patent. Patents for mill-sites are authorized by Sec. 2337, Revised Statutes of the United States, which provides:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent or surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made on such non-adjacent land shall exceed five acres, and

payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

It is evident that said section must be construed to authorize location of mill-sites prior to the application for patent, because it specially insists upon "the same preliminary requirements and notice as are applicable to veins and lodes," and restricts future locations to five acres, and requires "payment for the same at the same rate as fixed by this chapter for the superficies of the lode." It will not be denied that the basis of a mineral claim is the due location thereof, and the practice of the land department has uniformly been, as I am informed, to require evidence of the due location of the mill-site prior to the publication of notice of application for patent therefor.

In the case of Rico townsite (1 L. D., 556, 557) my predecessor said: "It is true that the statute is silent as to the location of mill-sites; but it is not unreasonable to suppose such location must be made substantially as that of a mining claim."

In this case there was a contest between the townsite entrymen and the mill-site protestants who had *located* their claims prior to the townsite entry. The claim of the protestants was rejected because "there is no evidence of a lode, vein, or claimants therefor, except as appears in the protest of the mill-site claimants against issue of patent to the townsite. The case of Esler *et al.* v. Townsite of Cooke (4 L. D., 212) was also a contest between the protestants, who were mill-site claimants, and said townsite, and the statement is made that "the protestants aver that each mill-site was *located* in connection with a distinct lode claim. So also in the case of the Sierra Grande Mining Co. v. Crawford (11 L. D., 338) it appears that said company, on March 24, 1885, located the Sierra Grande Mill-site, in connection with the "Annie P." lode claim, and filed application for patent on July 3, same year.

The allegation of error in holding that the burden of proof was upon the contestant to prove the truth of his charges, because the entry had been suspended, is also without force.

The effect of your order of July 13, 1890, directing a hearing, after having secured the supplementary proof called for by your letter dated July 24, 1889, was to place the burden of proof upon the contestant. Nor is the allegation of the appellant that "it was admitted by Robertson that the same was made for the common use of several mining claims" confirmed by the record of the testimony in the case.

A careful consideration of the whole record fails to show sufficient error to warrant the cancellation of said entry, and your decision dismissing said contest must be, and it is hereby, affirmed.

PRE-EMPTION ENTRY—CONFIRMATION.

HARVEY v. MCKEE ET AL.

A pre-emption entry is not confirmed by section 7, act of March 3, 1891, where at the date of final certificate the homestead entry of another for the same land exists of record.

Secretary Noble to the Commissioner of the General Land Office, November 26, 1892.

This is a petition filed by Swan and Smith and Ben. S. White, transferees of Fred McKee, praying that the record in the above stated case may be certified to the Department under rules 83 and 84 of Rules of Practice.

The petition and accompanying exhibits show the following facts:

On May 8, 1885, Fred McKee filed pre-emption declaratory statement, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 28, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 33, T. 64 N., R. 16 W., Duluth, Minnesota, alleging settlement January 29, 1885, and offered final proof upon the same August 16, 1886. The printed notice of the intention to offer final proof contained a citation to Armour Harvey to appear and show cause why the proof should not be allowed, the said Harvey having, prior thereto, to wit, on March 26, 1886, made homestead entry of the tract.

Harvey failed to appear or protest against the acceptance of said proof and final certificate issued to McKee, but your office, on September 25, 1889, allowed Swan and Smith sixty days in which to show cause why patent should not issue on McKee's entry.

Upon a corroborated affidavit filed by Harvey, showing that McKee failed to comply with the law, a hearing was ordered, and upon the testimony taken at the hearing the local officers, on June 10, 1891, found that McKee never actually resided upon, improved, or cultivated the land; that his entry was fraudulent and speculative; that plaintiff abandoned the land after two or three visits, and both entries should be canceled.

Harvey filed an appeal from this decision within the time required, but the defendant did not file his appeal until after the thirty days allowed by the rule had expired from notice of the decision.

On April 2, 1892, counsel for James H. Swan and Ira O. Smith, transferees, filed a motion to dismiss the proceedings against McKee's entry, and asking that it be confirmed under the act of March 3, 1891 (26 Stat., 1095), upon the ground that no proceedings were instituted against the entry within two years after issuance of final certificate.

You denied said motion, holding that the entry of Harvey, existing at date of final certificate, was an adverse claim, and affirmed the decision of the local officers, and held the entry of McKee for cancellation.

The defendants not having appealed from the decision of the local

officers, they were denied the right of appeal from your decision, and this petition is filed to correct the errors alleged to have been committed.

No decision should have been made against the right of appeal until it was tendered, but, upon a full consideration of the facts presented by the petition and accompanying exhibits, I see no error in the action of your office in canceling the entry of McKee and in holding that it is not subject to confirmation under the act of March 3, 1891.

Although Harvey failed to appear and protest against the allowance of McKee's entry, yet, as his homestead entry remained of record, there was no error in allowing him sixty days to show cause why his entry should not be canceled. As the cause shown by his affidavit did not depend upon the question of priority of right between McKee and Harvey, but attacked the validity of the entry of McKee, showing that it was fraudulent, and that McKee did not comply with the law, a hearing was properly ordered and the entry was properly canceled upon the proof submitted.

The petitioners not only failed to appeal from this decision within the time required by the rule, but rely in their petition mainly upon the ground that no adverse proceedings were commenced within two years from the date of McKee's entry, and that your office had no authority to allow Harvey sixty days within which to show cause why his entry should be canceled. They do not pretend to defend the entry of McKee, and allege no error in holding that it was fraudulent and that he failed to comply with the law, but rely upon the confirmatory provisions of the act of March 3, 1891.

I see no error in holding that the entry of Harvey remaining of record was such an adverse claim as would defeat the right to confirmation, and the petition is therefore refused.

MINING CLAIM—EXCLUDED LANDS—MILL SITE.

MICHAEL HOWARD.

A mineral entry should not be allowed for a lode claim that includes land embraced within a senior location, or is intersected by an excluded mill site.

Secretary Noble to the Commissioner of the General Land Office, November 26, 1892.

On October 22, 1891, Michael Howard made mineral entry (No. 3871 of the mining claim known as the "Howard No. 1, Howard No. 2 and Howard No. 3 lode," located in the unsubdivided township No. 3 S., R. 74 W., 6 P. M., designated as lot No. 6799, and embracing 7,540 acres, in the Montana mining district, Clear Creek county, Colorado, subject to sale at the Central City land district, Colorado.

The said mining claim embraces three separate original locations as follows: The Howard No. 2 was originally located by A. N. Robinson and James Lang July 2, 1883, as the Victor Hugo lode, on discovery, made April 13, 1883. The Howard No. 1 was originally located by Michael Howard and William H. Lane as the Beamer lode, on August 8, 1884, on discovery made June 16, 1884. The Howard No. 3 was originally located by Michael Howard and William H. Lane as the Applin lode, on August 8, 1884, on discovery made June 26, 1884.

These three claims were relocated by said Howard on December 1, 1890, under their present names as above given, and without waiver of any rights acquired by said former locations. The papers were duly transmitted to your office.

By your letter of February 9, 1892, said entry was held for cancellation as to the Howard No. 2 lode, on the following grounds:

In this case the survey would go to show that as a matter of fact the discovery shaft of the Howard No. 2 claim is sunk upon the lode discovered upon the Howard No. 1 claim, and that patent is sought for two claims where only one lode has been discovered. Further, the Howard No. 2 claim is intersected by two excluded millsites, surveys Nos. 895 B and 6251 B.

A motion was filed for a review of your order of cancellation, and in answer thereto, accompanied with the affidavit of said Howard, in which it is alleged, *inter alia*.

That as depth is gained, No. 1 and 2 separate, going in entirely different directions, and that Howard No. 2 is a distinct and separate property from No. 1, and is older in point of location and discovery than No. 1, and that the discovery shaft of No. 1 is far to the west of any conflict with either surface lines or vein of the No. 2.

This motion makes no sufficient answer to the point that said claim No. 2 crosses two excluded millsites.

By letter of March 19, 1892, you denied said motion.

An appeal now brings the case before me.

The plat shows that there are two objections to allowing the entry as made.

First. The Howard No. 1 projects its east end into No. 2, contrary to Sec. 2322, of Revised Statutes, which requires mineral locations to be made "on the public domain." Circular of December 4, 1884 (3 L. D., 540); Engineer Mining and Developing Co. (8 L. D., 361); Correction Lode (15 L. D., 67).

Second. The Howard No. 2 crosses two excluded millsites. By Sec. 2337, Revised Statutes, millsites must be located upon "non-mineral land." Mineral Circular of October 31, 1881, Rule 75, Alta Mill Site (8 L. D., 195).

The applicant, by excluding these millsites practically admits that they are properly located upon non-mineral land. The cancellation of the entry as to the Howard No. 2 claim is one mode of eliminating these objections. Another mode would be to resurvey the Howard No. 1 claim, making that claim terminate at its eastern end "where

the lode in its onward course or strike intersects the exterior boundary," of the Howard No. 2 claim; and also to resurvey the Howard No. 2 claim, making it terminate at its eastern end "where the lode in its onward course or strike intersects the exterior boundary" of said excluded millsites.

The applicant is allowed thirty days after notice of this decision in which to make his election whether he will abide by your decision, or make the resurveys herein indicated. If he makes no election within said period your judgment will stand affirmed.

RELINQUISHMENT—DEATH OF ENTRYMAN.

CONFAR *v.* CONFAR.

A relinquishment of a homestead entry, not presented during the lifetime of the entryman, should not be subsequently accepted against the protest of his widow.

Secretary Noble to the Commissioner of the General Land Office, November 26, 1892.

I have considered the case of Nancy Confar, widow of William Confar, deceased, *r. v.* Louis B. Confar, on appeal by the latter from your decision of February 20, 1891, refusing to place on file the relinquishment of William Confar, and refusing the entry of Louis B. Confar for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 26, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 27, T. 33 N., R. 1 E., Durango, Colorado land district.

On December 27, 1887, William Confar, now deceased, made homestead entry for this land. He was a widower who had several children of full age. On April 6, 1890, he was married to Nancy, the protestant. Confar died on the 18th day of September following. On the day preceding his death, he executed a relinquishment of his entry before the judge of Archuleta county, Colorado, and delivered it to his son, Louis B. Confar. On November 11, following, the son sent the same to the local office with his application to make homestead entry for the land. The local officers returned the application because the relinquishment was signed "Wm." instead of "William." On the 20th of the same month, Nancy Confar filed a protest against the filing of said relinquishment, supported by her affidavit uncorroborated, averring that the said relinquishment was a fraud and forgery; that if William Confar ever did sign it, the same was done while he was unconscious, in a dying condition, and he signed it under undue influence, and she charges a conspiracy between Louis Confar and Barzella Price, county judge, who was father-in-law of Louis Confar. Thereupon Louis filed a number of affidavits tending to show that William Confar usually wrote his name "Wm." instead of William. Further, that the relinquishment was

signed and acknowledged while William Confar was entirely rational. To this point is the affidavit of the physician who attended him and who was present and says he saw William write his name, also that he talked with him, and had previously talked with him on the subject. Also the affidavits of several neighbors, two of whom were with Confar the last twelve hours of his life, all of which tended to show that William Confar was of sound mind and memory when he executed the paper.

The local officers held that as the relinquishment had not been filed during the life time of the entryman, that it could not be filed, and was of no value, and they rejected it, from which action Louis Confar appealed. Your office affirmed this action, citing three cases in support of your decision. From this decision Confar appealed to the Department.

This statement of the facts in the case shows that the relinquishment was not presented or entered of record during the life time of William Confar; at his death the law cast the homestead rights upon his widow.

In Wiley *v.* Raymond (6 L. D., 246), it was held (p. 248) "A relinquishment amounts to nothing so far as releasing the land is concerned until it is filed." This was followed in Webb *v.* Loughrey (9 L. D., 440).

The relinquishment was to the government, not to Louis B. Confar, and he is not in position to insist upon it being filed, as against the protest of the widow of William Confar. Your decision is therefore affirmed.

CONFIRMATION—TIMBER CULTURE ENTRY.

WONDER *v.* BRUN.

The fact that the entryman did not fully comply with the law in the matter of tree planting will not defeat confirmation of a timber culture entry, for the benefit of a transferee, under section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 28, 1892.

Joseph Brun made timber culture entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ or Sec. 24, T. 26 S., R. 11 W., Larned land district, Kansas, on the 18th of March, 1879, and made final proof, and received final certificate for the same on the 26th of March, 1887.

On the 13th of April, 1887, Brun and his wife executed a mortgage upon said land to the Showalter Mortgage Company, for \$700, which mortgage was afterwards transferred to Lewis A. Leland.

On the 30th of May, 1889, B. F. Wonder filed affidavit of contest against said entry. After a hearing, the local officers recommended that said contest be dismissed. From such decision Wonder appealed. While said appeal was pending in your office, Leland petitioned that said entry be confirmed and patented under the provisions of section

seven of the act of March 3, 1891. (26 Stat., 1095). With his petition he submitted satisfactory proof that he was the owner of the mortgage executed by Brun and his wife, which was still unpaid, and a lien upon said land. A copy of said motion was served upon the attorney for Wonder, who made no reply, and interposed no objection.

On the 15th of December, 1891, you decided that the facts set forth by Leland in his motion, brought the case within the operations of said act, and stated that the land would be passed to patent in the regular course of office business, should your decision become final. From such decision Wonder appeals to the Department.

The incumbrance upon the land in question, originated after final entry, and prior to the first day of March, 1888. Section seven of the act of March 3, 1891, says that such entries shall be confirmed and patented, where no fraud is shown on the part of the incumbrancer. In the case at bar it is not charged that the mortgage was not given for a valuable consideration, or that the mortgagee was not a bona fide incumbrancer, or that Leland is not the owner and holder of said mortgage for value. The appellant simply claims that the entryman had only four and one-half acres planted to trees when he made his final proof, and that he should have had five acres so planted.

In the case of *Peterson v. Cameron et al.* (13 L. D., 581), it was held that failure to comply with the law on the part of the entryman, or want of good faith on his part, and that of his immediate transferee, will not defeat confirmation under section 7, act of March 3, 1891, for the protection of a subsequent bona fide incumbrance, executed after final entry and prior to March 1, 1888.

In *Axford v. Shanks*, on review, (13 L. D., 292), it was said: In the enactment of the body of section 7, act of March 3, 1891, Congress contemplates the relief of incumbrancers and purchasers described therein, and the illegality of the entry, or the pendency of a contest, does not defeat confirmation thereunder. The same doctrine was held in the case of *Kenoyer v. Gardner et al.* on page 181 of the same volume, and in *Witcher v. Conklin* (14 L. D., 349).

The decision appealed from was justified by the showing made by Leland upon his motion for confirmation, and is accordingly affirmed. Upon proof being furnished your office, that he is still the owner of said mortgage, and that the same has not been paid since said motion to confirm was made, patent will issue for the land as provided in said act.

MINING CLAIM—PROTEST—CHARACTER OF LAND.

HOUGHTON v. McDERMOTT, ET AL.

A protestant against a mineral entry, who alleges the land to be agricultural in character, is not entitled to an order for a hearing in the absence of a specific showing that said land was in fact agricultural at the date of application for mineral patent, where the record discloses that the mineral applicant made the requisite showing as to the character of said land.

Secretary Noble to the Commissioner of the General Land Office, November 29, 1892.

On January 27, 1887, John McDermott and six others made mineral entry (No. 1503) at Helena, Montana, of mineral claim designated as lot No. 42 in the unsurveyed township No. 6 N., R. 6 W., known as the Placer Mining Claim, embracing 132.05 acres.

On September 26, 1887, Horace S. Houghton filed a protest against said entry, alleging in part as follows:

I have lived upon said premises for the period of one and a half years last past, and now reside thereon. At no time since my acquaintance with said land has any mining work been done thereon. I have raised hay and vegetables upon said land, and the same with proper cultivation produces crops of hay and vegetables in paying quantities. My acquaintance with, and examination of, said land is such as to satisfy me that the said land is of no value for mining purposes, that it will not pay to work the same, and that it is much more valuable for agricultural purposes than for mining purposes.

This protest was duly corroborated.

By letter of October 29, 1891, you held that:

In view of the record showing made by the claimants, I do not consider the allegations of protestant sufficient to justify an investigation by this office. Said protest is dismissed.

On December 17, 1891, said Houghton filed a motion for a review and reconsideration of said decision, but by letter of April 11, 1892, you declined to review your judgment for the reason that said motion "does not set forth any new facts or evidence to be considered as the basis of review."

An appeal now brings the case before me.

The specifications of error assign the following, to wit:

First. It was error to hold that the affidavits were not sufficient upon which to base an order for a hearing.

Second. It was error to deny the right to a hearing, as it was a denial of a substantial right, and was therefore not interlocutory.

It appears from the record that the mineral claimants applied for a patent on March 11, 1874. The entry was delayed to obtain formal proof of location, citizenship of the claimants, etc.

The field notes and report of the deputy mineral surveyor filed on said March 11, 1874, describe the claim as follows:

This mine is a placer, bearing gold. There have been several prospecting shafts sunk, a head ditch from Rock Creek to the bar on Boulder Creek constructed, and

two pits have been worked out. There is a cabin on the claim. I judge that the value of the labor and improvements on this claim exceed one thousand five hundred dollars.

From a report of a deputy mineral surveyor, made May 27, 1887, it appears, *inter alia*, that:

The land embraced by this claim is valuable for the placer gold it contains. About forty acres will raise good hay, but no other crop, as the claim is too high. It has no value as a seat for a town, nor has it any municipal value. Its value as mineral ground is far greater than its agricultural value.

Protestant, upon his own showing, did not reside upon the land until about March 26, 1886, or twelve years after the applicants applied for a patent, and when he had full notice from the public records and the works upon the land that it was claimed as mineral land. He then lived there a year and a half before raising the question of the character of the land, waiting until eight months after the mineral entry was made before filing his protest.

Section 2325 of the Revised Statutes provides in what manner a patent may be obtained. After the requirements of the statute have been complied with, the last clause of said section provides that "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

The question is presented, therefore, at what date must the applicant for a mineral patent prove the mineral character of the land in order "to comply with the terms" of the mineral law.

The protestant alleges that the land was not mineral at the date of his protest. Does that allegation present such an issue as calls for any consideration?

Section 2325 expressly provides that the applicant for a mineral patent must show compliance "with the terms" of said chapter when he files his application for a patent, as follows:

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation, authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent under oath, showing such compliance together with a plat or field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following:

Then follow directions in relation to the publication of the notice that such application has been made, and if no adverse claim be filed during the period of publication "it shall be assumed that the applicant is entitled to a patent."

This assumption is based upon the fact that the applicant had complied with the requirements of the law, at the date of his application, and that nothing further is required of him.

The required form of an application for a patent alleges that the applicant has become the owner of the "vein, lode, or deposit bearing _____ together with surface ground." Copp's Mineral Lands, 441. So that the kind of mineral must be made to appear in the application. In the present case the mineral is alleged to be gold in the application.

The question whether a contest should be allowed against a final entry, and a hearing be granted, rests in your sound discretion, and your judgment will not be interfered with unless an abuse of this discretion is affirmatively made to appear Gray *v.* Whitehouse (15 L. D., 352, 354).

In the present case I am of the opinion that you exercised your discretion wisely.

The protestant can claim no right to the land unless he can "show" it was agricultural at the date of said application for a patent. He presents no such issue by his protest. He does not "show" that the applicants failed to comply with the law at that date. You were not bound, therefore, to order an investigation to determine the character of the land on September 26, 1887, in view of the record evidence that the applicants had complied with the law, in showing that the land was mineral, at the date of their application, March 11, 1874.

Your judgment is affirmed.

DONATION CLAIM—RELINQUISHMENT.

WILLIAM B. AIKEN.

The relinquishment of a donation claim operates to restore the land covered thereby to the public domain.

Until patent issues upon a donation claim the Land Department has jurisdiction to determine whether the donee has complied with all requirements of the law.

Secretary Noble to the Commissioner of the General Land Office, November 30, 1892.

I have considered the motion for review of departmental decision of April 15th last (unreported), filed by William Boys, as the guardian of William B. Aiken.

The grounds of said motion are: (1) Error in affirming your decision, which, among other things, found that Henry S. Aiken, who filed notification No. 7880 for donation claim to land in T. 8 N., R. 9 W., Oregon City, Oregon, under the act of September 27, 1850 (9 Stat., 496), did not take said claim for agricultural purposes. (2) In holding that said Aiken had relinquished said land, because he had no power to relinquish the same, the legal title having vested in him.

Counsel for Aiken, at the oral argument had upon said motion, also filed copy of the argument made in support of his appeal when the case was first considered by the Department. An examination of said brief shows that no new question is presented that was not considered by the Department when the decision complained of was rendered.

It has been repeatedly held by the Department that "a motion for review will be denied where no new question of law or fact is presented for the consideration of the Department." *Stone v. Cowles*, on review (14 L. D., 90); *Ary v. Iddings*, on review (13 L. D., 506); *Pike v. Atkinson* (12 L. D., 226); *Charles W. McKallor* (9 L. D., 580); *Fort Brooke Military Reservation* (3 L. D., 556).

But, independently of the foregoing, there does not appear to be any sufficient reason for changing or modifying said decision.

It sufficiently appears that said Henry S. Aiken abandoned his claim in 1857, as shown by the following paper in the record:

To the Register and Receiver
of the Land office for Oregon,

Gentlemen:

I have abandoned all claim to the land described in my "notification to the surveyor-general of Oregon of settlement on public land," dated "Astoria, November 3, 1853;" and also described in my "notification to the Register and Receiver of the Land Office for Oregon," dated "Oregon City, March 13, 1857." And I do hereby renounce and relinquish all right, title, and claim to said land, or any part thereof under the act of Congress approved 27th September, 1850, entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and make donations to settlers of the public lands," and amendments thereto by virtue of my residence on and cultivation of said land.

H. S. Aiken.

Astoria, August 24, 1857.
In presence of
A. A. Skinner.

This relinquishment is full and complete, and there is no evidence that the signatures thereto are forgeries.

There can be no question, I think, of the power of said Aiken to relinquish his claim prior to the issuance of final certificate thereon, and the effect of said relinquishment was the restoration of said land to the public domain. Besides, the proof filed by said William Aiken shows that his father, said Henry S. Aiken, did not die until about May 1, 1875, more than twenty years after the date of said relinquishment, and during all this time he took no steps to make final proof, as required by said act.

In the case of *Charles F. Whittlesey et al.* (3 L. D., 469), it was said:

It was held in *Hall v. Russell* (101 U. S., 503), that under the donation act the settler did not acquire a vested right until he had complied with all the requirements of said act, and that prior to such compliance his rights were merely possessory. Then the rights to which the heirs succeed must also be possessory, and as further acts were yet to be performed by the ancestor before title vested, so further acts remain to be done by heirs before their right, under the law, will be sufficient to take

the land. While further residence and cultivation is not required by the heirs, it is required of them that they shall show their ancestor to have fully complied with the law up to the date of his death, and until this is done such heirs have only a possessory right to the land, the title thereto yet remaining in the government. If this is true, it follows that ample jurisdiction is vested in your office and this department to inquire into the status of said tract, and if warranted by the evidence to declare the land open to settlement and entry.

I am satisfied that until patents shall issue upon the respective donation claims under said act, the Land Department has jurisdiction to determine whether the donees have complied with all the requirements of the law.

A careful consideration of the questions presented in said motion shows no good reason for granting the same, and it is accordingly denied.

MISSOURI, KANSAS AND TEXAS RY. CO. v. TRAMMEL.

Motion for rehearing in the case above entitled, decided by the Department March 25, 1892, 14 L. D., 605, denied by Secretary Noble, December 1, 1892.

TIMBER CULTURE ENTRY—SETTLEMENT RIGHT.

BENIE GREENBERGH.

No rights are acquired under the timber culture law by residence upon and improvement of public land, and such acts, performed prior to the repeal of said law, do not bring the claimant within the protection provided for claims "lawfully initiated" prior to said repeal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 1, 1892.

I have considered the appeal of Benie Greenbergh from your decision of February 9, 1892, rejecting his application to enter the SW. $\frac{1}{4}$ of Sec. 34, T. 157, R. 63 W., Grand Forks, North Dakota, under the timber culture law.

The application to enter was made December 22, 1891, and rejected by the local officers for the reason that said law had been repealed by the act of March 3, 1891.

You affirmed their decision.

It appears that Greenbergh settled upon this land prior to the survey thereof, with the intention of entering the same under the timber-culture act when surveyed, and has resided thereon and has improvements to the value of \$200.

In his appeal he claims that he is protected by the following proviso to section one of the act of March 3, 1891:

That this repeal shall not affect any valid rights heretofore accrued or accruing, under said laws, but all *bona fide* claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed.

The weakness of the proposition advanced by the applicant exists in the fact that under the timber-culture law, the applicant could gain no valid rights under said law by residence upon, and improvement of the land, hence he had no rights to be protected by the proviso which he cites.

Your decision is affirmed.

COAL LAND—HOMESTEAD ENTRY—CONTEST.

JONES v. DRIVER.

On issue joined as to the character of land alleged to be more valuable for coal than for purposes of agriculture, it is incumbent upon the plaintiff to show the existence of a coal deposit sufficiently valuable to be worked as a mine.

Before final certificate issues, a homestead entry is open to attack on the ground that the land embraced therein is mineral in character, without regard to the date of the alleged mineral discovery.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 2, 1892.

The land involved in this controversy is described as the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 28, T. 19 N., R. 6 E., Olympia land district, Washington.

It appears that on November 13, 1888, Arthur Driver made homestead entry of the above tract and on May 31, 1890, Daniel Jones filed a protest against said entry and instituted contest proceedings to set aside the same on the ground that the tract was valuable coal land.

At the day of hearing both parties appeared and submitted testimony, the local officers decided in favor of the contestant and recommended the cancellation of the entry, from which the defendant appealed, and under date of December 5, 1891, you reversed the judgment below, whereupon the contestant appeals, assigning errors, substantially, as follows:

In holding that coal must have been known to exist on said tract prior to the date of entry and that such land must be more valuable for its coal deposit than for agricultural purposes; second, in holding that the evidence fails to sustain the alleged coal character.

The testimony submitted in the case is very voluminous and accompanied with a large number of maps and exhibits to show the coal strata and soil of the land in question. Several cross-section measurements have been taken of the alleged coal deposits on this land and

submitted by witnesses for the contestant and also for the defendant and although it would seem from a casual glance at the testimony, that there is a wide difference in the statements made and the measurements taken in the cross-section, yet when we take into consideration that these examinations were made by parties at different times and probably at different places on said vein and the further fact that part of said measurements ended at the hanging wall and others at the foot wall and still others at the shale strata attached to the foot wall, and, furthermore when we consider that some of the experts making these measurements classified a bony coal strata as coal, I find no difficulty in harmonizing the different statements and measurements made in relation to this coal deposit.

The plaintiff seeks to prove that a vein of coal exists on the land in dispute of sufficient merchantable value to pay for working; that the land is hilly and rocky, and with the exception of two or three acres, worthless for agricultural purposes; that said vein is an extension of the valuable Wilkinson coal mines and therefore as the vein goes deeper it will improve in quality and quantity.

On the other hand, the defendant presents testimony to show that the coal deposit is so mixed with shale, bone, slack, and other impurities, that it cannot be made to pay as a merchantable product; that from one-half to three-fourths of the land can be cultivated and produce good crops adapted to that location and that said vein is not a continuation of the Wilkinson series, but belongs to another or upper strata of coal and would never improve in quality.

It appears that several months after the defendant made entry of the tract in dispute, the plaintiff went upon the land with some laborers and prospected for coal claiming to have discovered thereon a valuable vein about thirteen feet thick of which some four and a half or five feet were good merchantable coal.

The plaintiff further claims that he was prevented from making a more thorough investigation of the tract by threats and intimidation, made by the defendant, but as it appears by his own witnesses that several of them were on the land after the alleged intimidation and were not disturbed in any manner, I do not deem the plea of sufficient importance to affect the decision in the case on the evidence submitted.

The tract in question was returned by the surveyor-general as agricultural land, and therefore the burden of proof falls upon the plaintiff to disprove the *prima facie* character of the same.

Hugh White, witness for plaintiff, testifies that the coal croppings show from five to six feet of coal, yet admits that he has no experience in mining coal, and depends on that of others.

Peter C. Forrester states that he never had any experience in coal mining previous to his present employment, as superintendent of Wilkinson mines. He made no actual measurement but guesses the cropping shows four feet of coal; that he has no fear of violence from defendant and that "the soil might be cultivated if the land was cleared."

Wm. J. Wood, coal expert, finds one foot of good coal next to the hanging wall and that it is not especially valuable, it being non-coking bituminous coal. Does not think a company would be justified in expending money to develop coal on this land, although in his opinion, the vein is a continuation of the Wilkinson series.

Willis Wilcox, that he was over the land once; that there were three or four acres cleared; that he would not like to pay over \$25, or \$30, per acre for the land and that some of the best lands are worth \$500, per acre for raising hops.

Ernest G. Lock, coal expert, has had fifteen years experience; states that he has opened and worked several mines; that he has examined said vein and finds about four and a half feet of seams of coal next to the hanging rock; that it could be worked profitably; that in his opinion it is a continuance of the Wilkinson veins; that he only knows the strike of No. 1, and therefore can not tell whether the veins converge towards each other, as he has never studied geological formations and can not tell coking from non-coking coal.

Wm. Lackman states that he has had twelve years experience in mining; that he examined the coal croppings on the land, but made no measurements or tests that he thinks, however, there are three and a half to four feet of coal that could be worked.

Frank Bison, witness for the defense, testifies that the strike of the Wilkinson and Tacoma mines, starting from a given point, is in different directions and that north of that point, where the land in dispute is located, everything is mixed up, coal, dirt, rock, shale and sand-stone being out of place; that prospects made thirteen years ago, in this section, developed bony coal, which was considered worthless and was abandoned, and that the croppings are "mostly bone, shale and dirt, with strata of coal not over eight inches."

Andrew Driver, defendant, settled on the land over three years ago, has a house twenty-four by twenty-six feet, with five rooms, papered throughout and comfortably furnished; that he has six or seven acres under cultivation, and has three head of cattle and eighty chickens on the premises.

John Hodder testifies that he made a coal filing for the land in dispute about the year 1881, and after a careful examination, abandoned it as worthless, furthermore, that he has had twenty-one years experience as a practical miner, and that there is no similarity between this cropping and the Wilkinson veins.

S. D. Evans, a practical miner for thirty years, says, he has prospected this land several times for different parties eight years ago; "found slate and small streaks of coal; there is not a strata of clean coal in it and there is no comparison between it and the Wilkinson mines."

Benj. Fellows, civil and mining engineer, educated for the profession in England, testifies that he came to Washington to develop the Wil-

kinson mines; that he discovered No. 2 and 3 of said mines, and developed the same; that he spent considerable money for expenses trying to find valuable coal veins, north of Fletts' Creek, not only on the land in dispute but in the contiguous tracts and did not discover any; that he made a survey and examination of the croppings and took a cross-section of the vein exposed, as follows: Beginning with cap, gray sand-stone, clay $2\frac{1}{2}$ ", slate 1", alternate strata of coal and bone $2\frac{1}{2}$ "; slate 1", bone coal $1\frac{1}{2}$ ", coal $3\frac{1}{2}$ ", clay slate 6 to 8", bone coal 2", coal 4", bone coal 6", coal $2\frac{1}{2}$ ", bone coal $2\frac{1}{2}$ ", coal $2\frac{1}{2}$ ", bone coal slate and carbonaceous matter mixed 5", coal 4", bone coal 1", slate 4", total $4\frac{1}{2}$ feet, below this are $7\frac{1}{2}$ feet of carbonaceous slate clay, etc., to foot wall, and that this deposit is commercially valueless and has no relation with the Wilkinson mines.

Charles C. Woodhouse, mining engineer and metallurgist for twelve years, and graduate of Knox College, Illinois, testifies that he has examined over one hundred of these bony measures and they are "never worked by coal companies, as they have learned they never grow any better;" that he examined the vein in question and found it of a different geological period; that he made a careful analysis of the best sample he could get and found after eliminating four parts in five, of earthy matter, that the remaining $\frac{1}{5}$ showed $40\frac{4}{10}\%$ fixed carbon; $33\frac{7}{10}\%$ volatile combustible matter; $21\frac{5}{10}\%$ ash earthy matter and $4\frac{4}{10}\%$ hydroscopic water; that it would cost five times more to prepare a ton of this coal for market than it does the Wilkinson coal and then be worth but little. He considers the coal in question of no value.

In addition to the foregoing John McGregor, miner, Samuel Walker, miner for six years, William Penfield, practical miner for thirty years, James Shaw, miner for eighteen years, David Morris, practical miner for about thirty-five years, Edward McConnell, miner for twenty years, Patrick Cunningham miner for twenty-four years, and George W. Driver, mining expert and assistant geologist under Bailey Willis, who made the geological survey of that section, all testify that they have examined the alleged vein several of them making cross-sections of the same, and taking measurements thereof, and that there is very little coal, that it is principally slate, shale, rock and bone and worthless for commercial purposes.

After a careful examination of the testimony in this case, it appears that taking the true strike of the Wilkinson mines and continuing it northerly it would come nowhere near the cropping; in fact, would not, under any circumstances pass through the land in dispute; that the difference in the Wilkinson and Driver coals is due to the upheaval of the Wilkinson from a lower productive strata, while that on the Driver or homestead tract is from the upper strata. Geologically, the stratas are entirely different. Furthermore, at the convergence of the anti-clinal axis or the point where the coal measures of the Wilkinson veins come together. (and it is shown by the strike of the different veins that

they do come together) the coal strata is all broken up and crushed showing a great fault in the coal system. North of this convergence on the homestead and adjoining tracts the Wilkinson strata has never been found, hence it follows that the coal found on the homestead is of another system and has a different strike, than that of the Wilkinson mine.

Lock, the coal expert for plaintiff, admits that it would be possible for this cropping to be a different vein entirely from the Wilkinson series.

The defendant has shown by a large amount of testimony and by the only actual measurements and scientific tests, that the coal in the cropping is totally different from the Wilkinson measures, not only different but it is non-coking and belongs to the upper bony or non-productive measures, so intermixed with foreign substances, as to make it of no commercial value.

From the foregoing, the claim that the vein if followed down would improve has not been sustained, but even if such were the case it has been repeatedly held by the Department, that it must appear that the land in dispute is valuable for its mineral and that the proof must be specific and based upon actual production. Commissioners of Kings Co. v. Alexander, and cases cited (5 L. D., 126).

The supreme court in the case of the Colorado Coal Co. v. U. S. (123 U. S., 307); says:

The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine.

In your decision in this case, you state as one of the questions to be determined, "was coal known to exist on either legal subdivision of forty acres at or prior to date of entry?" The plaintiff alleges error in this respect. I am not prepared to assent to your conclusion as applied to the case at bar. This is a homestead entry, but not such an entry as can be properly called a sale until it has been completed in accordance with law by making satisfactory final proof, paying the final commissions and the issuance by the proper officer of the final certificate as the basis of a patent. Spratt v. Edwards (15 L. D., 290; id. 37).

With this view of the case, I see no just reason why a mineral claimant should not be allowed to show the mineral character of a tract embraced in a homestead entry at any time before final certificate has issued, without regard to the date when said mineral discovery was made.

It must not be understood, however, that this doctrine in any way conflicts with that heretofore laid down in numerous decisions in pre-emption cases.

In Colorado Coal & Iron Co. v. United States (*supra*) the court says, respecting this question:

The question must be determined according to the facts in existence at the time of sale.

If upon the premises at the time, there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them, acquired under the pre-emption act can not be successfully assailed. See also *Davis v. Weibbold* (139 U. S., 507).

As before stated this tract was returned as agricultural land, and after a careful examination of the evidence, in the case, I am satisfied that the plaintiff has failed to establish the coal character of either of the forty acre tracts covered by the homestead entry, and although the land is not all adapted to cultivation, yet the evidence shows that about sixty acres can be cultivated and produce good paying crops, and that the defendant has resided on the land since date of entry and has good substantial improvements.

The charge of bad faith made by plaintiff on account of the defendant's attempt to make a coal filing subsequent to the date of his homestead entry, is not sustained. It was nothing more than natural that the defendant should try every means suggested to protect his entry when threatened, without thought of doing wrong or of acting in bad faith.

Your decision is affirmed.

SCHOOL LAND—INDEMNITY SELECTION—ACT OF MARCH 1, 1877.

STATE OF CALIFORNIA ET AL. v. HERBERT.

A school indemnity selection made prior to the act of March 1, 1877, in lieu of land, included at date of selection within the surveyed limits of a Mexican claim, and subsequently excluded therefrom, is confirmed by section 2 of said act, and the title to said basis reinvested in the United States. A purchase of such indemnity lands from the government, by the party holding under the selection (erroneously allowed under said act) does not strengthen the title thereto, or cause the title to the basis to revert to the State.

Secretary Noble to the Commissioner of the General Land Office, December 3, 1892.

On December 27, 1890, John S. Herbert made application to make homestead entry for the SE. $\frac{1}{4}$ of Sec. 36, T. 4 S., R. 4 W., S. B. M., Los Angeles, California. The same was rejected by the register, because "the tract applied for is State school land, and not open for entry. He appealed, and, on March 17, 1891, you reversed that action, and directed that the application be allowed.

The State of California and Albion Smith (intervener) have appealed from said decision, and allege error of both law and fact.

Appellants insist that the land in controversy was granted to the State of California by the act of March 3, 1853 (10 Stat., 246), and the title having vested in the State, it can not be divested without the legislative consent of the State.

A proper disposition of the questions raised by this appeal renders it important that certain matters of record and court proceedings should be recited with some particularity.

On April 22, 1868, a plat of T. 2 S., R. 13 W., S. B. M., was filed in the United States land office at San Francisco, and on the same day the State of California, through its locating agent, selected the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, of that township, in lieu of the SE. $\frac{1}{4}$ of Sec. 36, T. 4 S., R. 4 W. (land in controversy), "which the State is compelled to relinquish from the fact that it is included in a private grant."

The selection was approved by this Department, November 23, 1871; and, in 1873, the State sold this lieu land to one Squires, who afterwards—namely, October 20, 1875,—obtained patent from the State. The title thus acquired by Squires passed by mesne conveyances to one Nathan Fletcher, who, on December 20, 1875, contracted to sell the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (twenty acres), for the consideration of \$1,000, to one Mower, who paid \$500 in hand and gave his note for the balance, payable eighteen months after date, taking back from Fletcher an agreement for the conveyance of the land on payment of the note.

Mower took possession of the land thus patented, but, subsequently, entertaining the opinion that the State's selection was defective and invalid, and that Fletcher could not acquire a valid title thereunder, and claiming that the land was vacant public land of the United States and repudiating his agreement with Fletcher, he, on March 12, 1876 filed his declaratory statement for the whole tract which Fletcher had obtained, being the lieu land above described; and, on December 12, 1876, he tendered to the register and receiver proof of settlement, residence, etc., and also tendered the price of the land, commissions, etc., and applied to enter the same. His application was refused, and he appealed to your office, and on his further appeal to this Department, Secretary Kirkwood, on March 11, 1882, directed that the case (with many others involving like questions) be adjusted in accordance with Secretary Schurz's letter of November 22, 1880, construing the act of March 1, 1877 (19 Stat., 277), and afterwards, viz: May 11, 1882, the local officers were ordered to allow purchasers from the State to appear and perfect their claims within a specified time in cases where State selections were found defective or invalid and not confirmed by the act of 1877 (*supra*).

Fletcher, fearing to risk the validity of his title from the State, was allowed on February 10, 1882, to make entry of the land, on the ground that the State's selection thereof was invalid, and, on January 18, 1883, your office, over Mower's objection, approved for patent his cash entry, and in the same decision (in place of confirming the State's selection as recited by you in the decision appealed from) the then Commissioner (McFarland) canceled the selection, saying, "the records of the office

showing that said Sec. 36 " (the base of the selection) " is not lost to the State, but in place." From that judgment Mower appealed to the Department.

In the meantime, on Mower's refusal to make further payment under his agreement with Fletcher to pay for the land, the latter brought two suits—one for the amount of the note (reported in 55 Cal., 119), and one in ejectment for the possession of the land (reported in 56 Cal., 421). Fletcher recovered in both suits, and Mower appealed to the supreme court of the United States, pending which the Department (43 L. and R., p. 356) considered the appeal of Mower from your office decision of June 18, 1883, above referred to, approving Fletcher's cash entry for patent.

It then appearing that Mower's appeal to the supreme court involved a judicial construction of the act of March 1, 1877 (*supra*), and it also appearing from the assignment of errors that the validity of Fletcher's title deraigned from the State was involved, the motion then made by Mower to suspend the issuance of patent on Fletcher's entry was sustained, awaiting the supreme court decision.

The supreme court of California (55 Cal., 122), in its decision had said: "The plaintiff tendered his deed to the defendant after the passage of what is known as the 'Booth bill'" (Act of March 1, 1877;

and under the construction which has been given to that act of Congress by both the Secretary of the Interior and the Attorney General of the United States, the land in dispute was public land at the date of the selection by the State, and it was entirely competent for the United States as between it and the State to grant it to the State. We are entirely satisfied with the construction.

The case came before the supreme court of the United States in January 1886 (Mower *v.* Fletcher, 116 U. S., 381), the judgments in the court below were affirmed, and the supreme court, *inter alia*, said: "It is clear that the act of March 1, 1877, confirmed the State's title, and made that of Fletcher good when the note of Mower to him fell due and when he was bound to convey under his contract."

Notwithstanding that judgment, patent was issued to Fletcher on his cash entry on December 3, 1886.

Although the judgment of the supreme court, rendered in January 1886, had pronounced Fletcher's title, deraigned from the State, to be "good," thus confirming the State's title under its selection and departmental approval, yet subsequently to that judgment the State reasserted title in the base (SE. $\frac{1}{4}$ Sec. 36, T. 4 S., R. 4 W., land in controversy), which, in 1868, it had been "compelled to relinquish," and sold the same on October 14, 1887, to the intervener herein, Albion Smith, for the sum of \$218.50, which Smith swears has been fully paid, he claiming patent from the State under the certificate of purchase issued to him November 4, 1887, by the register of the State land office, and uniting with the State in its protest against Herbert's homestead application for the land.

The sectional lines of the township (4 S., R. 4 W.) were first surveyed in 1856 and approved April 16, 1857. By this survey the whole of section 36 was surveyed as public land. A second survey of said township was approved December 21, 1867. By this survey, lot No. 38 in the township, covering an area of 12,297.48 acres, designated a part of the Rancho San Jacinto Nuevo and embraced all of Sec. 36, except the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of that section being included in the claimed limits of the private grant.

Subsequently, the validity of the San Jacinto location was attacked, and a third survey was ordered, and the location of the private grant was changed, the survey being approved August 8, 1883, and by it the whole of section 36 was excluded from the limits of said grant. Then it was that the State re-asserted title under the act of March 3, 1853 (10 Stat., 246), granting to the State sections 16 and 36, for school purposes.

It is claimed by the State, and may be conceded, that the land in controversy has never been under the claim of any confirmed, and finally surveyed, Mexican or Spanish grant. But, as said in the case of *Mower v. Fletcher*, *supra*, "This is not inconsistent with the fact that when the selection was made, the land was within the limits of an unconfirmed Mexican claim, the boundaries of which had not been fixed by a final survey."

Although the land selected and approved to the State was subsequently patented to Fletcher, yet his title was not rendered thereby any more secure; nor does it appear that the second section of the act of 1877 (*supra*) authorized such sale, as said in D. C. Powell, on review (6 L. D., 552), "Congress having provided for the purchase of defective selections only in cases where it appeared that there was no basis for the selection." It follows that the government's patent to Fletcher can not be construed into an admission that the listing and approval of the same tract to the State was invalid, or that the original tract in lieu of which it was selected reverted to the State. Section 2449 of the Revised Statutes.

It having been decided by the Supreme Court that the act of March 1, 1877, confirmed the State's title, and made that of Fletcher good, "the United States took, in lieu of the selected land, that which the State would have been entitled to but for the indemnity it had claimed and got If the State claimed and got indemnity when it ought to have taken the original sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu." *Durand v. Martin*, 120 U. S., 374; D. C. Powell, *supra*.

The land in controversy being public lands of the United States is subject to entry, and Herbert's application should be allowed, if he be a qualified entryman.

The decision appealed from is accordingly affirmed.

PRIVATE CLAIM—SCRIP—ACT OF JUNE 2, 1858.

ALEXANDER LABRANCHE.

It is incumbent upon an applicant for a certificate of location under section 3, act of June 2, 1858, to make satisfactory proof that the claim as confirmed remains unsatisfied.

Secretary Noble to the Commissioner of the General Land Office, December 3, 1892.

I have considered the appeal taken by Septime Fortier, as administrator of the succession of Alexander Labranche, deceased, from your decision of March 13, 1891, affirming the decision of the United States surveyor general for Louisiana, of February 4, 1890, rejecting his application for certificates of location for an alleged deficiency between the confirmation and survey of the private land claim of said Alexander Labranche.

By the act of March 3, 1807, (2 Stat., 440, Sec. 4) commissioners were to be appointed "for the purpose of ascertaining the rights of persons claiming land in the territories of Orleans and Louisiana," who should have "full powers to decide according to the laws and established usages and customs of the French and Spanish governments, upon all claims to lands within their respective districts," whose decisions were to be final when in favor of the claimants.

The second section of said act provides as follows:

That any person or persons, and the legal representative of any person or persons, who, on the 20th day of December, 1803, had for ten consecutive years prior to that day, been in possession of a tract of land not claimed by any other person, and not exceeding two thousand acres, and who were on that day resident in the territory of Orleans or Louisiana, and had still possession of such tract of land, shall be confirmed in their titles to such tract of land: *Provided*, That no claim to a lead mine or salt spring, shall be confirmed merely by virtue of this section: *And provided also*, That no more land shall be granted by virtue of this section, than is actually claimed by the party, nor more than is contained within the acknowledged and ascertained boundaries of the tract claimed.

Under this statute P. Grymes, Joshua Lewis and Thomas B. Robertson were appointed a board of commissioners to adjust private land claims in the eastern district of the territory of Orleans, whose decisions were communicated to the House of Representatives by the Secretary of the Treasury on January 9, 1812, and are found in the "American State Papers," Vol. 29, (Public Lands, Class 8, Vol. 2), Gales and Seaton Ed., from page 258 to page 439, inclusive.

On page 377 the decision of the board on the claim of Labranche is reported as follows:

No. 22.—Alexander Labranche claims a tract of land, situate on the east side of the river Mississippi, in the county of German Coast, containing thirty-five arpents and a half in front; twenty-five and a half of which have a depth of one hundred arpents, and the remaining ten front arpents a depth of forty arpents.

It appears that the ten arpents in front, on the ordinary depth here claimed, were inhabited and cultivated on the 20th of December, 1803, and for more than ten consecutive years prior; and it also appears that the remaining twenty-five and a half front arpents, with the ordinary depth of forty arpents, were inhabited and cultivated on the 20th of December, 1803, and for more than ten consecutive years prior; and that, in the year 1801, there was a concession for a second depth of sixty arpents to the aforesaid twenty-five and a half front arpents. Confirmed.

This decision does not specify the number of acres to which Labranche was entitled, so that evidence *aliunde* must be resorted to in order to ascertain the extent of his grant under said statute, and to determine definitely what was "contained within the acknowledged and ascertained boundaries of the tract claimed."

It is contended that the side lines should be parallel, and that the tract should have been at least a league square, while in fact it was actually granted in triangular shape, and the side lines converged to a point in the rear. The petitioner, therefore, claims a certificate of location for this alleged deficiency, under the terms of the third section of the act of June 2, 1858 (11 Stat., 294), which provides that where such a confirmed land claim

in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his original representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied.

The burden of proof therefore rests upon the applicant to make "satisfactory proof" that said claim "remains unsatisfied." The proof, so far as any proof exists, is to the effect that said claim was "satisfied," and as granted contained all the land whithin the "ascertained boundaries" of the tract.

The surveyor general states the evidence accessible to him as follows:

I find the 'notice of claim,' and most of the original evidence filed in support of the same has been lost or destroyed. I find, however, a certified copy of an old plat of survey made by Carles Trudeau, Spanish surveyor, in May, 1801. The original was filed by Alexander Labranche, with his notice of claim, as evidence, showing the locus and shape of his lands. It represents his claim as having thirty-five arpents front, on the river, with side lines converging to the rear, and meeting at a point 990 perches, or nearly 100 arpents, from the river. It shows what land was claimed at the time, and it is evident that the board never intended that he should have more or less. It served as a guide for McCarty, deputy surveyor, in making the original location and survey in 1831, and for Gillespie, who made the re-survey under McCulloch in 1858. A different location, and one between parallel lines as claimed, would include more land than was ever claimed originally by the grantee, as said plat of Trudeau shows. I conclude, therefore, that the claim of Alexander Labranche has been satisfied by survey and location, and have denied the application for indemnity certificates, as prayed for by the applicant.

In your decision of March 13, 1891, affirming that of the surveyor general, it is stated that:

This claim as surveyed by the United States is located in townships 12 and 13 S., ranges 8 and 9 east, Louisiana, and contains 1247.27 acres, a less quantity than a league square; and, not including either a lead mieu or salt spring, the same stands confirmed. The survey of this claim by the United States was approved, as appears by the official township plats of this office, Nov. 12, 1860. This claim has a frontage upon the Mississippi river of 35 $\frac{1}{2}$ arpents, with a depth to a point where the side lines are run nearly at right angles to the general course of the river at the points of departure, and converge in the depth thereof. The appellant bases his claim for scrip on the theory that the claim should have been located between parallel side lines, and asks that certificates of indemnity be issued for some 2542.12 acres he claims to have thus lost in place. . . . I find a tracing of a survey purporting to have been made by Carlos Trudeau in the year 1801. The register of the land office at New Orleans certified under date of March 24, 1831, it was 'a true copy of the one of record in this (his) office, with the notice of the claim of Alexander Labranche, being No. 22 of the notice registered,' &c. This survey shows converging lines and, being extended, meet. The U. S. Survey is substantially the same.

This old survey shows that this land fronts on the bend of the river, and within the bend, and that the side lines of the land run at right angles to the river at their points of departure. Such a mode of running the lines necessarily causes them to converge and meet in the rear, giving the tract a triangular or wedge shape, the head of the wedge lying upon the river.

The evidence above detailed is entirely satisfactory that such was the original claim of Alexander Labranche, as presented by himself, and the applicant opposes to this evidence only a theory that the side lines of said land were parallel. He fails to furnish any "satisfactory proof" thereof. His application must be denied.

Your judgment is affirmed.

PRE-EMPTION—TRANSMUTATION—ACT OF MARCH 2, 1889.

ARTHUR CROCKER.

A pre-emption claim initiated prior to the act of March 2, 1889, may be transmuted under section 2 of said act, though the claimant may have perfected title to another tract under the homestead law; but this right of transmutation can only be exercised by one who could have secured title under the pre-emption law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 3, 1892.

With your letter ("G") of May 7, 1892, you transmit the appeal of Arthur Crocker, from your decision of January 7, 1892, rejecting his application to transmute his filing, dated July 2, 1888, for the SW. $\frac{1}{4}$ of Sec. 29, T. 13 S., R. 6 W., Huntsville, Alabama, to a homestead entry, under section 2, act of March 2, 1889 (25 Stat., 854).

It appears that on November 2, 1872, he made homestead entry for one hundred and sixty acres of land in an adjoining section, upon which

final certificate issued October 16, 1879. After making his filing upon the land now in question July 2, 1888, he was allowed by the local officers to make cash entry for the same (certificate No. 37,877), August 6, 1889, although in submitting his final proof (February 13, 1889,) he testified that he had abandoned a residence on his own land (that covered by his homestead entry) to reside on the land described in his pre-emption claim.

On November 13, 1890, he sold the land covered by his pre-emption entry to L. B. and J. C. Musgrove, who, on February 21, 1891, sold the same to the "Jasper Town and Lands Company" (limited).

In a decision, dated July 23, 1891, your office allowed him sixty days in which to show cause why his pre-emption cash entry should not be canceled, by reason of his disqualification under the second inhibition contained in section 2260 of the Revised Statutes, prohibiting the right of pre-emption to one "who quits or abandons his residence on his own land to reside on the public land in the same state or territory." He did not appeal from that judgment, but went to the Jasper Town and Land Company, explained the status of the land and requested the company to reconvey to him, which it did by quitclaim deed executed November 13, 1891. The next day thereafter (November 14) he relinquished all claim to the land, and filed the same for record in probate office, Waldo, Alabama, and on November 18, following, the entry was canceled, and on the same day he applied to "transmute same to a homestead entry claiming credit for my former settlement since May 22, 1887, under Sec. 2 of act of March 2, 1889."

The proviso to section 2 of the act of March 2, 1889 (*supra*), is as follows.

That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims under the homestead laws, notwithstanding they may have heretofore had the benefit of such law; but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

A pre-emption settler whose claim was initiated prior to the act of March 2, 1889, is authorized by section 2 of that act to transmute his filing into a homestead entry, although he has already perfected title to another tract under the homestead laws. James W. Barry, 10 L. D., 634.

But the right of transmutation can only be exercised under the act above quoted by one whose claim could have been perfected under the pre-emption law. As above seen, he was expressly prohibited by section 2260 of the Revised Statutes from acquiring "any right of pre-emption." His application was therefore properly rejected.

The decision appealed from is accordingly affirmed.

CERTIORARI—APPEAL—MISTAKE.

DEAN *v.* SIMMONS.

An application for certiorari may be allowed on behalf of a party whose failure to appeal in time is due to a mistake that is satisfactorily explained, and where such action will not result in injury to innocent parties.

Secretary Noble to the Commissioner of the General Land Office, December 3, 1892.

On the 3d of August, 1892, you transmitted an application on the part of James H. Simmons, for a writ of certiorari, requiring you to certify to the Department the record in the case of Alvah L. Dean *v.* James H. Simmons, under the rules of practice.

The lands involved are lots 1 and 2, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 19 N., R. 3 E., Guthrie land district, Oklahoma Territory.

On the 19th of March, 1892, you affirmed the decision of the local officers, and held for cancellation the homestead entry of Simmons, made for said tract, on the 27th of May, 1889.

As shown by the record in the local land office, the attorney for Simmons accepted notice of your decision, on the 24th of March, 1892, and minuted the fact upon his office register that he accepted such notice on the 31st of said March. In preparing his appeal, he acted upon the information disclosed by his office register, which he supposed was correct, until the 28th of May, when he went to the local land office to obtain some data to enable him to perfect his appeal. He was then informed that he had accepted notice of your decision on the 24th of March, and that the sixty days allowed for appeal had expired, that the entry of his client had been canceled, and another entry for the land accepted.

An appeal, however, was perfected on the 30th of May, 1892, and filed in the local office on the 31st—the 30th being a legal holiday. The local officers rejected the appeal, on the ground that it was not filed in time, and allowed thirty days for appeal from their decision, which was duly taken.

On the 29th of June, 1892, you informed the local officers that their action with regard to Simmons' appeal from your decision was erroneous and without authority, and set the same aside. You, however, declined to receive his appeal, and allowed him twenty days in which to apply for a writ of certiorari, under rules of practice 83 to 85, inclusive. Such application is now before me for consideration.

The Department has repeatedly held that notice to an attorney of record of any action taken in a case, is notice to the party he represents, and negligence on the part of an attorney to take an appeal in time, deprives the party of such right. In the case at bar, however, the default was more the result of a mistake than of negligence. The attorney for Simmons made a *mistake* in entering upon his office register,

the date upon which he accepted notice of your decision. His mistake was such a one as an attorney of ordinary prudence might readily make, and he explains it, and his failure to bring the appeal within time, in a manner which I think should be accepted, unless injury to innocent parties would result. In this case, it is shown that copies of the application, and accompanying affidavits were duly served upon the attorney for the contestant, and upon the present entryman, and no objection to granting the writ is interposed by either.

The case of *Sheldon v. Warren* (9 L. D., 668), recognizes the fact that failure to bring an appeal within the time limited by the rules of practice, may be so excused as to call for the exercise of the supervisory authority of the Department. The same doctrine was held in the case of *Oscar T. Roberts* (8 L. D., 423), where it was said that though the applicant for a writ of certiorari may have failed to appeal within the time fixed by the rules of practice, and hence not be entitled to the writ on the ground of the wrongful denial of his appeal, yet, if it appears that he is justly entitled to relief, it may be granted under the Secretary's supervisory authority.

In the application before me it is made to appear that the contestant, Alvah L. Dean, is now dead; that the claimant's improvements upon the land are worth from six to seven hundred dollars, consisting of a frame house, twelve by thirty feet, a frame barn and other buildings, a well, thirty-six feet deep, sixty-five acres enclosed with a good substantial post and wire fence, seventy acres of good land under a good state of cultivation, and in growing crops.

Under the circumstances of the case, and in view of the action of the Department in *Ferguson v. Daily et al.* (12 L. D., 230), I think the application should be allowed. The record will therefore be certified to the Department for its consideration.

RAILROAD GRANT—RELINQUISHMENT—ADJUSTMENT.

FLORIDA CENTRAL AND PENINSULAR R. R. CO.

Lands covered by entries intact at the date of the general relinquishments executed by the Florida Railway and Navigation Company for the benefit of *bona fide* settlers, should not be subsequently listed on account of the grant, where such entries have been canceled, in the absence of satisfactory evidence that the entrymen were not entitled to the benefit of said relinquishments.

Secretary Noble to the Commissioner of the General Land Office, November 26, 1892.

With your letter of August 6, 1892, were forwarded for my approval lists Nos. 1 and 2, embracing, respectively, 64,455.51 and 3,558.66 acres, within the primary limits of the grant under the act of May 17, 1856 (11 Stat., 15), to aid in the construction of the road now known as the Florida Central and Peninsular Railroad, formerly the Florida Railway

and Navigation Company. The latter company executed relinquishments in 1876 and 1881 in favor of all actual *bona fide* settlers upon any of the lands included within their grants at the dates of said relinquishments.

These lists show numerous homestead entries to have been in existence at the dates of said relinquishments, embracing lands included in these lists. As to said entries, you report that they have all been canceled, and that there is no claim now being asserted to any of the lands covered thereby adverse to that of the company. You also state that: "It is the opinion of this office, as the relinquishment was in favor of actual settlers, that in the absence of an adverse claim, and of any allegation of settlement by the entrymen, the lands should be certified to the State for the company."

I am unable to agree with this construction, as there has been no showing made by the company as to whether any of the said entrymen were *bona fide* settlers at the dates of said relinquishments. The lands being included in said entries at the time of their relinquishment, the company would have been warranted in presuming the claims to have been covered by the relinquishments, and thereupon would have been authorized in making lieu selections therefor, under the act of June 22, 1874 (18 Stat., 194). This presumption is as strong to exclude the lands from listing by the company as it would have been to have authorized selections in lieu thereof under the act of 1874, and I am therefore of the opinion that, until it is satisfactorily shown by competent testimony that the persons making said entries were not entitled to the benefits of the relinquishments, the tracts covered by such entries should not be listed on account of the grant.

The lists are therefore returned herewith, that such tracts may be eliminated and new lists submitted for my consideration and approval.

RAILROAD GRANT-INDEMNITY SELECTIONS.

FLORIDA CENTRAL AND PENINSULAR R. R. Co.

In the preparation of railroad indemnity lists each loss should be separately specified, and the selection therefor designated. The difference in acreage that may exist in any case between the loss and selection should approximate the area of the smallest legal sub-division.

Secretary Noble to the Commissioner of the General Land Office, November 26, 1892.

With your letter of August 6, 1892, was forwarded for my approval list No. 3, embracing 170,852.38 acres, lying within the indemnity limits of the grant made by the act of May 17, 1856 (11 Stat., 15), to aid in the construction of the road now known as the Florida Central and Peninsular Railroad.

In the matter of the preparation of indemnity lists, such arrangement of the losses designated as a basis for the selections should be made, that each selection stands by itself, and, in case the loss fails, the selection based thereon is readily ascertainable.

In the case of the Northern Pacific Railroad Company *v.* Miller (7 L. D., 100), it was held, referring to the selection of indemnity lands,

I think it should be observed that a mere claim of selection, not based upon such foundation as the law and the regulations of the Department require, cannot give a right; the selection must be one which is both well founded in the necessity for it and the manner of making it, and, therefore, one within the direction and approval of the Secretary of the Interior.

The practice prevailed for a long time of designating losses in bulk *i. e.*, ten or twenty thousand acres, or, perhaps, one hundred thousand acres would be selected and an amount equal in quantity designated as lost to the grant.

Under this arrangement, it could not be said with any degree of certainty on what basis any given selection rested, and, hence, in the determination of conflicting rights, individual interests suffered, for such rights can only be protected by the designation of losses, tract for tract.

The interests of the government also require such a designation, for, in the event of mistake in certifying or patenting lands under railroad grants, in order to have a standing in the courts, the specific tract sued for must be identified, and, if this can not be done, no matter how great the fraud or error in the certification, the judgment must be with the company.

By the circular of August 4, 1885 (4 L. D., 90), the local officers were directed to observe the following, in passing upon railroad indemnity selections:

Before admitting indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections upon record until directed so to do.

Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

Again, in giving directions for the adjustment of the grants for the St. Paul, Minneapolis and Manitoba Railway Company and the St. Paul and Northern Pacific Railroad Company, this Department held as follows (13 L. D., 353):

The act of 1857, making the original grants to these roads, provides that where, at the time of the definite location, the United States have disposed of "any sections or any parts thereof," it shall be lawful to select in lieu thereof so much land in "alternate sections or parts of sections as shall be equal to" the lands disposed of. A similar provision is found in most of the other railroad grants. The requirement of the law seems to be plain. The selection must be made tract for tract of the lost

lands, not exceeding, however, in any case, an entire section. To make the selection properly in accordance with the rule, it is absolutely essential that the losses should be specified with particularity and the selections correspond therewith in quantity as nearly as legal subdivisions will permit.

If the loss is of an entire section, because, perhaps, of the swamp land grant, it will be lawful to select as indemnity therefor an entire section, or parts of a section, or sections, in one group; not exceeding in quantity the lost land. And so, in like manner, for the loss of any smaller quantity of land. Each loss, however, must be separately specified and the selection therefor designated. It is not proper to group losses on account of several claims, and make one selection to cover the lot, but the losses and selections should correspond to the extent of the claim which caused the loss, not to exceed, however, in any specification of loss or selection of indemnity, the amount of one section. With lists thus prepared, I think the law and rules of the Department will be sufficiently complied with.

In the list now before me the total difference between the amount selected and the losses designated is but 43.91 acres, the losses being in excess, but a casual examination of the list shows many separate selections not having a proper basis—thus:

NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 15, T. 22 S., R. 24 E., 119.87 acres, is selected in lieu of the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17, T. 22 S., R. 22 E., containing but eighty acres; again, the NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$, Sec. 21, T. 17 S., R. 21 E., containing 561.12 acres, is selected in lieu of the NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ Sec. 31, T. 26 S., R. 22 E., containing only 483.50 acres.

Other selections occur upon a basis similarly faulty, some of which I have checked.

It is apparent that such selections should not be approved by this Department, as the difference exceeds a legal subdivision. The difference must in each case approximate the area of the smallest legal subdivision, viz: forty acres.

If the selection is in excess of the loss by more than twenty acres, a further tract must be added to the loss, or the selection reduced to conform with the loss. Differences under twenty acres will not be taken into account, as far as the separate selections are concerned, but the total of the list must, like the individual selection, also approximate forty acres.

This list also contains many interlineations and erasures, and as this grant provides merely for the certifying of the lands, this list becomes the equivalent of a patent upon my approval, and I can but note its condition. Such lists should be free from interlineation, and, as far as possible, from erasures.

The list submitted is herewith returned, for compliance with the above requirements.

If the failure to properly designate the losses is but the fault of your office, the same may be corrected, otherwise the faulty selections will be eliminated, and a new list submitted for my consideration and approval.

MINING CLAIM—SURVEY—APPLICATION.

FREDERICK A. WILLIAMS.

Where separate applications for patent are made on contiguous locations, notice given accordingly, and separate surveys of the several locations made, but one set only of field notes is furnished, the survey being treated as for a consolidated claim, the entryman may, in the absence of adverse claims, file a new application, embracing the several locations as a single claim, and make entry thereof *nunc pro tunc*, with a view to the subsequent equitable confirmation of such entry.

Secretary Noble to the Commissioner of the General Land Office, December 5, 1892.

I have considered the appeal of Frederick A. Williams from your decision of December 14, 1891, requiring him, as the claimant of the "New Fisherman," "New River Bend," "New Washington City," and "New Boston" placer claims, to give new notice of his application for patent in each case, by due publication in a newspaper, posting on the claims, and in the land office at Montrose, and to have a proper survey made of each claim, separately, and to show by certificate of the surveyor-general that five hundred dollars worth of labor has been expended or improvements made upon each claim by himself or grantors.

It appears that said Williams, on December 26, 1890, at the Montrose land office, Colorado, made four mineral entries, known as follows: No. 20, The New Washington City Placer, containing 108,047 acres; No. 21, The New River Bend Placer, containing 157.81 acres; No. 22, The New Fisherman Placer, containing 159,205 acres; No. 23, The New Boston Placer, containing 90.31 acres—all located in T. 47 and 48 N., R. 17 W., N. M. P. M.

The survey of these claims was completed May 14, 1888, by L. Cutshaw, deputy mineral surveyor, and, although each claim is separately surveyed, one set of field notes only was prepared, and designated as one survey, No. 5303. This survey embraces in one document the four separate surveys of said claims, above designated, as one consolidated claim, and certifies that the value of the labor and improvements upon this consolidated claim, placed thereon by the claimant and his grantors, is not less than five hundred dollars.

In your letter of December 14, 1891, you use the following language, with reference to this survey:

The survey is such as would have been sufficient and proper had the claimant consolidated his claims in one application and one entry; but said survey, in my judgment, is not sufficient to sustain four separate and distinct applications for patents and four separate entries.

Section 2330 of the Revised Statutes provides that "two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make a joint entry thereof."

The provision that two or more persons "may make a joint entry" of contiguous claims may be held to authorize, in the event that several of those claims have been assigned to one person, such assignee to join these claims in a single entry or to make separate entries thereof, at his election. S. F. Mackie (5 L. D., 199); Golden Sun Mining Company (6 L. D., 808).

In the case of *Smelting Company v. Kemp* (104 U. S., 636, 651), it is said:

A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. . . . In addition to all this, it is difficult to perceive what object could be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground, taken up by different locations, and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the conditions of certain annual expenditures upon them in labor and improvements.

In that case the court below instructed the jury that the owner of the several claims must do substantially what was held necessary to be done, in your decision, by Williams, and the supreme court (page 653):

The last position of the court below, that the owner of contiguous locations, who seeks a patent, must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country; requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens.

This language applies with greater force to the present case, where all these preliminary proceedings have been once gone through with by Williams, under the direction of the local officers, with a full knowledge of all the facts.

These four claims were all located January 1, 1888, and relocated February 10, 1888, by their respective owners. A separate application for a patent in each case was filed by said Williams, on August 30, 1888, accompanied with said consolidated survey No. 5303, at the Gunnison land office, and also the plat of the four claims, approved by the surveyor-general, August 8, 1888, which shows the four claims, connected as one contiguous tract and claim. Upon these applications, separate notices were issued in each case, and duly published. Adverse claims were filed, which were afterwards settled and withdrawn.

It seems that the Montrose land district was opened for business on September 1, 1888, and that the land embraced in these claims fell within said new district.

On November 8, 1888, your office wrote as follows to Williams:

I am in receipt of your letter of the 29th ultimo, relative to four applications filed by you August 28, 1888, at the Gunnison, Colorado, land office. In reply, I have to advise you that proof of posting, proof of publication, and other papers necessary in making final entries should all be filed with the register and receiver at Gunnison, Colorado, and those officers will forward them to the register and receiver at Montrose, Colorado, so that final entry may be made there, if the land is shown to be within the said Montrose land district.

These instructions were followed by Williams.

In your letter of July 18, 1889, to the local officers, in this case (16 C. L. O., 110), you said: "The proper land office in which to file an application for patent or adverse claim is the land office having jurisdiction of the land in question at the *time of filing*." Yet, in your letter of December 14, 1891, from which this appeal is taken, you say:

Notices of said applications for patents and the plat of the claims remained posted in the land office at Gunnison, Colorado, during the period of publication, but no notice of said applications, nor the plat of the claims were posted in the land office at Montrose.

You held therefore that on account of this omission there must be new application in each case, new publication, and new posting at Montrose.

In none of the former proceedings or instructions was any criticism made upon the fact that Williams had made four separate applications for patent, accompanied with one consolidated survey and one plat, embracing the four claims. They were apparently recognized as regular, and the four entries were allowed to be made. I am of the opinion that it would be inequitable now to require Williams to go through all these proceedings a second time. There is no adverse claim. A protest only has been filed by one who has no interest, and apparently no good ground for further consideration.

The question is therefore between the government and Williams. No rights of the public will be injured by allowing him to file one application embracing the several claims, and make one entry thereof *nunc pro tunc*. This will prevent adverse claims which Williams has once settled from being again presented, and obviate the necessity of further notice and publication. The case may then be sent to the board of equitable adjudication for confirmation.

Your judgment is modified accordingly.

DESERT LAND ENTRY—RECLAMATION.

JOHN H. KIRK.

Proof of reclamation does not necessarily require a showing that agricultural crops have been produced on the land as the result of irrigation.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 5, 1892.

I am in receipt of your letter of May 19, 1892, transmitting the appeal of John H. Kirk, from your decision of July 16, 1886, notice of which was not given the entryman until the receipt of your letter of March 5, 1890.

Kirk made desert land entry on the 18th of April, 1883, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 7; the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$; SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8; the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 17, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 11 S., R. 26 E.—360 acres—in The Dalles Oregon land district.

He submitted final proof March 30, 1886, which was rejected by the local officers, you say, "for insufficiency and failure to produce an agricultural crop on each legal subdivision."

Upon the rejection of the proof, the entryman filed an affidavit for an extension of time to enable him to make the agricultural crop required, alleging that he had water on the land, and raised grass for his stock, that his land was one hundred and ninety miles from The Dalles, or any market for grain; that he had raised hay and grass and wintered his stock; had raised some grain and vegetables for his own use, and that it would have been a waste of labor and money to have plowed the land and cultivated it to crops. This application was rejected because there is no provision in law for such extension of time. From the decision, and from the rejection of the application for extension, the entryman appealed, and you affirmed this action, from which he again appealed.

You were clearly correct as to the matter of extension of time, as there is no provision in law for it, but the local officers erred in holding that there must be "agricultural crops" raised on each legal subdivision. It is clearly shown that this land was desert, that this entryman has constructed a ditch about $1\frac{1}{2}$ miles long, and has carried water on to the land, and irrigated a considerable portion of it, and has water above the greater portion of it, so that it can all be irrigated, even to each twenty-acre tract, unless it is a few small parcels that are too high.

It was said by Secretary Teller to Commissioner McFarland, February 9, 1885, (3 L.D., 385),

The raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received, and ought not at any time to dispense with actual proof as to the character of the ditch, quantity, of water, etc., owned by the claimant. I do not wish to be understood as holding that the water must cover

all of the land; but it must be carried to a part whence it can be distributed over the land, except high points and uneven surface make it practically impossible that it should be done.

In the case of George Ramsey (5 L. D., 120 *et seq.*), the question is fully discussed, and the growing of agricultural crops was held not to be a necessary element in reclamation of desert land. This was followed in *Vibrans v. Langtree* (9 L. D., 419). See also case of William Skeen (14 L. D., 270). The proof shows that this man is 67 years of age, and in rather poor financial circumstances; that he has expended considerable money in cutting the ditch and carrying water upon this land, and the fact that there is no profit in raising grain, and that relying upon such irrigation as would grow grass and hay, he did not break any large amount of land, and confined this breaking and cultivation to the forty acres upon which his house was built, tends to prove good faith upon his part. There is no adverse claimant, and being satisfied that he has acted in good faith with the government in trying to reclaim this land, and secure title to it, I think the proof should be held sufficient, and having been offered in time, and being in substantial compliance with law, it will be accepted, and the entryman will be allowed to complete his entry.

RAILROAD GRANT—ACT OF AUGUST 5, 1892.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 30, 1892.

Registers and Receivers,
States of Minnesota, North Dakota, South Dakota,
Montana, Idaho, and Washington.

SIRS: By acts of Congress approved March 3, 1857 (11 Stat., 195), March 3, 1865 (13 Stat., 526), and March 3, 1871 (16 Stat., 588), grants were made to the Territory and State of Minnesota to aid in the construction of the railroads therein now owned by the St. Paul, Minneapolis, and Manitoba Railway Company. In construing these acts, this office and Department held that the grants did not extend beyond the boundary of the present State of Minnesota, and in consequence of these rulings, numerous persons settled upon, claimed, occupied, and improved adjacent lands in Dakota Territory, now the States of North Dakota and South Dakota, and have been allowed to make entry thereof. The supreme court of the United States, in the case of the Railway Company *v. Ransom Phelps* (137 U. S., 528), construing said acts, held that the grants were not limited to the State of Minnesota, but extended into the Dakotas, and as a large number of these settlers and claimants, within the limits of the grants so extended, settled after the right

of the company attached and were liable to be evicted from their homes, Congress on August 5, 1892 (Pamphlet Laws, 1891-2, page 390), passed an act for their relief.

By said act authority is given the railway company to reconvey the tracts purchased, claimed, occupied, or improved prior to January 1, 1891, to the United States, to the end that the claimants may be given a good title, and thereafter to select an equal quantity of non-mineral public land, not reserved, and to which no adverse claim or right shall have attached or been initiated at the time of the making of such selection, lying within any State into or through which the railway owned by said company runs.

The company has filed in this Department satisfactory evidence of the ownership of road in the States of Minnesota, North Dakota, South Dakota, Montana, Idaho, and Washington, and under the provisions of the relief act the company will be entitled to select in any of these States any non-mineral public land, either odd or even sections, which at date of selection may be unreserved and free from adverse claims or rights, not to exceed six hundred and forty acres in any one body.

The act also contemplates the selection by the company of unsurveyed lands. In the event of an application at your office to select such land, you will require the company to describe the tract applied for in such manner as to designate the same with a reasonable degree of certainty, and within three months after the survey shall have been made, and a plat thereof filed in your office, to file a new selection list, correctly describing the land according to the survey. In case the originally selected tract shall not precisely conform to the lines of the official survey, the company will be permitted to describe the tract or tracts anew, and so produce such conformity.

The company has reconveyed to the United States 44,745.31 acres, and is now entitled to select an equal quantity of land of the character described in the relief act, but such selection must be made as in the case of other indemnity selections, tract for tract, designating the particular tract released as the basis for such selection.

Very respectfully,

W. M. STONE,
Commissioner.

Approved December 8, 1892:

JOHN W. NOBLE,
Secretary.

RAILROAD GRANT—ACT OF AUGUST 5, 1892.

NOR. PAC. R. R. CO. v. ST. PAUL M. AND M. CO.

The act of August 5, 1892, providing for the release, by the Manitoba railway company, of certain lands specified therein, is for the sole benefit of the individual settler, and does not operate to confirm selections of said lands, made by the Northern Pacific company, and illegal on account of the superior right of the Manitoba company.

Secretary Noble to the Commissioner of the General Land Office, December 8, 1892.

Departmental decision of August 18, 1892, affirmed your decision of August 13, 1891, holding for cancellation certain indemnity selections made by the Northern Pacific Railroad Company, of lands within the primary limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company, as extended into the State of North Dakota under the decision of the supreme court in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Ransom Phelps (137 U. S., 528).

By the act of Congress approved August 5, 1892 (27 Stat., 390), entitled "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," provision was made for the release by the Manitoba Railway Company of all lands opposite to and coterminous with such portions of its roads as were constructed within the time required by the acts making its grants, which, prior to January 1, 1891, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, and the selection of other lands in lieu thereof, upon the terms and conditions named in said act.

A motion has been filed by the Northern Pacific Railroad Company for the review of said departmental decision of August 18, 1892, based upon the ground that the act of August 5, 1892 (*supra*), should be so construed as to protect the purchasers of the Northern Pacific Railroad Company, of the lands in question, through the approval of its indemnity selections, which selections, it is urged, is a claim under a law relating to the public domain.

Under the decision of the supreme court in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Ransom Phelps (*supra*), the right of the Manitoba Railway Company attached to these lands upon the definite location of its road—viz: December 19, 1871. There had been no location or withdrawal on account of the Northern Pacific railroad grant, at, or prior to that date, which included these lands; hence, any selection thereafter made of the same by the Northern Pacific Railroad Company must have been without authority of law, and, hence, illegal.

It was upon this ground that the selections were canceled, and the motion admits the correctness of this position, but claims protection under the relief act referred to.

Such a claim can not properly be made the ground for the review of a decision in which no error is alleged, and the motion might, for that reason, be denied. I have decided, however, to consider the claim on behalf of the Northern Pacific Railroad Company as properly presented by the motion.

Any question as to the rights of those persons, who, prior to January 1, 1891, settled upon the lands in question under a deed, contract, or license from the Northern Pacific Railroad Company, to claim the benefits of said act of August 5, 1892 (*supra*), is not raised by the motion now under consideration. The sole question sought to be raised by the motion is, in effect: Did said act contemplate the release of one company's claim in order to approve the selections made by another for the same lands; in other words, did Congress intend to secure the release by the Manitoba Railway Company, in order to validate illegal selections made by the Northern Pacific Railroad Company, which would result in an extension of its grant, by making available to its selection lands which, prior to that time, were not subject to such selection? If not, then the review must be denied, as the selections were admittedly illegal when made, and must be canceled, unless confirmed by the act of August 5, 1892 (*supra*).

It is plain to my mind that such was not the intention of the statute, its sole purpose being to protect those settlers who had been induced, by the erroneous action of this Department, in refusing to recognize any right in the Manitoba Railway Company to lands outside of the boundaries of the State of Minnesota, to enter upon, purchase, and improve lands which, under the decision of the court, are held to have passed to said company under its grant. The title of the act, its preamble, and the plain language of the act itself, all show unmistakably that the individual settler was the person, and the only person, towards whom the protection of the statute was directed.

The motion is therefore denied.

TIMBER CULTURE ENTRY—SUCCESSFUL CONTESTANT.

Alice Carter.

A successful contestant who fails to make timber culture application for the land involved until after the repeal of the law authorizing timber culture entries, is precluded by said repeal from making such entry, though the failure to make such application, prior to said repeal, is due to the neglect of the local office to advise the contestant of his rights in the premises.

Secretary Noble to the Commissioner of the General Land Office, December 8, 1892.

I have considered the application for review of departmental decision of June 24, 1892, rejecting the application of Alice Carter, to make timber-culture entry for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 8, T. 20, R. 44, Chadron, Nebraska.

The facts in this case are these:

The timber-culture entry of Thomas Carter for the tract in question was canceled by you on October 29, 1890, upon the contest initiated and prosecuted to a successful termination by Alice Carter.

You state in your letter of July 28, 1891, that through the neglect of the local officers, Mrs. Carter was not informed of the cancellation of said entry, and of her preference right in the premises, until after the repeal of the timber-culture law by the act of March 3, 1891, and when she did learn, upon personal inquiry at the local office on June 25, 1891, that said entry had been canceled, and made application to enter the land, her application was rejected for the reason that the timber-culture law had been repealed.

You approved the action of the local officers, and on appeal your decision was affirmed by departmental decision of June 24, 1892 (unreported), said decision being based upon the decision in the case of August W. Hendrickson (13 L. D., 169), that a timber culture entry could not be allowed for the reason that no application to enter was pending at the date the repeal of the timber-culture law took effect.

In the affidavit filed in support of the motion for review, Mrs. Carter swears that when she made affidavit of contest before the county judge, she presented her application to enter the land under the timber-culture law, that being the only right she had, but the judge told her she was not required to offer the application at that time, and that she had better wait until the entry was canceled. She further states that it was her intention to so enter the land when she filed the contest, and in conformity with that intention she had cultivated with her own hands, thirty-one acres of the tract, and had planted ten acres to tree seeds and cuttings and had the local officers performed their duty and notified her of her cancellation of the prior entry, she would have made entry of the land before the repeal of the timber-culture law. While it appears that the applicant did all that was necessary to procure the cancellation of the prior entry, and the reason why she did not make entry of the land after said cancellation and prior to the repeal of the timber-culture law, was the fact that the local officers neglected to perform their duty in notifying her of her rights in the premises, yet the fact remains, that at the date of the repeal of the timber-culture law, there was no application pending to make entry of the land, and the law having been repealed, such application can not now be received.

The motion is therefore denied.

RESERVATION OF PUBLIC LANDS—EXECUTIVE ORDER.

JOHN C. CRAWFORD.

A departmental order withdrawing lands from entry precludes such disposition of said lands while said order remains in effect.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 8, 1892.

On the 10th of July, 1891, John C. Crawford applied at the Vancouver land district, Washington, to make homestead entry for the SW. $\frac{1}{4}$ of Sec. 4, T. 2 N., R. 14 E., W. M. Upon his application the local officers made this endorsement: "Rejected same day, for conflict with instructions of Commissioner of the G. L. O., letter "C", June 14, 1888, withdrawing from entry by whites the township within which the tract applied for is situated. Fees tendered and refused."

From this action of the local officers Crawford appealed, and on the 1st of February, 1892, you informed them that, by letter of May 25, 1888, the Honorable Secretary of the Interior directed that all entries attempted to be made by white men in township 2, north, ranges 13, 14 and 15, east, be refused, until further orders from the Department, and as the Secretary's orders had not been modified or revoked, the lands remained in a state of reservation. You therefore affirmed their action in rejecting Crawford's application. From your decision he appeals to the Department.

On the 12th of May, 1892, the Commissioner of Indian Affairs, upon the report of Special Agent Litchfield, recommended "that all of the odd numbered sections within said townships, except sections 19, 17 and 13, in T. 2, R. 14, and section 25, T. 2 R. 13, be restored to the public domain." On the 14th of that month the recommendation of the said Commissioner was approved by the Department, and the order of May 25, 1888, was modified accordingly.

This modification, however, did not apply to the land for which Crawford applied to make entry, as said lands are not situated in an odd numbered section. The order of May 25, 1888, therefore remains in force, so far as the even numbered sections in said township are concerned, and Crawford's application was properly rejected.

In the case of Thomas Holt, which originated in the same land district, and whose application embraced land in township 2, your decision rejecting his application to make entry, was modified by the Department, in a decision rendered on the 25th of October, 1892, (Press Copy Book 255, page 317), for the reason that the land which he applied for was situated in an odd numbered section. He was allowed to make entry, under the order of March 14, 1892, in case no other obstacle existed.

In the report of Special Agent Litchfield, he recommended that the order of May 25, 1888, be continued in force as to all even numbered

sections in said township, and to the four odd numbered sections mentioned by him, until further investigation could be made.

Under the circumstances recited herein, the decision appealed from is affirmed.

SETTLEMENT RIGHT—RELINQUISHMENT.

McGOWAN v. McCANN.

A settler on land covered by the entry of another acquires a legal status, as against the government, the instant such entry is relinquished, and the right thus acquired is not defeated by the entry of a third party immediately following said relinquishment.

Secretary Noble to the Commissioner of the General Land Office, December 8, 1892.

I have considered the case of John P. McGowan *v. A. McCann*, on appeal by the former from your decision of December 21, 1891, dismissing his contest against the timber culture entry of the latter for the NE. $\frac{1}{4}$, Sec. 30, T. 25 S., R. 25 E., M. D. M., Visalia, California Land District.

The record shows that one, James Hamlin made a desert land entry for the entire section on February 18, 1884, and offered final proof on May 13, 1887. This proof was such that it was rejected, and the entry held for cancellation, from which Hamlin appealed.

Pending these proceedings, McCann, and certain other persons joined in an affidavit of contest against the said entry. McGowan, however, had no part in this. Inasmuch as the government had the entry under consideration, and held for cancellation, nothing was done with this affidavit.

In January, 1888, Arthur McCann moved on to the NE. $\frac{1}{4}$ of the section, built a house, dug a well, and made some other improvements. He had exhausted his pre-emption rights, and was living on a homestead from which he moved when he went on the tract in controversy. He lived on the tract about five months, and went back to his homestead.

In October, 1888, McGowan went upon the land, built a house, cleared some land, made some other improvements, and has had his residence thereon continuously since that date.

In October, 1888, and a few days before McGowan's settlement, McCann returned to the tract with his family, and again took up his residence on the land.

On February 19, 1889, McCann filed in the local land office at Visalia, a relinquishment by Hamlin, of his desert land entry, and on said day made timber culture entry for the tract in dispute. March 20, following, McGowan filed an affidavit of contest against this timber culture entry, alleging his own settlement and improvements on the land,

and that McCann knew of his settlement rights when he made his timber culture entry, and that his settlement antedated said entry, and he claimed the right to make pre-emption filing for the tract. He filed a "declaratory statement for cases where the land is not subject to private entry," which is attached to the affidavit of contest now before me, and which is in due form, and appears regular upon its face. The affidavit of contest was fully corroborated, and upon due notice, a hearing was had, and the register and receiver found for McCann, and recommended the dismissal of the contest. From this action, the contestant appealed, and on December 21, 1891, you affirmed said action, from which judgment he again appealed.

You found, and very properly, that neither the proceeding of McCann to contest Hamlin's entry, nor the purchasing of a relinquishment by him, gave any preference right, citing authorities therefor. And you agree with the local officers that both parties were trespassers in going upon Hamlin's land while it was segregated by his entry, but you say that that matter concerns Hamlin alone.

McGowan was on the land prior to the filing of the relinquishment, and there in good faith, intending to make a filing for the land as soon as the Hamlin entry should be canceled.

McCann had exhausted his settlement rights, when he made pre-emption filing and homestead entry. Settlement rights are not necessary to timber culture entry. The law defines what is necessary to perfect a timber culture entry, and settlement is no part of it. McGowan acquired the right of a settler upon this land the instant the relinquishment was filed. In *Wiley v. Raymond* (6 L. D., 246), it was held, that as Raymond had a settlement on land covered by the homestead of one Grassick, that his right attached as against the government *eo instanti* upon the filing of the Grassick relinquishment. So in the case at bar, McGowan's settlement rights attached *eo instanti* upon the filing of the Hamlin relinquishment, and this settlement right could not be defeated by the timber culture entry of McCann. See also *Fosgate v. Bell* (14 L. D., 439).

Counsel for McCann claims that because he had filed an affidavit of contest against the Hamlin entry, that he thereby acquired a preference right of entry when the relinquishment was filed. There is nothing, however, showing that the relinquishment was the result of the contest, but it was, from all that appears, induced by the proceedings by the government and money paid by McCann, neither of which gives a preference right of entry.

While it is shown by the testimony of McCann and his wife that they had intended to abandon their homestead and live on the timber culture tract, it does not appear that any relinquishment was filed, or anything except moving from the homestead the second time.

It may be a hardship to cancel this timber culture entry, but equity follows the law, and the law is with McGowan. Your decision is therefore reversed, and the entry will be canceled.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. Co. v. STEVENS.

The mere enclosure and use of public land, at date of definite location, without settlement, or asserting any claim thereto under the settlement laws, or intention of asserting such claim, does not except said land from the operation of the grant.

Secretary Noble to the Commissioner of the General Land Office, December 8, 1892.

I have considered the case arising upon the appeal of the Northern Pacific Railroad Company from your decision of November 3, 1891, adverse to the company, in the case of said company against James E. Stevens, involving the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 27, T. 1 S., R. 4 E., Bozeman land district, Montana.

The land is within the primary limits of the grant to said company. The question at issue is whether, at the date of the filing of the map of definite location of the road opposite the land, it was subject to such claim or right as excepted it from the grant.

The map of definite location was filed July 6, 1882. At that date the land was used and cultivated by one Emil Ketterer, who had previously filed his declaration of intention to become a citizen, and had not used either his pre-emption or his homestead right. He had married the daughter of one John Arcola, who had given her one hundred and twenty acres of land adjoining that in controversy, and had sold to Ketterer other contiguous land. Arcola testifies thus:

I sold land adjacent to that in question, but it was *all fenced together*; I also sold him the fence on this land, but *not the land*, as it did not belong to me. I gave—not sold—the land adjoining that in question to my daughter, who is the wife of Mr. Ketterer.

Q. Did you at the time of this gift lay any claim whatever to the one hundred and twenty acres now in dispute?—A. No, I had no claim to it.

Ketterer cultivated twenty or twenty-five acres of the land each year that it was in his possession, raising and harvesting therefrom wheat and oats. The value of the crop raised and harvested in 1882 was between \$150 and \$200. Regarding the character of his claim to the land, he testifies as follows:

I had it merely under fence, and afterward filed a timber-culture entry on it. I turned it over to James Stevens in 1885.

Q. Were you occupying and claiming the land continuously from the fall of 1880 till you transferred it to Stevens?—A. Yes.

Q. Then on July 6, 1882, you had such a claim that you could have carried it to patent?—A. Yes, sir.

Q. How far from the land in question were you residing July 6, 1882?—A. I was making my home in Bozeman.

Q. Were your family residing in Bozeman?—A. Yes, sir.

Cross-examination. Q. Was there any transfer or sale made to you or your wife of the land in question?—A. No, sir.

Q. You simply used this land in controversy because it was handy and under fence in the same common inclosure with your purchase?—A. Yes, sir.

Q. What was the nature of this disposal to James E. Stevens?—A. I abandoned it, without pay, to Mr. Stevens, as I was informed that I could not hold it under the timber-culture law. The old man was living on his place adjoining, and I told him if he wanted it to go and file on it, and I would withdraw my filing—which was done.

Counsel for the railroad company contends that as the land in dispute was only used by Ketterer in connection with other land, that had been given to his wife, and as he made no claim and asserted no right to it (until after the date of definite location of the road, when he filed a timber-culture claim, which he afterward abandoned), it was not excepted from the grant, which included all lands that were "free from pre-emption or other claims or rights at the time the line of said road is definitely fixed."

It is clear that Ketterer had no "claim or right" to the land, under any of the settlement laws of the United States, at the date of the definite location of the road. He had not settled upon it, and there is no intimation that he ever entertained the least intention of claiming it under such laws. His own statement is that he simply *used* it, "because it was handy, and under fence in the same enclosure" with other land that he did own. The fact that he afterward initiated a claim to the land under the timber-culture law, and that he finally relinquished it without receiving any consideration therefor, and without at any time making a pre-emption filing or homestead entry for the same, supports the presumption that he laid no claim to the land under any of the settlement laws. In my opinion, the mere fencing in and cultivation of a portion of the public domain—or its cultivation if he finds it fenced in—without claiming it and with no manifest intention of claiming it under any of the settlement laws, does not except it from the grant.

Your decision must therefore be reversed, Stevens' entry canceled, and the land awarded to the railroad company.

NORTHERN PACIFIC R. R. Co. *v.* MATTHEWS.

Motion for review of departmental decision above entitled, rendered July 20, 1892, 15 L. D., 81, denied by Secretary Noble, December 8, 1892.

PRE-EMPTION ENTRY—ABANDONED MILITARY RESERVATION.

JOHN W. IMES.

An entry erroneously allowed of land included within a military reservation, but afterwards opened to entry, may be permitted to remain intact, and take effect as of the date when the land became subject to entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 8, 1892.

On February 5, 1889, John W. Imes filed pre-emption declaratory statement for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 14, T. 2 S., R. 6 E., Bozeman land district, Montana.

On September 14, same year, he made cash entry of the same.

On September 4, 1891, you wrote to the register and receiver at Bozeman as follows:

GENTLEMEN: Pre-emption cash entry No. 400, by John W. Imes, covering the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 14, T. 2 S., R. 6 E., is hereby suspended, for the reason that the land lies within the abandoned military reservation of Fort Ellis (see act of July 5, 1884, and act of February 13, 1891), and is not subject to pre-emption entry. You will report at once why the entry was allowed by your office.

On September 11, 1891, the register and receiver wrote you explaining that their action was based upon a letter to them, dated January 4, 1889, from the surveyor-general of Montana, in which he stated that he had been instructed by you, by letter of December 24, 1888, to notify them that the N. $\frac{1}{2}$ of Sec. 14, T. 2 S., R. 6 E., was not within the limits of the Fort Ellis military reservation.

Upon the receipt of the said letter, you enclosed to the register and receiver a copy of said instructions of December 24, 1888, to the surveyor-general, in which he was informed that "the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of Sec. 14" was outside the reservation—and not the *entire north half*, as he had notified the register and receiver; you directed their attention to the fact that the *south half* of the north half—the land covered by Imes' entry—was within the limits of the reservation; that therefore it was not subject to entry; and you directed them to notify the entryman that he would be allowed sixty days in which to show cause why the entry should not be canceled.

Thereupon counsel for Imes submitted an argument, setting forth the good faith of the entryman and the fact that the officers of the government had allowed the entry; contended that if the land was not subject to entry at the date it was made, that it became so upon the passage of the act of February 13, 1891; furnished certified copies of the record showing that after the issue of final certificate, the tract had been mortgaged for a loan of \$1,000, and directed attention to the equities on the part of Imes and his mortgagee, that the error had occurred through the oversight of an agent of the United States, and that the question was one solely between the entryman and the government.

By letter of January 25, 1892, to the local officers, you held "That the arguments set forth are without weight, for the reason that the reservation in question never has been subject to pre-emption entry," and you held the entry for cancellation.

From this decision Imes appeals to this Department.

Edward Flynn, the mortgagee, also asks to intervene.

There can be no doubt that the entry was erroneously allowed. The only question for decision is, what is a proper course to pursue, under all the circumstances, in view of the act of February 13, 1891, by which the Secretary of the Interior is "authorized and directed to cause the land embraced within the abandoned Fort Ellis military reservation in Montana to be regularly surveyed by an extension of the public surveys, over the unsurveyed portions thereof." (26 Stat., 747.)

The second section of said act grants to the said Montana, for public purposes, one section of the reservation, "to be selected according to legal subdivisions, so as to embrace the buildings and the improvements thereon." But none of said buildings and improvements are on the land embraced in Imes' entry, or on any part of said section 14.

The third section of the act provides that "The remainder of said reservation, or any portion thereof, may be selected by the State of Montana, at any time within one year after the approval of the survey thereof, in tracts of not less of one section, in square form and according to legal subdivisions," for school purposes; and further, "that if any portion of said reservation shall remain unselected by said State for a period of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States." The survey of all the lands in the reservation had been made in the summer of 1887, which survey was approved by your office on December 19, of that year—a fact of which it would appear that Congress was unadvised. You have held that the period within which the State must make selection expired in one year from the date of the act, and that by the provision above quoted, the portion of the reservation remaining unselected became subject to entry on the 14th day of February, 1892. The land claimed by Imes was not selected by the State prior to that date, nor has the State ever made application for the same. In short, there appears to be no adverse claim to the land in question.

This case is in many respects similar to that of Richard Griffin, decided by the Department September 2, 1890 (11 L. D., 231). Griffin had been informed by the local officers that the land which he desired to enter was outside the Sioux Indian reservation, and subject to entry, and was permitted by them to make homestead entry of the same. By subsequent survey it is found that the tract in question was inside the reservation. He requested that his entry be allowed to stand until such time as the Indian reservation bill, at that time before Congress, should be finally passed upon. You denied the application, and held the entry for cancellation. He appealed to the Department. After-

ward the act was passed opening the land in question (*inter alia*) to settlement and entry. In view of the facts set forth, the Department did not insist upon the cancellation of the entry, although it had been made when the land was not open to entry, but on the contrary, directed that it should remain intact, and take effect from the date when the land became subject to entry. In my opinion the case at bar should be decided upon the same liberal principle. If the allowance of Imes' entry was erroneous under the circumstances as they existed when it was allowed, the obstacle which then rendered the entry illegal has since been removed; and neither the government nor any other party having any rights in the premises will suffer loss or hardship by permitting the entry to remain intact, taking effect from the time when the land became subject to entry.

Your decision is therefore reversed, and patent will issue for the land.

HOMESTEAD ENTRY—AMENDMENT—ADDITIONAL ENTRY.

LIZZEY PEYTON.

The provisions of the act of March 2, 1889, with respect to additional homestead entries, are not applicable, where the original entry is made subsequent to said act.

A homestead entry can not be amended so as to embrace an additional tract, where the entry, as originally made, covers the land intended to be taken.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 9, 1892.

Lizzey Peyton made homestead entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 1, T. 47 N., R. 9 W., Ashland land district, Wisconsin, on the 10th of July, 1891.

On the 15th of January, 1892, she filed in the local office an application to amend her entry, so as to embrace, in addition to the land therein described, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the same section, township and range.

Her affidavit in support of her application was corroborated by two credible witnesses, and was transmitted to your office on the 19th of said January. On the 16th of April, 1892, you rejected her application, and on appeal from your decision brings the case to the Department.

Her application is based upon the facts that when she made her entry she was ignorant of the provisions of the homestead law, and supposed she made entry for all the land she had a right to take under said law. Upon learning that she could have made entry for one-hundred and sixty acres, and that her entry embraced only eighty, she applied to amend, stating that the additional tract applied for was contiguous to her former entry, and was vacant land, and would have been included in her original entry had she understood her rights.

The provisions in relation to change, or correction of entries are embraced in sections 2369, 2370, 2371 and 2372 of the Revised Statutes, and Sec. 7, act of March 3, 1891 (26 Stat., 1095).

Section 2369 provides for change of entry where mistake has been made through the fault of the government officers, or error in the public records. Section 2370 extends this provision to cases where patents have been issued, or may hereafter issue. Section 2371 makes the same provisions applicable to errors in the location of land warrants, while section 2372 provides for the correction of mistakes made by the entry-man himself in the true numbers of the tract intended to be entered, and said section 7 for the correction of clerical errors.

These are all the statutory provisions in relation to change or correction of entries, and the statute nowhere provides for an amendment of entry. Occasionally, however, as was remarked in Homer C. Stebbins (11 L. D., 45), changes and corrections have been allowed to be made by amendment, in the interest of justice and equity, where entry of a tract of land not intended to be entered has been made through a mistake of the true numbers, where no intervening rights are disturbed, and where the mistake was through no fault or negligence of the entry-man.

In the case of entries made prior to the passage of the act of March 2, 1889, (25 Stat., 854) a remedy was provided therein by way of additional entries, but in the case at bar the entry was made subsequent to the passage of that act, and it is not pretended that it does not cover the land intended, but simply that it does not include all the land desired.

It was held in the case of Anna Johnson, decided by the Department on the 22d of June, 1892, (Press Copy Book 247, page 63), that such a state of facts does not present a case in which amendment can be allowed, neither is it a case where an additional entry can be permitted.

The application of Miss Peyton to amend her original entry was properly rejected by you, and the decision appealed from is therefore affirmed.

SCHOOL LAND—INDEMNITY SELECTION—ENTRY.

GEORGE SCHIMMELPFENNY.

A school indemnity selection, defective for want of a proper basis, can not be amended so as to defeat the right of an intervening applicant for the land covered by said selection.

An application to make homestead entry for land covered by an illegal school indemnity selection can not be allowed while said selection remains of record, but the application in such case may be treated as an attack upon the selection, and the State called upon to show cause why the selection should not be rejected.

Secretary Noble to the Commissioner of the General Land Office, December 9, 1892.

From the record in the case of George Schimmelpfenny it appears that on June 13, 1891, he applied to make homestead entry for the SW. $\frac{1}{4}$, Sec 22, T. 3 N., R. 1 E., Vancouver, Washington. His application

was rejected, because the State of Washington had selected the land as indemnity for school land lost in place.

On appeal you, by your decision of January 5, 1892, affirmed the rejection, and he has appealed to this Department.

The township, for which this indemnity was selected, was a fractional one, and entitled to nine hundred and sixty acres of school land. Two hundred and thirteen and twenty-seven one hundredth acres had been found in place (Sec. 16), leaving seven hundred and forty-six and seventy-three one hundredth acres for which indemnity was allowed. But the State had selected the full nine hundred and sixty acres—namely: all of section 9 and the south half of section 22, or two hundred and thirteen and twenty-seven one hundredth acres more than the State was entitled to. The land applied for is the southwest quarter of the last-named section (22).

It appears from the record that the selection in controversy contains 213.27 acres in excess of the deficiency in said township. There being no basis for said excess, the entire selection must fail, and it can not be amended by the relinquishment of such excess so as to defeat the right of any applicant for lands embraced in said selection whose application is filed prior to such amendment.

The local officers were right in refusing to allow entry to be made by Schimmelpfenny under his application, because the selection by the State, as long as it remained of record, reserved the land from other appropriation, until said illegal selection was removed, but the application being in the nature of a contest or attack upon said selection, the State should be called upon to show cause why the selection should not be rejected, and, if it is found to be invalid, it should be canceled and the application of Schimmelpfenny, if otherwise legal, should be allowed. *Niven v. California*, 6 L. D., 439.

Your decision is modified accordingly.

HOMESTEAD ENTRY—REINSTATEMENT—ADVERSE CLAIM.**AYERS v. BROWNLEE.**

A homestead entry canceled for failure to make final proof within the statutory period, such failure being due to the entryman's arrest and conviction on a criminal charge, can not be re-instated in the presence of an intervening adverse claim.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 9, 1892.

The land involved in this entry is the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 36, T. 17 S., R. 2 W., Montgomery, Alabama, land district.

The record shows that Leonard Ayers made homestead entry of said tract January 27, 1875, which was canceled March 12, 1883, on account of expiration of time to make final proof.

On September 28, 1886, Benjamin Brownlee made additional home-stead entry of said land, under the act of March 3, 1879, together with others, and received final certificate for same May 17, 1887.

On November 1, 1886, the plaintiff made an "excuse affidavit" setting up his reasons for not having made his final proof within the period limited by statute, and upon this showing you, by letter of May 3, 1887, restored his entry subject to any adverse right, and upon presentation of his corroborated affidavit of contest ordered a hearing. The allegations of this affidavit are substantially as follows:

That he was unable to make his final proof for the following reasons: He was arrested and placed in jail in 1881; that at the fall term of the court in Jefferson county, in 1882, he was convicted and sentenced to hard labor for one year, and fifteen months additional to satisfy the costs; that he served out the full term at hard labor in the coal mines; that after his release from prison and after he learned that his entry had been canceled and the land had been entered by defendant he went to Birmingham and employed land attorneys, who agreed to take his case and try and get his entry reinstated, for which he paid them sixteen dollars, at that time and after waiting about a year one of the members of said firm (now defendant's attorney) informed plaintiff that he had been employed by defendant and said attorney then paid back ten dollars of said fifteen dollars. He afterwards applied to other parties who wrote for plaintiff and ascertained the condition of the case from the United States land office; that plaintiff was for a long time unable to get an attorney to take hold of his case or to do anything for him; that he had a continuous home upon the land in question for more than sixteen years with his family and has cultivated some portion of said land every year; that the improvements now on said land which have been put there by plaintiff are worth five hundred dollars.

The testimony was taken before a notary public and on consideration thereof the local officers recommended the cancellation of that portion of defendant's entry which conflicts with the original entry of plaintiff and that plaintiff's entry be reinstated. The defendant appealed and you by letter of December 5, 1891, reversed their decision, whereupon plaintiff prosecutes this appeal assigning as error, substantially, that your decision is against the evidence.

The allegations in the affidavit of contest as above set forth are sworn to by the witnesses at the hearing, but the details of his arrest and incarceration are given to show that he was not free to make final proof at the expiration of seven years. (See Sec. 2291, R. S.). It seems that he was arrested for burglary in 1881, and convicted at the "fall term 1882," and for some portion of the interim was in jail. He says that owing to his trouble over the arrest he could not raise money to make his proof. It seems that while serving his sentence another party entered the land, of which act Ayers had knowledge, but he seems simply to have held it until Ayers was released, when he relinquished for his benefit. Then it was that he retained counsel to look after the matter for him, but it seems they did not do so, but subsequently entered the employ of this defendant, and one of them appears here for him. While his counsel were inactive in his behalf the defendant secured the land.

This is a case of peculiar hardship. The plaintiff is an ex-slave, unable to read or write. He settled upon this forty acre tract to make a home for his family. He cleared about twenty acres of the land; fenced all of it, built three houses, beside a cotton-house, and out-buildings; has a good orchard, and has lived there almost twenty years and raised his family. But his failure to comply with the law has placed it in the power of another to acquire title to this land, and an impartial administration of the law forces me to dismiss his contest. It is not apparent that there was any fraud on the part of the defendant and the entry of plaintiff having been lawfully canceled, more than a year after the expiration of the period in which an entryman must make final proof, I can not do otherwise than hold his entry intact.

Your judgment is therefore affirmed.

RAILROAD GRANT—PRE-EMPTION—SETTLEMENT RIGHT.**TETREAULT v. NORTHERN PACIFIC R. R. CO. ET AL.**

Land embraced within an expired pre-emption filing at date of definite location, is not excepted from the operation of a railroad grant, if the pre-emptor at such date is not then asserting a claim under said filing.

Settlement at definite location by one holding under the company's title, and intending to purchase from the company, does not except the land covered thereby from the grant.

Secretary Noble to the Commissioner of the General Land Office, December 9, 1892.

I have considered the case of Albert Tetreault *v.* Northern Pacific Railroad Company and John R. Latimer, involving the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 9, T. 13 N., R. 20 W., Helena land district, Montana, pending on appeal by Tetreault from your decision of December 20, 1890, rejecting his claim to said land.

The tract here in question is within the primary limits of the grant for said company, shown by the map of definite location filed July 6, 1882, and was included within the limits of the withdrawal upon the map of general route filed February 21, 1872.

The records shows that one Dewitt C. Beers filed declaratory statement No. 1431, for said tract, January 16, 1871, alleging settlement January 10, 1870.

Theodore H. Carrick filed declaratory statement No. 2458, for same land, April 9, 1872, alleging settlement February 5, 1872.

Albert Tetreault, the present claimant, filed declaratory statement No. 7172, for this land, July 15, 1885, alleging settlement April 11, 1885.

Charles Kelsey filed declaratory statement No. 7253, for same land, August 20, 1885, alleging settlement April 13, 1885.

On March 10, 1885, the Northern Pacific Railroad Company applied to list this tract on account of its grant, and upon the rejection of said list on account of the filing by Beers, the company appealed.

In accordance with published notice, Tetreault tendered proof upon his filing on March 9, 1888, when he was met by Latimer, who protested against the acceptance of the same, as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 9, which tracts he claimed under purchase from the Northern Pacific Railroad Company.

Upon the testimony taken you found that there was no one "residing upon and claiming the land July 6, 1882, under the settlement laws of the United States," and therefore held that it passed to the company under its grant.

The appeal urges that the filings by Beers and Carrick served to except the tract from the withdrawal on general route and also from the grant; further, that Latimer was residing upon the land at the date of definite location, and, although not qualified, yet such residence would defeat the grant.

As to the filings by Beers and Carrick, I have but to say that said filings had expired long prior to the date of the definite location of the road, and as it is not shown that they continued to claim the land under said filings on July 6, 1882, I must hold that, so far as said filings are concerned, the land was free from claim and subject to the grant. *Reynolds v. Northern Pacific Railroad Company* (9 L. D., 156); *Northern Pacific Company v. Stovenour* (10 L. D., 645).

It but remains to consider the effect of the settlement by Latimer, who was in possession of the land at the date of the definite location of the road.

It is admitted that he had exhausted both his homestead and pre-emption rights, and that his settlement was with a view to purchasing the land of the company.

It is well established by the rulings of this Department that where a settlement is relied upon to defeat the claimed rights under a grant, such settlement must have been made by one having the legal qualifications to perfect the claim initiated by such settlement. *Northern Pacific Railroad Company v. Fitzgerald*, 7 L. D., 228; *Northern Pacific Railroad Company v. Potter et al.*, 11 L. D., 531.

This of itself disposes of the settlement by Latimer, but it also appears that he was in possession under and by virtue of the company's title and without intention of claiming under the general land laws. Such a settlement will not defeat the grant. See *Northern Pacific Railroad Company v. Dunham et al.*, 11 L. D., 471; *Same v. Pile*, 12 L. D., 322.

For the above reasons, I am of the opinion that the land was not by the terms of the land grant excepted therefrom, and your decision rejecting Tetreault's claim to the same is therefore affirmed.

HOMESTEAD CONTEST—ABANDONMENT.

REEDHEAD v. HAUENSTINE.

The continuity of residence is not interrupted by absence from the land caused by judicial restraint, and a charge of abandonment in such case must fail.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 9, 1892.

I have examined the appeal in this case and find that on April 26, 1887, Albert E. Hauenstine made a homestead entry for the NE. $\frac{1}{4}$, Sec. 14, T. 14 N., R. 25 E., North Platte, Nebraska and that on August 14, 1889, Joseph D. Reedhead initiated a contest against said entry alleging abandonment.

The local officers set a day of hearing giving the usual notices, but before the trial the parties agreed upon a statement of facts, and submitted the case without taking testimony.

The statement submitted shows that for about one year prior to November, 1886, the defendant lived upon the tract in question, with his family, that he built a good house and stable on the land and that he broke some ten acres thereof preparatory to raising crops; that on or about November 11, 1888, he committed murder, and was arrested and tried, found guilty and sentenced to death; that at the time this statement was made, he was in the penitentiary, pending a review of said case on error in the supreme court of the State of Nebraska; that he has a wife but no children; that his wife has not lived on said claim since November 11, 1888, when the murder was committed; that no cultivation of any kind has been done on said claim since defendant's arrest and that said tract is abandoned so far as the claim is concerned. That the reason for said abandonment is due to defendant being deprived of his liberty by reason of his confinement in the penitentiary, and that the wife is poor and in straightened circumstances and can not support herself on said claim or live thereon alone.

Plaintiff asks that the entry be canceled. Defendant for his wife, asks that contest be dismissed and the entry allowed to stand for his wife's benefit.

Upon this statement of facts the local officers decided in favor of the defendant and recommended a dismissal of the contest, whereupon the plaintiff appealed and you under date of December 12, 1891, sustained the judgment below, and the plaintiff again appeals.

This Department has repeatedly held that where a party was absent from his entry by reason of judicial restraint, as in this case, that it could not be considered an abandonment. While it is true that the homestead law requires personal and continuous residence, yet it is also true that residence once established can only be changed by the personal act and intention of the claimant affecting such change.

In the case at bar the absence of the defendant was the result of judicial restraint and his residence was therefore not interrupted thereby, *Kane et al. v. Devine* (7 L. D., 532); *Anderson v. Anderson* (5 L. D., 6), and *Arnold v. Cooley* (10 L. D., 551).

Your decision is accordingly affirmed.

HOMESTEAD ENTRY—DESERTED WIFE—RELINQUISHMENT.**O'CONNOR v. STEWART.**

The right of a deserted wife to make homestead entry of the land on which she is living at date of desertion, and on which she previously resided with her husband, cannot be defeated by one who, with full knowledge of the facts, sets up a claim under a relinquishment obtained from the husband after said desertion, and while he is so intoxicated as to be unfit for the transaction of business.

First Assistant Secretary Chandler to the Commissioner of the General Land Office December 9, 1892.

The land involved in this appeal is SE. $\frac{1}{4}$ of Sec. 35, T. 48 N., R. 40 W., Marquette, Michigan, land district.

The record shows that John O'Connor filed his homestead application for said land August 25, 1887, upon which the local officers made the following endorsement:

The within application with the required fee was this day tendered and rejected for the reason that the land applied for is in an odd numbered section within the indemnity limits of the Marquette and Ontonagan R. R. Co., and reserved for that company and its successors.

It seems that he appealed from this rejection, and by subsequent action of your office, the application was returned together with that of one Fish, for the same land and a hearing ordered to determine who had the prior right. The land became subject to entry October 10, 1887, on which day James Stewart made homestead application, and the hearing then proceeded between the three applicants to determine the prior right. As a result of this hearing the register and receiver decided that Stewart had the better right. Fish and O'Connor appealed but it appears that the day before O'Connor's attorney filed the appeal in the local office, he executed and filed a relinquishment of his right and by the same instrument withdrew all objections to the decision of the register and receiver. The date of this relinquishment is May 23, 1889.

On June 25, 1890, Mary O'Connor, wife of John, filed with you a petition supported by affidavits, in which she charges—

That the relinquishment in this case was obtained through fraud, and for the purpose of depriving her of her rights as the deserted wife of said Jno. O'Connor, that said Jno. O'Connor executed said relinquishment at a time when he was so intoxicated as not to know what he was doing, and through the collusion of Stewart, the other party in interest, with said O'Connor; and that said relinquishment should, in

accordance with the rulings of the Land Department, be set aside as null and void and she (Mrs. O'Connor) be allowed to prove up as the deserted wife of said John O'Connor.

By letter of April 15, 1891, you ordered a hearing on these charges. On December 26, 1891, James Stewart filed the relinquishment of Fish. As a result of the hearing the register and receiver recommended that the petition be dismissed and Stewart's entry be allowed. Mary O'Connor appealed, and you, by letter of February 5, 1892, affirmed both their said decisions, that is, that Stewart had the better right to the land, and that Mary O'Connor's petition should be dismissed, whereupon she prosecutes this appeal, assigning error as follows:

1. She renews her appeal filed in the local land office on November 19, 1891, by her attorney, F. F. Cutts, and alleges error in not sustaining each and every specification of error therein contained.
2. Said decision errs in holding that the relinquishment executed by appellant's husband was a valid instrument and that it had not been procured by fraudulent methods.
3. It is error to hold that Stewart was a *bona fide* settler on the land in question, prior to the attaching of the settlement rights of this appellant.

In the consideration of this case as it now stands I shall divide it into two parts, and consider first, the issue raised between the three applicants to enter the land and determine which had the better and prior right, and, second, the petition of Mary O'Connor and the issue raised thereby.

The testimony taken at the first hearing shows beyond a reasonable doubt that John O'Connor settled on this land prior to James Stewart. O'Connor went into the vicinity of the land with several others, for the purpose of securing a homestead, about the first of September, 1887. He selected this piece, built a cabin on it and made a small clearing. He remained there until October 12, following, and on the 14th of that month made his application to enter the land at Marquette. He remained there until July 9, 1888, when he returned to the land, fixed up his cabin, lived there and cleared some more ground. In September of that year he married the appellant herein, who was a widow with five children. On October 16, he moved his wife and family on the land, built an entirely new and larger house and lived there with his family continuously until after the first hearing, which began January 28, 1889, and ended April 27, following.

There seems to be no question raised as to the sufficiency of his acts of settlement or residence, but your judgment, and that of the local officers against him seems to be based upon an alleged bargain between this entryman and one William Stewart, a brother of the defendant, whereby it is claimed that he—O'Connor—agreed to sell this claim to, and relinquish his right in, said land to the defendant. It is claimed this bargain was made when he was there in 1887, and William Stewart swears he paid some money on the deal to one Taplin for one O'Connor. It may be questioned from the testimony that any such

trade was ever made. O'Connor denies it, and I think his acts alone, subsequent to the time it is said to have been made, fully corroborates his statement. It seems unreasonable and unnatural if he ever made such a sale, that he should subsequently present his application, then go back upon the land the next season; repair his old cabin so as to make it comfortable; erect a new and larger house, move his family there; make other improvements, and at all times assert his right to the land. He did not relinquish, as it is claimed he agreed to; did not, so far as the record discloses take any other land, but did do all on this that could be reasonably required. The defendant Stewart did not go upon the land until January, 1889, and after the first hearing had been ordered when he claims to have established his residence there. The controversy between O'Connor and Stewart in the light of the testimony before me, as to this trade is not one that comes within the jurisdiction of this Department, except for the purpose of determining whether O'Connor was fairly entitled to the tract. The question before me is as to which of the parties should be awarded this land.

Considering the testimony and circumstances I am forced to the conclusion that O'Connor had the better and prior right to the land and that his application should have been received subject to a future compliance with the law, and that of Stewart rejected.

The further question to be considered is as to whether the appellant Mary O'Connor is entitled to the land as the deserted wife of John O'Connor. The testimony taken on this hearing shows that O'Connor was a blacksmith by trade; that he was in the habit, whenever an opportunity presented itself, of getting drunk; that this habit was so strong in him that it was necessary to keep his money from him. His wife at the time of her marriage had a little money and this was used in building the new house and making the other improvements; and by her labor and that of her children, the improvements were continued until about six acres were cleared. In addition to this she did washing and other work to earn means to support the family and her excessively hard work together with packing provisions about two miles on her back had resulted in the premature birth of their child, still born.

On May 18, 1890, O'Connor left her with the declaration that he would not live with her longer and he kept his word. He went to Marquette and remained there until after the execution and relinquishment on the 23d. During all this time he was more or less under the influence of liquor, and I think it fairly deducible from the testimony that he was so thoroughly intoxicated that he was unfit to transact business.

It is probably true that he had entered into negotiations with the Stewarts to sell James his relinquishment a day or two before he left his wife, and that they were aware of his intention of abandoning her. They testify that he expressed a desire to go away and work at his trade. William Stewart accompanied him to Marquette on this trip,

and was with him more or less until he procured the relinquishment, which was executed in the local office and acknowledged before the register. Hugh Stewart, another brother, paid him \$200, and a note was given him for \$300, payable when entry should be made.

It is not shown who executed the note. I should state that there is no apparent connection between this later trade and the one referred to in the former hearing. But in both deals, as well as in all other matters in connection with this controversy William Stewart is the active person who figures prominently in everything relating to this and the previous hearing, and in all the transactions connected with the land. He has a homestead adjoining this tract and he it was who, in the first instance, wrote James in regard to the O'Connor land and thus gave him the first information he had in regard to it, and induced him to declare his intention of becoming a citizen of the United States so as to qualify himself to enter it.

The defendant lived on the land after establishing his residence in January, 1889, and he is therefore chargeable with notice of the acts of settlement by O'Connor. There is some testimony tending to show that the Stewarts encouraged O'Connor in his dissolute habits by chafing him on refusing to drink after his marriage, because he was disposed to regard as sacred his promise to his wife not to do so. They certainly were familiar with his habits and his weakness and I can not escape the conviction that they were directly instrumental in bringing about his condition and procuring for a grossly inadequate sum the relinquishment. It is shown that the land is worth from \$14,000 to \$15,000. There is also testimony tending to show that O'Connor was so far intoxicated when he signed the relinquishment as to be insensible of his acts and that if he could get the land for himself he would do so, but that he would do nothing toward aiding his wife in securing it. (She continued to live upon and improve the land after the desertion.)

It seems to me from all the testimony that it is fairly shown that the appellant herein is the deserted or abandoned wife of the entryman; that he and the defendant, who procured his relinquishment did so for the purpose of depriving her of her only home and the fruits of her labor and industry; that her husband was intoxicated at the time of the execution of the relinquishment to such an extent as to disqualify him from intelligently transacting business, and I think all these facts were known to the defendant at the time. I therefore think that she should be permitted to make entry of this land as a deserted wife. *Roncaglion v. Yarbrough* (unreported) L. P. B. #251, page 146; *Mary Lewis*, 3 L. D., 187; *Wilber v. Goode*, 10 L. D., 527; *Kamanski v. Riggs*, 9 L. D., 186.

Your judgment is therefore reversed. You will order the cancellation of James Stewart's entry and notify Mary O'Connor that she will be allowed to make an entry, as a deserted wife, within thirty days from notice of this decision.

SCHOOL LAND—INDEMNITY SELECTION—APPROVAL.**TONNER v. O'NEILL (ON REVIEW).**

Where a school indemnity selection of land not subject thereto has been duly approved, the State is not entitled to take other land in lieu thereof, until the first selection has been formally relinquished, or set aside by proper authority. No title is acquired by a school indemnity selection until the same has been duly approved and certified.

Secretary Noble to the Commissioner of the General Land Office, December 10, 1892.

This is a motion filed by P. C. Tonner, asking for review of the decision of the Department of April 1, 1892, in the case of *Tonner v. O'Neill* (14 L. D., 317), accompanied by an application from the State of California to have its indemnity school selection for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$, Sec. 7, T. 5 S., R. 1 W., Los Angeles, California, as per list No. 167, revoked and canceled, and that selection No. 854, of the SE. $\frac{1}{4}$, Sec. 20, T. 1 S., R. 7 W., same land district, be approved to said State in lieu thereof.

The land embraced in list No. 167 was selected January 3, 1871, and said selection was certified and approved to said State January 23, 1875. At the date of said selection and approval, the public surveys showed that said land was subject to selection.

Subsequently thereto, the final survey of the Mexican grant San Jacinto Viejo, under which it was patented January 17, 1880, showed the lands to be within the limits of said grant.

The State of California, on June 23, 1884, without taking any action in regard to this selection, which has been approved to it, selected the land in controversy, as per list No. 854, designating the same bases that had been used in list No. 167.

On January 3, 1889, P. H. O'Neill made application to file pre-emption declaratory statement for the tract in controversy, which was rejected, upon the ground that the land applied for was covered by indemnity school selection made by said State as per list No. 854, to compensate deficiency in Sec. 16, T. 1 N., R. 14, from which decision O'Neill appealed.

On April 15, 1890, you held the selection for cancellation, from which decision the State appealed, and on November 15, 1890, you considered O'Neill's appeal from the rejection of his application, and held that his application, being in the nature of an attack upon the selection, might be accepted, subject to the final action of the Department upon the appeal of the State.

Both appeals were considered by the Department in the case now under review, and it was there held that the application of O'Neill, although improperly allowed, should be permitted to remain of record, but stand suspended, until the right of the State to make such second selection is finally adjudicated. You were then directed as follows:

Said selection should not, however, be canceled without first giving the proper parties notice of the contemplated action and an opportunity to be heard in support

of the validity thereof. You will therefore give said parties notice that they will be allowed ninety days from notice hereof within which to show cause why said selection should not be canceled, and will thereafter take such steps as may be proper and necessary to a final adjudication of the rights of the respective claimants.

The State now contends that it was error in not holding that selection No. 167 was void *ab initio*, because made of land included within a valid Mexican grant, and in not holding that the State abandoned said attempted selection when it filed selection No. 854 for the land in controversy, long before any intervening rights were acquired and before O'Neill made any claim to the land.

It is true that the land certified to the State by list No. 167 was not the property of the government, and, hence, said certification passed no title thereto. The State is therefore entitled to select other land to compensate the deficiency for section 16 in said township 1 north, range 14 west, but, until the State has formally relinquished the selection, or it has been set aside by the proper authority, it has no right to select other land in lieu thereof. State of California, 7, L. D., 91.

Said selection being invalid, the application of O'Neill was properly allowed to remain of record, and to be finally accepted, in the event of the cancellation of the State's selection.

All selections of indemnity lands made by the State in lieu of lost school sections, or to compensate the deficiencies in fractional townships, are subject to the approval of the Department, and the State can acquire no title to the same until they have been certified to it by the proper authorities.

The attempted sale by the State of lands which have been selected by it, but have not been approved, conveys no right or title to the same, and purchasers from the State of such lands must look to the State for relief.

Since the State by this motion has had an opportunity to be heard in the premises, and has failed to show cause why said selection should not be cancelled, it is hereby cancelled, and you will take such action on O'Neill's application as may be proper.

TIMBER CULTURE CONTEST—SECOND ENTRY.

STRIEGEL v. HAYS.

A second timber-culture entry may be permitted to stand where the first is relinquished for the reason that trees could not be grown on the land embraced therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 10, 1892.

On the 20th of June, 1882, William O. P. Hays made timber-culture entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 1 N., R. 5 E., Bozeman land district, Montana.

On the 9th of November, 1888, Joseph Striegel filed an affidavit of contest against said entry, alleging failure to comply with the law as

to cultivation and planting. Hays died several years prior to the initiation of this contest, and notice of the hearing appointed to investigate the charges, was served upon his executors. At the time fixed for the hearing, Striegel filed an additional affidavit, charging that said entry was invalid, for the reason that Hays had made timber culture entry for another tract, prior to the entry in question.

The trial which finally took place, resulted in a decision by the local officers on the 20th of January, 1891, in favor of the claimant. This decision was reversed by you on the 11th of March, 1892, and an appeal from your decision brings the case to the Department.

When Striegel filed his affidavit, attacking the validity of the entry in question, the counsel for claimant objected to the introduction of any evidence upon that point, on the ground that no notice of this charge had been given. At the hearing, however, the records of the local office were introduced without objection, which showed that on the 18th of September, 1878, Hays made timber culture entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 18, T. 1 N., R. 5 W., in the same land district. This entry was voluntarily relinquished by Hays on the 15th of July, 1880.

The instrument does not recite the reasons for the relinquishment, but the evidence at the hearing established the fact that it was because trees could not be grown upon the land, on account of its being strongly impregnated with alkali. Several settlers had attempted to grow trees upon the same class of land, and failed for the same reason.

An examination of the evidence in the case, as to the entry in question, satisfies me that in the matter of cultivation and tree planting, the timber culture law had been complied with sufficiently to satisfy the rules of the Department in contest cases, as laid down in *Haffey v. States* (14 L. D., 423), and the cases therein cited.

Your decision is based entirely upon the ground that Hays, having made timber culture entry No. 13, on the 18th of September, 1878, could not legally make timber culture entry No. 122, on the 20th of June, 1882.

Under the evidence in this case, I am clearly of the opinion that the first entry of Hays could not have resulted in a patent, under the timber culture law, for the reason that trees could not be made to grow upon the land covered thereby. In the case of James C. Keen (8 L. D., 239), the case of R. E. Gilfillan (6 L. D., 353) is cited in support of the doctrine that second timber culture entries may be allowed when, through no fault of the entryman, the first entry is incapable of being carried to patent. That case also cites the case of A. J. Slootskey (6 L. D., 505), to show that the same principle governs the allowance of a second timber culture entry, as obtains in the case of a second homestead entry.

In the case of Thurlow Weed (8 L. D., 100), who had made a homestead entry for a tract of land on the 7th of April, alleging settlement

on the second of that month, and for which land Sarah Kellogg filed her declaratory statement on the said second of April, alleging settlement on the 29th of March, Weed was allowed to relinquish his said entry, and make entry for another tract. He made application to do so, on account of the uncertainty of the result of the contest, and his limited financial ability to carry on the same. When Weed applied to make his second entry, after relinquishing his first, the local officers rejected his application upon the ground that he had exhausted his right under the homestead law, by a former entry. You affirmed the action of the local officers, and the Department, in reversing your decision, said:

If exceptions are to be allowed to the rule of but one homestead entry—and the exception appears to be well established doctrine, and quite as supportable as the rule itself—they should be admitted whenever justice clearly requires, and no bad faith or fraud is shown, and the failure to discover the obstacle to the first entry is fairly excusable. A mistake which involves no wrong, and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead, when honestly sought in good faith by a genuine settler with a family.

The fact that the land for which Hays first made entry would not grow trees, could not be discovered by a casual or careful inspection of the tract, and was only ascertained after several efforts and failures to produce that result. His mistake, therefore, was "attributable to causes reasonably likely to produce it," and under the rule expressed in the foregoing extract from the Weed decision, ought not to forfeit his privilege under the law, especially in view of the only prohibition of the statute being against acquiring title to more than one quarter section.

In the case of Patrick O'Neal (8 L. D., 137), which presented questions somewhat similar to the Weed case, and wherein the local officers and your office rejected his application to make a second entry after the relinquishment of his first, on the ground that he had exhausted his homestead rights by his former entry, the Department also reversed your decision, and passed his entry to patent.

In the case of Edward C. Davis (8 L. D., 507) the land for which homestead entry was first made, was not habitable on account of the poisonous quality of the water. It was held that this was a fact not discoverable by the exercise of ordinary diligence at the time of making the entry, and he was allowed to relinquish it and make a second.

In the Davis case, he was required to file with his relinquishment his affidavit that he had not received money or other valuable consideration, or the promise of such consideration for abandoning said land, and that said relinquishment was not intended to operate to the benefit of any other person or corporation.

No proof of this character was filed with the relinquishment of Hays, neither is there any charge or proof in the case that he received any consideration for his relinquishment, or that it was intended to operate to the benefit of any other person or corporation.

In view of the fact that Hays could not have secured patent under the timber culture law for the land for which he first made entry, for

the reason that trees could not be grown thereon, and that the law has been complied with as to the second tract, and of the rulings of the Department in regard to second entries, in the decisions cited, I am disposed to concur in the judgment rendered by the local officers in this case. The decision appealed from is accordingly reversed.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

GEORGE H. SHERER.

By the terms of the act of March 3, 1883, all lands in Alabama theretofore reported as valuable for coal or iron must be offered at public sale before agricultural entry therefore is permissible. This requirement of the statute must be followed without regard to whether said lands are properly or improperly so reported.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 10, 1892.

On the 14th of January, 1892, the local officers at Huntsville, Alabama, rejected the application of George H. Sherer to make homestead entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 14 S., R. 7 W., at said land district. They based their action upon the ground that the land was classed "mineral" in the mineral list in their office.

On the 16th of February, 1892, you affirmed the decision of the local officers for the reason that the tract appeared on the original mineral list in your office as "valuable for coal." You cited the act of March 3, 1883, (22 Stat., 487), in support of your ruling, that such land cannot be entered until an offering thereof has been made.

From your decision Sherer appeals to the Department, alleging that the land is agricultural, and not valuable for coal or any mineral of any kind, and that under the decision in the case of James W. Burnum (14 L. D., 292), the application should be allowed.

He, however, makes no showing to bring his case within the rule laid down in the case cited. There a distinction was made between land which was reported as containing coal or iron, and land which was reported as being *valuable* for coal or iron. In that case the local officers stated that the tract had been reported as valuable for coal, while in your decision you said the tract was reported as containing iron. An examination of the original list, or record in your office, showed that your statement was correct, and it was thereupon held that land which had been examined and reported as containing coal or iron was subject to homestead entry, while lands which were reported as *valuable* for coal or iron were not subject to such entry.

In this case the land was reported as *valuable* for coal, and it was properly held by the local officers, and in your office, that an entry for such land could not be allowed until after an offering thereof had been

made. The act of March 3, 1883 (22 Stat., 487) directed that all the public lands in Alabama should be disposed of only as agricultural lands, with the proviso that those theretofore reported as containing coal or iron, should first be offered at public sale. This has been construed to contemplate those reported as *valuable* for mineral. (Circular of April 9, 1883, 1 L. D., 655, *Avery v. Smith*, 12 L. D., 550, and James W. Burnum *supra*).

It will be noticed, too, that the terms of the statute require all lands theretofore *reported* as mineral, to be offered at public sale, and this without regard to whether properly or improperly so reported. Thus the allegation that the land here involved is not valuable for coal or iron, need not be considered, because that is a question that will not be inquired into. I find no error in the conclusion reached in your office, and the decision appealed from is affirmed.

TIMBER LAND ENTRY—PROTEST—CHARACTER OF LAND.**KELLY v. OGAN.**

An applicant under the timber land act of June 3, 1878, must show affirmatively that the land applied for is of the class subject to such disposition; and the burden of proof in such case does not shift to a protestant who objects to the acceptance of the final proof.

Land that is unfit for cultivation until the trees and stone are removed therefrom is subject to entry under said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 12, 1892.

On the 22d of July, 1889, John H. Ogan filed application to purchase the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 4 N., R. 25 W., S. B. M., Los Angeles land district, California, under the act of June 3, 1878, (20 Stat., 89), and on the 16th of October, 1889, offered final proof in support of said application.

William B. Kelly filed a protest against the acceptance of such proof, alleging that said land was not subject to entry under said act, and asked that he might be allowed to cross-examine Ogan and his witnesses, and to introduce testimony to show that said land was not subject to such entry. He also asked that he might be allowed to make homestead entry for said land. He presented no homestead application, however.

After the presentation of proof by both parties, the local officers, on the 30th of December, 1889, united in a decision in favor of Ogan, recommending that his proof be allowed, and the protest of Kelly dismissed. This decision was affirmed by you, upon appeal, on the 19th of December, 1891, and a further appeal brings the case to the Department.

The first error complained of by counsel in their brief, is your holding that the burden of proof is upon the contestant.

It is questionable whether the appellant is in a position to present this question for the consideration of the Secretary. The record shows that notice of the Commissioner's decision was accepted by C. Cabot, attorney for plaintiff, on the 2nd of January, 1892, this was service on all the parties, and the only service required. He took the appeal March 1, 1892, and therein no complaint is made of this error, hence, it is waived, unless the second specification of errors filed by Messrs. McGowan, Holcomb and Johnson is within time. This specification of errors was filed March 11, 1892, which under the rules of practice, is out of time, unless it can be held that the service of notice upon Mr. Cabot was made by mail, so as to bring the notice within rule 87, which I do not think can be done. But giving the appellant the benefit thereof, I think from the reading of your opinion that you arrived at the conclusion that this land is subject to the timber act of June 3, 1878, 20 Stats., 89, from a preponderance of the evidence, yet, you incidentally, in closing your opinion, assert that the burden of proof is on the protestant and in that, I think, you err.

It must be remembered that it is only land chiefly valuable for timber and unfit for cultivation, which is subject to purchase under the terms of said act. In other words, the land desired to be acquired is exceptional land, and the party seeking to avail himself of the benefit thereof, must show that the land for which he has made application, is of the character provided in the statute, as subject to purchase. In this case Mr. Ogan was asserting that this land was chiefly valuable for its timber and desired to offer proof for the purpose of establishing that fact in support of an application which he had theretofore made. Mr. Kelly challenged the proof by protest and desired to cross-examine the defendant's witnesses, etc.

When the character of the land was challenged then it devolved upon the defendant to establish by a fair preponderance of testimony, the fact that this land is valuable chiefly for its timber product, and unfit for cultivation within the meaning of the said act, hence, the burden was upon him to bring himself within the exception. Such is the ruling of this Department in the case of *Hughes v. Tipton*, 2 L. D., 334, and approved in the case of the United States *v. Montgomery*, 11 L. D., 484.

But granting that you did err in such holding, is it a reversible error? I think not.

It is practically admitted that this land is rough and mountainous, badly cut up with canyons, and sparsely, at least, covered with a low grade of timber, also stone. While the testimony is very conflicting as to the value of this tract for its timber product, yet, it is clear to my mind that it is not very well adapted to agricultural purposes. The contestant offered testimony tending to show that twenty acres or up-

wards, of the tract might be, upon the removal of the timber and stone used for the growing of oranges, vines, etc.; that the trees growing on the tract were of a scrubby character, of low order and fit only for firewood; that there were probably eighty to one hundred cords of wood which could be cut from trees growing along the ravines but would bring no profit if hauled to market. That it would cost \$700 to \$1,000 to construct a road to the tract. No evidence is offered for the purpose of showing what it would cost to reduce this land to a condition fit for agriculture by removing the stone and timber, but all the testimony goes to show that without the removal of the trees and stone, the tract is unfit for cultivation.

The entryman in support of his application, offers testimony for the purpose of showing that there are at least, five hundred to one thousand cords of wood upon this tract; that it will cost \$2.75 per cord to cut it, and from \$3.50 to \$6 a cord to haul it to market where he could realize therefor, \$9 per cord; that on account of the stone and timber which are growing upon the tract and the canyons which cut it badly, it is unfit for cultivation, hence, the tract is chiefly valuable for its timber. The register and receiver adopted this view, as I think you did from a discussion of the case, independent of the question of where the burden of proof rested, and I am satisfied from the examination which I have given the case, that this tract is illy adapted for farming or agricultural purposes, and that, at the time this entry was made, the tract was chiefly valuable for its timber, and unfit for cultivation within the ruling of the supreme court in the case of the United States *v. Budd*, 144 U. S., 154.

Finding no error in the decision complained of, the same is affirmed.

PRACTICE—APPEAL—SPECIFICATION OF ERRORS.

UNDERHILL *v.* BERRYMAN.

An assignment of error to the effect that the decision below is contrary to the law and evidence is not sufficient to sustain an appeal on objection thereto.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 12, 1892.

On April 23, 1885, Campbell G. Berryman made timber-culture entry No. 6440 for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 113 N., R. 62 W., Huron, South Dakota.

On September 16, 1889, John C. Underhill initiated a contest against it. A trial was had on the issue formed, and after considering the evidence submitted, the register and receiver, on February 10, 1890, found in favor of the entryman, and dismissed the contest.

Contestant appealed from their finding to you, and on January 13, 1892, after considering the case, you affirmed said finding.

After notice was served upon the attorney for contestant, he filed a paper purporting to be an appeal from your judgment. The following is a copy of said paper:

To Horace Comfort, attorney for claimant in the above entitled contest:

You are hereby notified that the contestant in the above entitled case appeals from the decision rendered therein by the Hon. Commissioner of the General Land Office, to the Hon. Sec'y. of the Interior, and that this appeal is based upon assignment of errors hereto annexed.

* * * * *

ASSIGNMENT OF ERRORS.

First:—The Hon. Commissioner's decision is contrary to the evidence submitted in this case;

Second:—The Hon. Commissioner's decision is contrary to law;

Third:—The Hon. Commissioner's decision is contrary to the law applicable to cases of this class.

Respectfully submitted,

JOHN N. DAVIS,
Attorney for Contestant.

On September 23, 1892, Messrs. Holcomb and Johnson, of this city, on behalf of Berryman, filed a motion to dismiss said so-called appeal. The motion is based on a rule of this Department of January 17, 1892, (12 L. D., 64) and notice given by registered letter on September 23, 1892. No answer has been filed to the motion.

Rule 88 of the rules of practice governing the practice in the Department is as follows:

Within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

It is held in the case of Devereux *et al. v. Hunter et al.*, 11 L. D., 214, that an allegation, that there was error "because of the manifest errors in the conclusions of law and fact arrived at by the Commissioner in making the decision appealed from," was too indefinite to present any question.

The rule in the case of McLaughlin *v. Richards*, 12 L. D. 98, is that a specification of errors is not good where it charged that the party wishing to appeal "does hereby appeal from the decision made and rendered by the Hon. William Stone, Acting Commissioner, on the 29th day of June, 1889, in said case, on all questions both of law and fact." It is said in that case that—

The appeal in the case at bar entirely fails to designate clearly and concisely the errors complained of, but leaves the opposing party, your office, and this Department, wholly in the dark as to the particular respect in which McLaughlin deems your office decision wrong.

The party complaining ought to be able, and by these rules is required, to point out the particular errors complained of, and not leave this Department to fish out of a voluminous record supposed errors.

This appeal is defective in that it does not set forth any specification of error as required by rule of Practice No. 88. For that reason said appeal is dismissed.

See also case of Dorman *v.* McCombs, 14 L. D., 700.

It is apparent that the appeal in this case failed to "clearly and concisely designate the error of which he complains," and for this reason the motion to dismiss this appeal must be granted.

The appeal is accordingly dismissed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

STANLEY *v.* HOWARD ET AL.

The confirmatory operation of section 7, act of March 3, 1891, is not defeated by an order of cancellation made subsequent to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 12, 1892.

On December 12, 1883, George Howard made pre-emption cash entry No. 8082 for the SW. $\frac{1}{4}$ of Sec. 7, T. 130 N., R. 57 W., Fargo, North Dakota.

On December 15, 1883, he executed a mortgage on said tract to Minnie C. Wehmer to secure the payment of a debt of \$350, and not being able to pay it when due, the tract was sold on October 10, 1888, at sheriff's sale on decree of foreclosure to satisfy the debt and was bid in by the mortgagee for \$516. On April 13, 1889, she assigned the sheriff's certificate received by her to Charles A. Lenthstrom, who, on March 25, 1890, received from the sheriff a deed for said land, and is still the owner thereof.

On June 1, 1889, Jason H. Stanley initiated a contest against Howard's entry, alleging substantially, that he had not complied with the law in the matter of settlement and residence, and that his final proof was fraudulent. A trial was had and the register and receiver found in favor of contestant, and upon appeal you affirmed their finding. The case is now brought before the Department on appeal from your judgment.

It will not be necessary to consider this case on its merits, for under section 7 of the act of March 3, 1891, (26 Stats., 1095) this entry is confirmed. The first clause of said section provides, that:—

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers or incumbrancers, for a valuable consideration, shall unless upon an investigation by government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

In this case the final pre-emption cash entry was made on December 12, 1883, and three days later it was mortgaged to Minnie C. Wehmer for \$350. The entry was not attacked until after it had been made nearly six years and no fraud has been shown on the part of the mortgagee or her assignee, the present holder of the land. The entry in question is therefore confirmed and a patent should issue thereon, notwithstanding the contest of Stanley. *Axford v. Shanks et al.* (12 L. D., 250, and 13 L. D., 292).

You state in your judgment of August 19, 1891, that "I affirm your decision, cancel the entry, and close the case," and when Messrs. Goodykoontz and King filed a motion for a review of said decision in passing upon said motion, you state, among other things, that said motion "can not be considered as to Howard, because the said entry has been cancelled and the case closed as to him," etc.

By referring to your order of cancellation it is found that it is dated August 19, 1891, and the finding of the register and receiver recommending cancellation was rendered on April 28, 1891.

Any order that you may have made cancelling this entry, or if the entry was cancelled by you after March 3, 1891, said order or action was of no force, since from the facts shown in the record it clearly appears that said entry was confirmed on March 3, 1891. It is true that a cancelled entry cannot be confirmed, but this ruling has reference to cancellations made by you before March 1, 1891, and which had before that date become final.

Besides the cancellation in this case, even if it had been ordered before March 3, 1891, could not become final in the face of the appeal of Howard.

If the entry had been canceled, it should be reinstated and the contest of Stanley dismissed, and a patent should issue on the entry of Howard.

Your judgment is reversed.

APPLICATION FOR REINSTATEMENT—RESERVATION.

THOMAS BLUNT.

An application for the reinstatement of a canceled entry, while pending, operates to reserve the land covered thereby from other disposition.

Assistant Secretary Chandler to the Commissioner of the General Land Office, December 13, 1892.

The land involved in this case is described as lots 2 and 3, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 5, T. 20 S., R. 69 W., Pueblo land district, Colorado.

It appears that on February 12, 1883, Phillip Griffith filed pre-emption declaratory statement for said tracts, alleging settlement thereon

October 10, 1882; that on October 11, 1882, John Berlin made a homestead entry for the same land, whereupon Griffith instituted a contest to set aside the entry, which was dismissed by you as having been prematurely brought. On August 12, 1884, Berlin offered final proof which was protested by Griffith. The case was finally decided upon appeal by departmental decision dated March 1, 1888, sustaining your action in cancelling the filing of Griffith and leaving the homestead entry of Berlin intact upon the records.

By said decision the local officers were directed, as the final proof was found satisfactory, to issue the final papers on payment of the legal commissions due. It appears by the record that due notice of said decision was given to the parties in interest, but owing to the fact that the homesteader died before the decision was rendered, the widow failed at that time to take any steps towards consummating said homestead entry.

Under date of November 2, 1890, the local officers issued to Mary Berlin the usual notice of forfeiture, requiring her to show cause why said entry should not be canceled for failure to comply with the law in regard to making final proof, evidently overlooking the fact that final proof had already been made. From some cause unknown, Mary Berlin now Mary Griffith, failed to respond to said notice, which fact was duly reported to your office, whereupon under date of January 10, 1891, the Berlin homestead entry was canceled.

On August 5, 1891, the local officers transmitted for your consideration, the application of Mary Griffith for a reinstatement of said homestead entry on the ground that final proof had been made, submitted and accepted, citing the facts of the contest between Griffith and Berlin, herein set forth. On October 17, 1891, subsequent to the application for reinstatement, the appellant, Thomas Blount, tendered his application to enter the land under the homestead law, alleging a settlement thereon four days prior thereto, which was rejected by the local officers on account of the pending application for reinstatement, whereupon Blount appealed and, under date of January 22, 1892, you affirmed the judgment below, when Blount again appeals.

The only question that enters into this case, is whether the land in dispute is subject to entry by the appellant.

It is shown by the record that the cancellation of the Berlin home stand, was undoubtedly an error, brought about probably by omitting to return the final proof to the local office for appropriate action when the contest against the entry was finally decided in favor of the entryman.

The final proof was submitted within the period of seven years from date of entry as required by law, and was made by the entryman in person a short time before his decease.

This proof was accepted by the local officers, approved by you and your action affirmed by the Department and therefore the entry was

not subject to the forfeiture notice requiring the entryman, or his heirs in this case, to show cause why final proof had not been made.

The action of the local office under the circumstances, satisfactory final proof having been made, was erroneous, as was also your action in cancelling the entry predicated upon the report of the register and receiver, and therefore the claim of appellant that by reason of such cancellation the tracts became public land subject to his application to enter, is not tenable.

During the pendency of final proof, submitted under Osage filing, the land covered thereby is not open to the filing of another, and by such filing no rights are acquired as against the prior claimant. *Simpson v. Brookman* (13 L. D., 644). The same principle obtains in homestead entries. An entry should not be allowed during the pendency of final proof submitted by a prior claimant. *Jeffrey v. Record* (14 L. D., 165).

The application of Mary Griffith to have the entry reinstated brought into question the final proof submitted and was therefore a sufficient bar against the acceptance of another entry for the same land.

The question of abandonment of the land by the widow, raised by the appellant cuts no figure in the case; proof had been made by the entryman before his decease and I am aware of no statute that requires the widow of a deceased settler to reside upon the land under such circumstances.

Your decision reinstating the entry of Berlin and rejecting the application of Blunt is affirmed.

MINING CLAIM—EXCLUDED LAND.

ROCKY LODGE.

A mineral entry should not be allowed of land embraced within the prior location and application of another.

Secretary Noble to the Commissioner of the General Land Office, December 14, 1892.

On July 11, 1890, Agnes G. Herzinger made a mineral entry (No. 1310) at Montrose, Colorado, of the mining claim known as the "Rocky Lode," (Lot No. 6161) situated in Sec. 17, T. 44 N., R. 7 W., Paquin mining district, Ouray county, Colorado. The papers were duly transmitted to your office. Upon examination you found that said entry conflicts with the "Milwaukee Lode," application No. 1287, the area in conflict being included in said entry. In your letter of November 28, 1891, you state that—

Said Milwaukee lode was located October 15, '87, and that application was made therefor January 16, 1888. These dates are both prior to the corresponding ones in the case of the Rocky Lode, and the application includes the ground in conflict. Under this state of facts it was error to allow the entry of the Rocky Lode without an exclusion in favor of the Milwaukee lode. This entry is therefore hereby held for cancellation to the extent of the conflict with the Milwaukee lode.

An appeal has been taken to this Department, for the following reasons:

That the claimants of said Milwaukee lode never completed their application for patent therefor, as will appear by the certificate from your office hereto attached; and as no final entry has been made of said Milwaukee lode, and as said claimants of the Milwaukee lode had the opportunity to file whatever adverse claim they might have held against the entry of this claim No. 1310, it must be considered that they no longer have any claim to said Milwaukee lode.

This contention is not sound. It appears from the record that two adverse claims were filed against the Milwaukee lode within the period of sixty days from the first publication of the notice of application for patent for said claim, and that suits were brought in March, 1888, upon said adverse claims, which, for aught that appears, are still pending. The existence of these suits furnishes an entirely satisfactory reason why the claimants of said Milwaukee lode have not made final entry. Said claimants were under no obligation to file any adverse claim against the Rocky Lode. So far as appears, the claimant of the latter lode filed no adverse claim against the Milwaukee lode for the area in conflict, within the period of the publication of the notice that the claimants of the Milwaukee lode had applied for a patent. The first day of said publication was January 20, 1888, while the Rocky Lode was located October 19, 1887, and its location certificate was recorded November 19, 1887. The legal conclusion, therefore, was that no adverse claim existed against the Milwaukee lode on the part of the claimant of the Rocky Lode, which had been located prior to said publication, and that the applicants for the Milwaukee lode were entitled to a patent so far forth as the claimant of the Rocky Lode is concerned (Sec. 2325, Revised Statutes), in the absence of the assertion of any adverse claim by the latter. That conclusion still existed when the claimant of the Rocky Lode made said mineral entry, in the absence of any showing to the contrary. The area in conflict should therefore have been excluded from said entry.

Your judgment is affirmed.

HOMESTEAD ENTRY—ADJOINING FARM—RESIDENCE.

NELSON'S HEIRS.

Residence on the original farm prior to adjoining farm entry can not be computed as part of the period of residence required under such entry.

Commutation of an adjoining farm entry under section 6, act of March 3, 1891, can not be allowed in the absence of proof showing residence and cultivation for a period of fourteen months.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 14, 1892.

I have considered the appeal of Thomas J. Erwin for the heirs of Martha Nelson, deceased, involving the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 4 S., R. 4 E., Huntsville, Alabama.

The record shows that on December 30, 1891, Martha Nelson made entry of said tract as an adjoining farm to the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ same section, town and range; that on or about April 20, 1887, she died leaving several children; that on June 7, 1890, Thomas J. Erwin, husband of one of the heirs of said Nelson, and acting for all of the children and heirs, made final proof on said entry and submitted the same to the local officers for their action.

The register and receiver rejected final proof as insufficient, whereupon Erwin appealed, and under date of April 27, 1891, you affirmed their decision, and he again appealed.

An examination of the final proof in this case shows that Mrs. Nelson left the land in 1882, and went to live with her son-in-law, the appellant; that she never returned again to the land but died in 1887, and that the homestead, as well as the original farm, was never occupied by any member of the family, after she left it, but was apparently abandoned and the improvements allowed to fall into decay.

The appellant claims that Mrs. Nelson resided on the original farm over five years or about four years before the adjoining farm entry was made, and therefore that he should be allowed credit in making proof on the adjoining farm entry for the period of residence made on the original farm, and cites the case of Patrick Lynch (7 L. D., 33), to sustain his claim. This contention can not be sustained. The Lynch case was not a parallel to the one at bar in its controlling facts. It was in conflict with the cases of Wm. C. Field (1 L. D., 68) and Hall *v.* Dearth (5 L. D., 172), prior to its rendition, as well as Thatcher *v.* Bernhard (10 L. D., 485), decided after the Lynch case. Besides, it was overruled in the case of John W. Farrill (13 L. D., 713).

The provision for adjoining farm homestead entries is a part of the homestead law and is based upon ownership of the original farm and residence thereon for the length of time prescribed for ordinary homestead entries and residence on the original prior to the adjoining farm entry can not be computed as a part of said period of residence.

It is contended by counsel for appellant that a strict compliance of law was prevented by Mrs. Nelson becoming blind and having to leave the land; furthermore, that final proof was commenced before the Thatcher *v.* Bernhard case was decided and therefore the case is one for the action of the board of equitable adjudication. As before stated it not only appears that the land was practically abandoned from the spring of 1882 to April, 1887, when Mrs. Nelson died, but it appears that the heirs of said deceased party failed to take any steps whatever to keep up the improvements on the land or to assert any claim thereto for a period of three years or more thereafter, when the appellant made the proof now under consideration; therefore I can see no equitable grounds upon which the case can be submitted to the board of equitable adjudication, neither can the heirs be allowed to purchase the land by commutation under the sixth section of the act of March 3,

1891 (26 Stat., 1095), amending section 2301 Rev. Stat., until proof has been presented showing "settlement, residence and cultivation for such period of fourteen months" from date of entry.

Your decision is accordingly affirmed.

KEYS *v.* POWERS.

Motion for review of departmental decision of May 17, 1892, 14 L. D., 529, denied by Secretary Noble, December 14, 1892.

HOMESTEAD AND PRE-EMPTION—RESIDENCE.

CHILD *v.* MINOR.

The residence required under the homestead, and the pre-emption laws, does not differ in quality, only in the length of time prescribed therefor.

Secretary Noble to the Commissioner of the General Land Office, December 16, 1892.

Margaret M. Minor has filed a motion for review of departmental decision of May 21, 1892 (unreported). In the case of True M. Child against said Minor, involving the Homestead entry of the latter for the NW. $\frac{1}{4}$ of Sec. 1, T. 119, R. 64, Huron land district, South Dakota.

Said decision held the entry for cancellation on the ground that the defendant had "never made her home on the land in controversy, except to make occasional visits and remain a night or two at a time."

Counsel for defendant alleges that the decision complained of was in error in stating that "the local officers held that the charge of abandonment and bad faith was sustained." The decision of the local officers is not before me, being in the files of your office; but whether the decision was correct or incorrect in making this statement is of no importance, inasmuch as the departmental decision was not based upon that of the local officers, but upon the facts disclosed on an examination of the testimony.

Defendant alleges that said departmental decision erred in stating that "there is no evidence showing that the defendant ever advanced one dollar toward the improvements, or for any purpose relating to the entry," when, in fact, "the undisputed testimony in the case is that the claimant furnished the money to pay the two hundred dollars when proof was made." What the testimony may show in relation to this is a matter of no importance, inasmuch as the defendant's entry was not held for cancellation because she did not furnish the money to pay for the land, but because she had never resided upon it.

Defendant asserts that it was error to admit the *ex parte* affidavits of three parties named as evidence in the case, as there was no chance for

cross-examination. There is nothing in the decision complained of to show that said *ex parte* affidavits were considered; it is not to be presumed that the Department considered evidence that ought not to have been considered; and in any event, the testimony, leaving out of consideration the affidavits referred to, showed that the defendant had not complied with the requirements of the homestead law as to residence.

Defendant further contends that the entry in the case at bar was—

a commuted homestead; the two hundred dollars was paid; the law does not contemplate such a residence as where the claimant gets the land without the government price for the land. The Secretary says the residence was not such as is "contemplated by the homestead law"—when the residence on this claim should be governed by the pre-emption law, because commuted homesteads come under that law.

The above contention is without weight, inasmuch as there is no difference in the quality of residence demanded by the homestead law and that demanded by the pre-emption law; only a difference in the length of time covered by such residence before patent can properly issue. In the case of Samuel H. Vandivoort (7 L. D., 86), the Department said, "The right of commutation depends upon prior compliance with the homestead law;" and substantially the same form of expression is used in the cases of Greenwood *v.* Peters (4 L. D., 237); Frank W. Hewitt, on review (8 L. D., 566); Susie Corey (11 L. D., 235); Richard L. Williams (13 L. D., 42).

Evidently the expression "homestead law," in the decisions above cited, was used for the sake of convenience and brevity of expression, and because it was the commutation of an entry under the homestead law that was in each instance the subject under consideration, and not for the purpose of contrasting or distinguishing residence under the homestead law from that required under any other law demanding residence; and certainly there is nothing in the acts of Congress bearing upon the subject, or in the regulations or decisions of the Department, to support the appellant's contention that "residence" under the pre-emption law—during the period covered thereby—is in its quality any different thing from "residence" under the homestead law.

No reason being shown why the decision formerly rendered should be disturbed, the motion is overruled.

RAILROAD GRANT-ADJUSTMENT-SETTLEMENT CLAIMS.

NEW ORLEANS PACIFIC RY. Co.

Directions given for the issuance of patent on clear list No. 8, for certain lands within the primary limits.

All pending appeals by this company from decisions of the General Land Office, in which settlement rights at definite location have been recognized, are dismissed in accordance with an agreement filed by said company.

Under said agreement the company will be called upon to restore title where it has received patent for lands that were in the possession of actual settlers at definite location.

Secretary Noble to the Commissioner of the General Land Office, December 16, 1892.

I am in receipt of your letter of December 15, 1892, retransmitting for my approval clear list No. 8, embracing 70,807.36 acres within the primary limits of the grants for the New Orleans Pacific Railway Company under the acts of March 3, 1871, and February 8, 1887.

This list as originally transmitted embraced 75,529.08 acres, but under the notice published in accordance with my letter of October 8, 1892, claims were asserted to lands, which, being excepted from the list, reduces it to the amount first mentioned.

All fees chargeable against the list have been paid, and I can see no good reason for longer withholding from the company a patent for these lands, which are shown, after the exercise of all reasonable care, to be free from all adverse rights, and I have therefore approved the list as the basis of patents to be issued to the company.

In approving this list, I have to call attention to the agreement filed on behalf of the company, which is as follows:

1. That all appeals now pending before the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of said railway company's road shall be and they are hereby withdrawn, to the end that said settlers may obtain patents for said lands.

2. That neither said railway company nor said trustees will hereafter take appeals to the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of the said railway company's road, but, to the end that said settlers may obtain patents for said lands, said adjudication by the said Commissioner shall be regarded as final.

3. That in cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in the possession of actual settlers at date of the definite location of said railway company's road, and title is in said railway company, said railway company and said trustees agree to make without delay conveyance thereof to the United States; and where such lands have been sold by said railway company to third persons, said railway company undertakes to recover title thereto without delay, and convey the same to said settlers or to the United States, and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation.

In accordance with the first provision of this agreement, all appeals now pending before this Department from decisions of your office, in which it has been adjudged that the adverse claimants were actual settlers at the date of the definite location of the road, are hereby dismissed, but the records will be returned with separate letters.

In a large number of these cases patents have heretofore issued to the company covering the lands embraced therein, but, under the third provision of the agreement, the company should be called upon to restore the title to the United States, in order that the claimants may be permitted to complete entries for the lands claimed at the earliest day possible.

Under this liberal concession on the part of the company, all unadjudicated cases pending in your office should be speedily settled, and the grant thus adjusted.

Herewith are returned all the papers transmitted with your letter ("F") of December 15, 1892, including the company's agreement, which should be placed upon the files of your office.

RIGHT OF WAY—WIDTH OF CANAL—PUBLIC LAND.

KERN VALLEY WATER Co.

The map of a constructed canal may be accepted where, in place of giving the width of said canal, the area outside of the same, in each quarter-quarter section, as well as the area occupied by the canal in such tract, is calculated and noted on said map.

An application for a right of way for canal purposes may be approved, in so far as it affects unoccupied government land, though the line for the greater part traverses lands that do not belong to the public domain.

Secretary Noble to the Commissioner of the General Land Office, December 16, 1892.

I am in receipt of your letter of November 29, 1892, transmitting the map in duplicate of the Kern Valley Water Company's canal.

This company is a corporation duly organized under the laws of California. On December 5, 1891, you transmitted to the Department the articles of incorporation, certificate of organization, etc., and also the map in duplicate. On December 22, 1891, 13 L. D., 707, the papers were approved, and ordered to be placed on file. The map was returned without approval, for the reason that this canal having been already constructed, each side was meandered, and while it varied very much in width, the actual width was not given, except at the initial point; furthermore, the distance of neither line, from the adjacent corner where it crosses the section and quarter section lines, was given. It was said in my letter returning with the maps, that "The public land over which this canal passes, will be sold subject to the easement granted the company," etc.

The corrected map, as returned, is not strictly in compliance with the order, but it is substantially so, and as the canal is already built, it may be that the correction, as made is better than merely giving the width. The company has caused to be calculated the area outside of the canal in each quarter-quarter section, through which it passes, also the area covered by the canal, in each quarter-quarter section.

These areas are noted on the map; thus enabling any one, as well as the local officers, to see at a glance the land occupied, and what the purchaser takes free of the encumbrance. The regulations require the width of a canal, because ordinarily only the center line is run and marked, and unless the width is given a person entering the tract over which the canal or ditch is to pass, could not tell the extent of the encumbrance on the land; but as this canal is already constructed, and the area given as indicated, it will be accepted as equivalent to giving the width. The distance to the section corners appears to be properly noted.

The canal was completed, and in use prior to March 3, 1891. This canal begins at a point on the line between sections 14 and 15, T. 30 S., R. 24 E., M. D. M., which point is 13.275 chains north of the corner common to sections 14, 15, 22 and 23, of said township and range. The south line being 11.50, and the north line 15.25 chains from said corner. (in your letter you note the south line as the beginning point).

The canal runs in a north-western direction to a point near the N. W. corner of the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 19, T. 27 S., R. 22 E., a distance of 24 miles and 11 chains. It does not appear by said map whether or not it passes over any land belonging to the public domain, but it appears by your letter that the records of your office show that the main body of the land affected has been "approved to the State of California, under the swamp land act of September 28, 1850, or have been selected by the Southern Pacific Railway Company, under its congressional grant." It appears, however, that there is at least one tract of vacant public land over which it passes.

This tract is Sec. 30, T. 27 S., R. 22 E., M. D. M., and it appears from your said letter that this section was entered as desert land, by entry No. 639, but that the entry was canceled on September 9, 1891, and that no application has been made to reinstate it, nor has any person applied to make entry for the tract.

This canal appears to have been constructed under section 2339, Revised Statutes, under which land is granted, for the construction of ditches and canals, "for mining, agricultural, manufacturing or other purposes." As it appears, however, that Sec. 30, T. and R. aforesaid, is unoccupied government land, and as the approval of the map as to this section can in no way affect vested rights, the said map is approved, subject to all existing valid rights, in so far as it affects said Sec. 30, T. 27 S., R. 22 E., M. D. M., and no farther.

HOMESTEAD ENTRY—APPLICATION TO AMEND.

MACK LONG.

An application to amend a homestead entry reserves the land involved therein from other disposition until final action thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 16, 1892.

This case involves the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 35, T. 8 S., R. 11 W., Huntsville land district, Alabama.

The record shows that on September 13, 1889, Mack Long made a homestead entry for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 19, T. 9 S., R. 10 W.; that on October 9th, following, John R. Gentle instituted a contest against the entry, alleging prior right to the land by reason of his settlement and improvements thereon; that Long made no defense and therefore the contest was successful and the entry was canceled October 24, 1890; that on the same date the local officers transmitted Long's application for a change of entry to embrace the land first herein described, alleging that the entry was for land upon which Gentle had made improvements and was made through the mistake of one John H. Parker and furthermore, that he did all he could to make entry of the land to which he desires to amend.

Underdate of July 24, 1891, you rejected said application on the ground that Long failed to show that he had ever performed any acts of settlement upon either tract referred to, but directed the local officers to allow him thirty days within which to make a homestead entry of the land in question, provided he was properly qualified and the land was subject to entry.

September 26, 1891, as suggested in said letter, Long presented to the local officers his homestead application for the land in question, which was rejected on the ground that the land was covered by the homestead entry of John J. Poe, made December 5, 1890. From this decision Long appealed, when, under date of January 12, 1892, you affirmed the action of the local officers whereupon Long again appeals.

It is a well settled principle that a legal application to enter land is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition, until such time as it may be finally acted upon. *Pfaff v. Williams et al.* (4 L. D., 455); *Arthur P. Toombs* (10 L. D., 192); *Thomas B. Hartzell*, on review, (12 L. D., 558).

The fact that the application of appellant was not an original, but only for amendment of a former entry to embrace the land in dispute, does not alter the case.

The entry of Poe dated December 5, 1890, was made subsequent to appellant's application and while it was pending before the Land Department, therefore in accordance with the authorities cited, said entry

was erroneously allowed and it must be held subject to the rights of the latter.

Your decision of July 24, 1891, allowed appellant to make the new entry of the land, which was, in effect, the allowance of his application to amend, or in other words, it accomplished the same result in another manner, and therefore the land was withdrawn from disposal of any kind, until the final determination of the appellant's rights or until the expiration of the period fixed in said decision within which the appellant was allowed the right to enter the land.

With this understanding of the case you will require Poe to show cause why his entry should not be cancelled by reason of the prior adverse right of Long, this with notice to Long, and in the event of the cancellation of the existing entry the latter's application should be allowed.

Your decision is modified accordingly.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

DONNELL v. KITTRRELL.

One who by mistake enters Oklahoma prior to the time fixed by proclamation for settlement therein, but takes no advantage of his presence in said Territory and leaves the same, on discovery of his mistake, is not thereafter disqualified to enter lands in said Territory.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 19, 1892.

On April 23, 1889, Frederick W. Kittrell made homestead entry (No. 26) of the SW. $\frac{1}{4}$, Sec. 2, T. 16 N., R. 7 W., at Kingfisher, Oklahoma Territory.

On May 14, 1889, Henry W. Donnell filed an affidavit of contest against said entry, alleging—

That at the date of said homestead entry affiant was an actual settler residing upon and cultivating and improving said tract of land. That said homestead entryman had not, at the date of filing his homestead No. 26 for the tract involved, made settlement upon said tract; that the affiant was the only bona fide settler upon said tract; that on the 22nd day of April, 1889, said affiant had made a personal bona fide settlement upon said tract, and is entitled to said tract by reason of prior settlement.

On August 21, 1889, said Donnell filed an amended affidavit of contest, alleging—

That the said Frederick W. Kittrell made said entry fraudulently, illegally, and by perjury; that said Kittrell was not, and is not qualified to make said entry, having entered upon and occupied said land prior to noon of April 22, 1889, and subsequent to March 2, 1889, in violation of the act of Congress approved March 2, 1889, opening lands in Oklahoma or Indian Territory to settlement, and the proclamation of the President of March 23, 1889, opening said lands to settlement; that at the date of said H. E. No. 26 affiant was an actual prior bona fide settler upon said lands; that affiant had a house, a well and 15 acres of breaking thereon, which he purchased of

a former Indian occupant, of which improvements he has been dispossessed fraudulently and by threats of bodily harm, his crop of corn planted on said land being destroyed and his house containing his effects torn down by defendant.

A hearing was ordered for October 28, 1889, when the parties appeared, submitted their testimony and on February 18, 1890, considering the evidence, the local officers rendered a joint opinion, finding that the contest should be dismissed and that the entry of Kittrell should remain intact, subject to his further compliance with the law. On appeal, their decision was affirmed by your letter of January 27, 1892, and the contest was dismissed. A motion for review of your decision was filed, which was denied by your letter of March 16, 1892. An appeal now brings the case before this Department.

The specifications of error are as follows:

First, in holding that the preponderance of the evidence is clearly in favor of claimant, Frederick W. Kittrell, as to priority of settlement.

Second, in holding that the facts presented do not support the charge of duress.

Third, in holding that Kittrell's presence in the Territory on the 20th of April, 1889, was not such a violation of the law as would deprive a person of his right to enter lands in that Territory.

Fourth, in holding that Donnell made conflicting statements in regard to his movements just prior to the opening of the Territory, and that "such inconsistent testimony throws discredit upon all his statements."

Fifth, in holding that the facts justify the findings of the local office.

An examination of the evidence satisfies my mind that Kittrell was the prior settler upon the land on April 22, 1889. He followed up that settlement by making his homestead entry therefor the next day, and by his subsequent residence and improvements thereon. It is contended, however, that on April 20, 1889, he entered within the limits of the lands opened to settlement in Oklahoma Territory by the act of March 2, 1889 (25 Stat., 1004, 1006), and the proclamation of the President of March 23, 1889 (26 Stat., 1544), and that such entrance upon said lands was in violation both of said act and proclamation, and disqualified him from making said entry.

It is provided by Sec. 13 of said act of March 2, 1889, (25 Stat., 1005), *inter alia*, that—

Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The President's proclamation of March 23, 1889, recites said section 13 in full, and emphasizes the provision above cited as follows:

Warning is hereby again expressly given that no person entering and occupying said lands before said hour of twelve o'clock, noon, of the Twenty-second day of April, A. D., 1889, hereinbefore fixed will ever be permitted to enter any of said lands or acquire any rights thereto, and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect.

If, therefore, Kittrell "*entered upon and occupied*" any of said lands on April 20, 1889, as alleged, he was deprived of legal capacity to make said entry.

The evidence shows that he arrived near the west line of Oklahoma in the evening of April 20, 1889, and that he went to a creek near by to water his horses, when he saw a light at a distance of about two miles, which he says he thought was at a camp of "boomers," and he went to it to inquire where the west line of Oklahoma was, and found that the camp was that of some surveyors, who told him that he was within the line, and informed him about where the line was; that he immediately returned to his camp west of said line, where he remained till noon of the 22nd of April, when he made the rush with the rest. He swears that he did not intend to go over the line, and gained no advantage thereby, and there is no evidence to the contrary.

To determine whether he violated the terms of said act and proclamation, it is necessary to get at the spirit and intent as well as the letter of the law.

There can be no question that it was the intent of the act as well as of the proclamation to prevent one from taking advantage of his presence in the territory prior to the time named for the purpose of gaining ground over those who were to follow, and make settlement in harmony with the provisions of the statute and the proclamation. To hold that one who has inadvertently crossed the line prior to the time named in the act is deprived from ever acquiring any title to any of the lands in said Territory, is placing a forced construction upon the act and proclamation, which does violence to their spirit. In this particular instance, there is no dispute that Mr. Kittrell fortuitously crossed the line. He had no intent of seeking land at the time he did so, or of taking advantage of those who were waiting on the outside of the Territory, and as soon as he ascertained the fact that he was upon forbidden ground, he immediately withdrew and awaited the time when he could lawfully enter the Territory for the purpose of securing a home. He neither "took nor held possession" of any land; he had no unlawful purpose in passing within the line, and no one was injured thereby. He did not enter within the line "with a view and purpose of settlement of any part thereof." *Townsite of Kingfisher v. Wood* (11 L. D., 330, 335). He gained no advantage thereby, hence, the penalty provided by the statute and the proclamation for one who violated the spirit thereof, for the purpose of gaining preference, should not be visited upon him.

The disposition of the foregoing questions is decisive of the contest, and it is unnecessary to determine any other questions raised upon the record.

Your judgment is affirmed.

APPLICATION TO ENTER—SETTLEMENT RIGHTS.

MCINNIS ET AL. v. COTTER.

Settlement on land withdrawn for railroad purposes confers no right as against the government, but, where such land is subsequently restored, priority of settlement, while the land is so withdrawn, may be properly considered in determining the rights of adverse claimants.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 19, 1892.

This case involves the SW. $\frac{1}{4}$ of Sec. 11, T. 47 N., R. 38 W., Marquette land district, Michigan.

It appears that on May 1, 1889, Donald McInnis and John C. McAlpine, each made application for said tract under the homestead law. On the same day Robert Cotter made homestead application for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of said section, involving a part of the land in dispute. As the applications were filed simultaneously, the local officers ordered a hearing to take place March 6, 1890.

From the evidence submitted in the case the local officers found that Cotter was the prior settler entitled to enter the land he applied for, and that McInnis was the next settler in point of time, and therefore should be allowed to make entry of the remaining forty acre tract, viz., NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said section.

On May 7 and 19, 1890, McAlpine and McInnis respectively, appealed, and on February 12, 1892, you sustained the judgment of the register and receiver, whereupon the said parties again appealed. The record shows that each of the parties to this case made application to enter said land in the latter part of 1887, which were rejected by the local officers for the reason that the land is an odd-numbered section within the grant to the Chicago, St. Paul and Fond-du-lac railroad under the act of June 3, 1856, 11 Stat., 21.

From these orders each of the parties appealed, but it appears that at the date your decision was made in this case, no action had yet been taken on said appeals.

The local officers set May 1, 1889, as the date for receiving filings and entries for the tract in dispute, in connection with other lands, the same having been previously restored to entry under the provisions of the act of March 2, 1889 (25 Stat., 1008). This accounts for the simultaneous applications of the parties in interest.

The applications made by these parties while the land was in a state of reservation for the benefit of said railroad, were of no effect, and therefore the action of the local officers in rejecting the same was right and proper.

It must be remembered that the mere application to enter land already covered by an entry or other reservation, as in this case, does

not of itself, withdraw the land or in any manner affect its status, it merely has the effect to hold the land from other disposition, that the right of the applicant may be protected, but such right is dependent upon his showing that the land was subject to entry at the date of his application.

In view of the fact that after the lands were restored, the applications for said tract were simultaneous, it follows that the rights of the respective applicants must be based upon the acts of settlement made by each, upon the land, prior to said application, and where none of the parties have made settlement on the land the rule established in such cases requires that the right of entry shall be awarded to the highest bidder.

All three of these parties claim to have established residence upon the land while the same was in a state of reservation. This Department has decided in numerous instances that while an entry stands uncancelled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman or the United States, yet as between such settlers, priority of settlement may be properly considered. *Geer v. Farrington* (4 L. D., 410); *Kruger v. Dumbolton* (7 L. D., 212); *Rothwell v. Crockett* (9 L. D., 89).

In the case of *Tarr v. Burnham* (6 L. D., 709) the same principle was applied to the lands withdrawn for railroad purposes.

An examination of the whole record in this case shows that the facts, as far as stated in your decision, are substantially correct, and after a careful consideration of the same together with the foregoing, I concur in your conclusion and the same is hereby affirmed.

MALLET *v.* JOHNSTON ET AL.

Motion for review of departmental decision of June 18, 1892, 14 L. D., 658, denied by Secretary Noble, December 20, 1892.

OKLAHOMA LANDS—INDIAN OCCUPANCY.

POISAL *v.* FITZGERALD (ON REVIEW).

The occupancy of land in Oklahoma by an Indian, located under the authority of the government, is not affected by the provisions of the act of March 2, 1889, prohibiting the acquisition of settlement rights in said Territory prior to the opening thereof in accordance with said act.

Secretary Noble to the Commissioner of the General Land Office, December 20, 1892.

On the 6th of September, 1892, you transmitted the motion of Thomas Fitzgerald, for review and reversal of departmental decision of July 7, 1892, in the case of the heirs of Mrs. Poisal against said Fitzgerald

(15 L. D., 19). The land involved is the NE. $\frac{1}{4}$ of Sec. 17, T. 12 N., R. 6 W., Kingfisher land district, Oklahoma.

For this land Fitzgerald made homestead entry on the 30th of April, 1889, which entry was canceled by the departmental decision complained of, upon the contest initiated by Mrs. Poisal, an Indian woman, and continued by her heirs. Upon the trial, the fact was established that Mrs. Poisal was located on this land at her request, by the agent of the Arapahoes, of which tribe she was a member, in 1872; that the government built her house, broke and fenced some ground for her; that she lived there and cultivated her garden until her death; that Fitzgerald knew all these facts, and worked on the place for her son for thirteen months prior to April 22, 1889.

In the motion before me, I am asked to hold that Mrs. Poisal fell within the inhibition of the act of March 2, 1889, (25 Stat., 1004), and that she could gain no rights by reason of her unlawful occupancy of the tract in dispute, prior to the time fixed by the President's proclamation, opening said lands to settlement, and that such occupancy, with its attendant advantages, disqualified her, or any one claiming through or under her, from entering any of said lands, or acquiring any right thereto.

In reference to this proposition, my conclusion is, that the occupancy by Mrs. Poisal of the land in question, prior to the opening of the Territory to general settlement by American citizens, in accordance with the act of March 2, 1889, was not unlawful. She was one of the persons who were permitted to enter upon and occupy these lands long prior to the passage of said act, and her rights were not affected thereby.

It is true that she did not avail herself of her right to have this tract reserved for her in advance of the opening of the Oklahoma lands to settlement, but Fitzgerald was not misled by that omission. He knew that the land was occupied and claimed by her, and claims to have purchased from her son John, all her improvements and possessory rights thereto. No authority to make such sale was shown to be possessed by John, and he disclaimed having made such sale. It is claimed that she was notified of her right to have the lands reserved for her in advance of their being opened to settlement, but neglected to avail herself of the privilege; but whatever notice there was, seems to have been given to her son John, and never communicated to her. I think, therefore, it was correctly held, in the decision complained of, that she received no such notice.

The questions involved were duly considered in the decision of which a review and reversal is asked, and the motion before me does not make it appear that manifest injustice was done by the conclusion therein reached. It was held in *Mulligan v. Hansen* (10 L. D., 311), that in such a case a motion for review will not be granted. The motion is denied.

ALASKA LANDS—MISSION STATIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, December 21, 1892.***The Honorable, The COMMISSIONER OF EDUCATION.**

SIR: I am in receipt of a letter from Sheldon Jackson, Esq., General Agent of Education in Alaska, dated January 14, 1892, in which, after reciting the fact that the regulations issued June 3, 1891 (12 L. D., 583), to carry into effect certain sections of an act entitled "An act to repeal timber-culture laws and for other purposes," approved March 3, 1891 (26 Stat., 1095), properly excepted the mission stations in Alaska from appropriation and entry as manufacturing stations, trading posts, or townsites, he further states that:

As those regulations were for the information of manufacturers, traders and citizens interested in town sites, you have given no instructions as to the method to be pursued by the several missionary societies that are entitled to a reservation under the bill.

The secretaries of the various bodies are asking this office for information; they wish to know just what steps to take to have their reservations defined by metes and bounds, so that no manufacturers, traders or townsite communities will encroach on them through a misunderstanding of their boundary lines.

In reply, I have to state that the only portion of act that in any way deals with said missionary stations is the following sentence quoted from the fourteenth section thereof, to wit:

And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said district of Alaska are hereby excepted from the operation of the last three preceding sections of this act.

It is apparent, therefore, that no authority was given in said act for the issuance of any official instructions, either by this office or the Department, relative to said missionary stations, other than to provide that the same should not be included either in whole or in part within entries of land made for townsites, trading or manufacturing purposes.

The above-quoted sentence, however, is but a re-enactment of the provision in the act providing a civil government for Alaska (23 Stat., 24), to the effect:

That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several societies to which said missionary stations respectively belong until action by Congress.

And this latter provision was doubtless the result of precedents established by legislation for other portions of our country, notably the former Territories of Oregon and Washington, the organic acts creating which (9 and 10 Stat., pp. 323 and 172, respectively,) confirmed fee-simple title to the lands, not exceeding six hundred and forty acres in

a body then occupied as missionary stations among the Indian tribes of said Territories, in the several religious societies to which said missionary stations respectively belonged.

It will be observed that by the acts establishing territorial governments in Oregon and Washington, as well as by the acts creating a civil government for Alaska, no title or protection was given to any religious society not actually occupying land as a missionary station, within the territory affected by and at the date of passage of said respective acts. It appears, however, that protection has been extended to all religious societies that established missions among the Indians of Alaska subsequent to May 17, 1884, and prior to March 3, 1891.

With a view to avoiding conflicts between the claimants of mission lands in Alaska and others who may lay claim to the same or adjacent lands for townsite, trading, or manufacturing purposes, and in anticipation of such legislation as may be enacted by Congress relative to the mission stations therein, I therefore suggest that the several religious societies occupying land as mission stations among the Indians of Alaska prior to March 3, 1891, have the same surveyed and the outer-boundaries thereof permanently marked upon the ground in such manner as is deemed best. And I further suggest that plats of such surveys be made and placed of record in the office of the clerk of the court for the district of Alaska, who is *ex officio* recorder of deeds, mortgages, and other contracts relating to real estate in said district. The survey, marking and platting of said mission stations will not be held to settle any existing controversies regarding lands in said district, the adverse claims to any land applied for as a townsite, trading post, or manufacturing station being the subject of proof to be submitted on the day advertised to make entry thereof under the provisions of said act of March 3, 1891, and of careful investigation prior to the allowance of entries or issuance of patents under said act.

Should these suggestions be followed, the work must in each instance be performed at the expense of the society in whose interest the same is undertaken.

Where certain lots or blocks only, in the center of villages, or tracts within townsites, are occupied for school or mission purposes, ample provision has been made in sections 26, 29, 30, 31, and 32 of said circular of instructions issued June 3, 1891, for the acquisition of fee-simple title to the lots or blocks thus occupied and improved, by the respective societies to which such lots, blocks, and improvements belong, according to their respective interests.

Respectfully,

W. M. STONE,
Acting Commissioner.

Approved:

JOHN W. NOBLE,
Secretary.

STOOP *v.* OMAN.

Motion for the review of departmental decision of August 23, 1892, 15 L. D., 213, denied by Secretary Noble, December 23, 1892.

COAL ENTRY—TRANSFeree—LEGAL SUB-DIVISIONS.

SCOTT *v.* SHELDON (ON REVIEW).

A transferee claiming under a coal entry takes no better title than the entryman has to confer, and the right thus acquired is subject to the subsequent action of the Land Department.

Coal land entries are made of "legal sub-divisions," and if it is shown that any such sub-division, so entered, is not in fact coal land, the entry should be canceled as to such tract.

The case of Rucker *et al.* *v.* Knisley (14 L. D., 113), cited and distinguished.

Secretary Noble to the Commissioner of the General Land Office, December 23, 1892.

Nathaniel P. Sheldon, and the Skagit Cumberland Coal Company, his transferee, have filed a motion for review of departmental decision of August 30, 1892 (15 L. D., 361), holding for cancellation so much of his coal entry, made August 10, 1887, as embraced lot 2 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 35 N., R. 6 E., Seattle land district, Washington.

Sheldon's entire entry embraced, in addition to the above, the contiguous SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of said section. On September 2 following the date of the coal entry, James Scott filed application to enter lot 2 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. The local officers rejected it, on the ground of its being embraced in said coal entry. He appealed, and filed an affidavit of contest, alleging that the land he had applied for was not coal land, but was agricultural in character. A hearing was had, as the result of which they held "that the tracts in controversy are indispensable to the working of the coal mines therein and the adjoining tracts," and recommended a dismissal of the contest. On appeal to your office, you affirmed their decision. The homestead entryman appealed to the Department, which held:

The testimony shows conclusively that no coal has been discovered upon lot 2, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, or the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said land. Both you and the register and receiver find this to be the fact. There is not even expert evidence offered to show that it is probable that the veins of coal in that vicinity extend into or underlie the land sought to be entered as a homestead. But one witness to the defense testifies to this probability, but his testimony is not sufficient to convince me, especially in the face of the fact, that no attempt seems ever to have been made to demonstrate the truth of this theory. I think it is established beyond a doubt that the land is not mineral in character. . . . Your judgment is therefore reversed, and you will cancel the entry of Sheldon as to lot 2 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section.

The applicants for review allege that at least two witnesses (Garrett and Andrews) testified "that the strike of the known veins of coal in the immediate vicinity" of the land in contest was—

At such an angle as indicated clearly that such veins did underlie said described land; and their testimony upon this point being uncontradicted, it was error to decide that "there is not even expert evidence offered to show that the veins of coal in that vicinity extend into or underlie the land sought to be entered as a homestead.

The only question raised by this allegation would seem to be, whether the Department was in error in not considering the witnesses, Garrett and Andrews, "experts." Without delaying to discuss whether they were entitled to rank as "experts," it is sufficient to say that, giving their testimony all the weight that can properly be claimed for it, their "opinion," and their estimate of "probabilities," can not be allowed to outweigh the fact that in all the voluminous testimony there was nothing disclosed to support their opinion. In the case of Rucker *et al.* v. Knisley (14 L. D., 113), "the testimony of the geological expert" was admitted and given due weight; but in that case, coal had "actually been produced as a present fact to a sufficient extent to indicate the character of the land;" . . . wherever the land is tapped by shaft or drill, the *theory is reduced to fact, and coal is found*" (*ib.*, p. 115). That was a very different case from the one at bar, where there is not, as called for by the United States supreme court (Colorado Coal Company *v.* the United States, 123 U. S., 307-328)—

Upon the land *ascertained* coal deposits of such extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes.

In Dughi *v.* Harkins (2 L. D., 721) this Department held that the fact that land is mineral in character, "must appear from *actual production of mineral*, and not from any theory that it *may* produce it." This language is quoted approvingly by the United States supreme court in the case of Davis's Administrator *v.* Weibbold (139 U. S., 507-522). See also Kings county *v.* Alexander *et al.* (5 L. D., 126); Savage *et al.* *v.* Boynton (12 L. D., 612).

It will be seen that, granting that the witnesses named could properly be termed "experts," and giving their testimony all the weight to which it is duly entitled, it would not show that there was any error in the decision heretofore made.

The applicant contends that, the entry

Having been made in good faith and after due compliance with the then existing regulations, and the purchase money therefor having been tendered and received, and a final certificate and receipt embracing all of said lands having been issued, it was error, in the absence of any charge of fraud, to direct the cancellation of said entry or any part thereof.

The facts here stated were before the Department when the case was considered; indeed, they are substantially set forth in the decision complained of; and they afford no ground for the contention that the gov-

ernment should dispose of land under the coal land law which after a hearing is not shown to be coal land.

The applicant contends that, the land having been transferred, and the transferee having expended large sums of money in developing said lands and erecting permanent improvements upon them, it was error, in the absence of any testimony tending to prove fraud, not to have decided that such a right of property had become vested in the entryman and his transferee as rendered said entry indefeasible.

As to this it is sufficient to say that the doctrine that prior to patent the purchaser stands in the shoes of the entryman, that he takes no better title than the entryman has to confer, and whatever right is thus acquired is subject to the subsequent action of the land department, is as applicable to an entry under the coal land law as to entries under the other land laws of the United States.

The applicant contends that, as the land applied for by the homestead entryman—

Was in the peaceable possession of another, and that the same had been improved by the erection thereon of substantial and permanent buildings, it was error not to hold that, such improvements had been made under color of title from the United States, was not subject to entry under the settlement laws.

The fact that the land had been built upon and otherwise improved was fully brought before the Department in the voluminous testimony that was transmitted with the case, and received due consideration; therefore it does not now furnish a ground for review.

The contention upon which the applicant for review appears to place the most stress is, that the Department ought to have considered the coal entry *as a whole*—not canceling a part and leaving a part intact:

That it was error not to have held that the lands embraced in said entry *taken as a whole* were more valuable for coal than for agricultural purposes; it was error not to hold that the lands included in said entry *taken as a whole* were chiefly valuable for coal, and as such were subject to entry under the provisions of Sec. 2347 R. S.; it appearing from the record that *upon some portion* of the lands embraced in said entry, coal in paying quantities had been discovered, and that at the date of hearing the Skagit Cumberland Coal Company was actively engaged in mining the same, it was error to hold that there was any legal obligation on the part of the entryman or his transferee to show that, as a present fact, *each and every legal subdivision* of land embraced in said entry was more valuable for coal than for agricultural purposes; it appearing from the evidence that valuable deposits of coal had been discovered within the confines of said entry, it was error to hold that this fact of itself did not entitle said entryman Sheldon to acquire and maintain title to one hundred and sixty acres of land embracing such deposits, irrespective of any question as to the coal-bearing qualities of *each and every legal subdivision* embraced within the entry; it was error not to hold that an entry of lands of less acreage than the statutory limit, bounded by the lines of public surveys and embracing said mine or mines, was, so far as the United States and third parties were concerned, *an unit*, and hence not subject to cancellation in whole or in part.

These are different forms of stating the proposition that the coal entry should have been considered *as a whole*, and that if coal were found on

any part of it, no part of it should be canceled. Section 2347 Revised Statutes provides:

Every person above the age of twenty-one years shall have the right to enter, by legal subdivisions, any quantity of vacant coal lands not exceeding one hundred and sixty acres to such individual person, etc.

The clear inference from the above would be, if legal subdivisions are to be considered when making entry, and it should happen that any "legal subdivisions" were entered which afterwards proved not to be coal land, such "legal subdivision" had been improperly entered, and the entry for such "legal subdivision" ought to be canceled. Sections 2348 and 2349 provide for the pre-emption of coal-lands—from which some analogy to the pre-emption law might be inferred. But in the case of agricultural lands entered under the pre-emption law, such entries are not necessarily considered "as a whole," but one or more "legal subdivisions" may be canceled, leaving the remaining intact (see *Tinkham v. McCaffrey*, 13 L. D., 517; *Clark v. Martin*, 11 L. D., 72; and many other cases). Homestead entries have often been canceled as to a portion, and the rest been allowed to remain intact (see *Winters et al. v. Bliss*, 14 L. D., 59, and many other cases). If an entryman of desert land has failed to irrigate and reclaim the whole of the land entered by him, his entry is canceled as to the "legal subdivision" not reclaimed, and patent issued for the remainder (*Adam Schindler*, 7 L. D., 253, and many other cases). Counsel for applicant fails to show—in fact makes no attempt to show—why an entry of coal-land, made by "legal subdivisions," can not and should not be canceled "by legal subdivisions," in case it is clearly shown that a given "legal subdivision" is not coal-land, and therefore not subject to entry under the coal-land law.

The motion is overruled.

TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW.

SWALL v. LOEB.

In determining whether breaking, cultivation and planting, done prior to the time fixed by statute is a substantial compliance with the timber culture law, the good faith of the entryman should be taken into consideration.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 23, 1892.

On the 21st of December, 1886, Leopold Loeb made timber culture entry for the SE. $\frac{1}{4}$ of Sec. 28, T. 7 N., R. 13 W., S. B. M., Los Angeles land district, California.

On the 24th of December, 1889, Jacob Swall filed an affidavit of contest against said entry, in which he alleged that "Leopold Loeb has not

plowed or cultivated, or caused to be plowed or cultivated, any portion of said tract during the third year from date of said entry, as required by the timber culture law."

A hearing took place in March, 1890, and on the 11th of July, of that year, the local officers united in a decision, in which they recommended "that this contest be dismissed, and that the entry be allowed to stand, subject to further compliance with the law." This decision was reversed by you on the 18th of February, 1892, and the entry held for cancellation. An appeal from your judgment brings the case to the Department.

There are no disputed questions of fact in this case. All parties agree that in the spring of 1887, five acres of the tract were properly plowed. In the fall of that year, ten acres were plowed, the five acres plowed in the spring, and five other acres. These ten acres were properly cultivated in the spring of 1888, and in April of that year, seven and a half acres of the land were planted to cotton-wood cuttings.

It is also admitted that on the 24th of April, 1889, one Joseph B. Rutledge filed an affidavit of contest against said entry, alleging that Loeb had not sown the first five acres to grain the second year. Jacob Swall was his corroborating witness. This contest was dismissed on the 24th of July, 1889, the day set for the hearing, on the ground that the affidavit did not allege facts sufficient to constitute a cause of action. Rutledge took no further action in regard to his contest. Swall testified that he instituted his contest at the suggestion of Rutledge, and the record shows that he was one of the principal witnesses for the contestant at the hearing. The papers in the Rutledge case were introduced as part of the record in the case at bar.

The timber culture act requires the entryman to break five acres the first year, and five additional acres the second year. The first five acres must be cultivated to crop or otherwise, the second year, and the third year must be planted or set to trees, seeds or cuttings. The third year, too, the second five acres must be cultivated to crop or otherwise, and the fourth year planted to seeds, trees or cuttings.

According to these provisions of the law, Loeb was required, at the end of the third year after his entry, to have ten acres of his tract broken and cultivated, five acres of which should be planted or set to trees or cuttings. All of this, it is admitted, was done by or for him. It is also admitted that when the seven and a half acres were planted to cotton-wood cuttings, in April, 1888, the ground was in good condition, and they were properly planted.

The facts being undisputed, the question of law is presented: Was the breaking, cultivation and planting done by Loeb, prior to the time designated therefor, a compliance with the law under which his entry was made?

In *Grengs v. Wells*, (11 L. D., 460), it is held that planting trees before the time fixed by law, is compliance with its requirements, so far

as time is of the essence of the matter, provided the land has been broken, cultivated and properly prepared. In *Friel v. Bartlett*, (12 L. D., 502), it is said: All that is required is that the breaking and planting is done within the required time. He may do it in advance of the required time, and the law will be satisfied. In support of this doctrine, the case of *Clark v. Timm* (4 L. D., 175) is cited.

In determining a question of this character, I think the good faith of the entryman and his honest intent to comply with the terms of the law is a necessary inquiry. There may be instances where a technical failure to observe the statutory requirements at the time provided for in the act, would call for a cancellation of the entry. It is probable that it would not do to hold that the entryman might break and plant the ten acres required to be cultivated to trees, the first year, and fail to do anything the second and third, and be sustained in his position, on the ground that he had in advance done all that was required of him, and that the time should only begin to run against his default the second and third years, at the expiration of the time when he might have lawfully complied with the provisions of the statute.

It is true in this case, that Mr. Loeb did not plant the first five acres to trees and cultivate the second five acres the third year as required by law, but completed his planting seven and one-half acres the second year; this is not the literal observance of the statute, and could I find any act upon his part which shows a wanting of good faith in attempting to comply with the law, I should feel quite differently about the rights from the opinion which I now entertain.

It is not claimed nor shown in evidence that his technical non-observance of the law was prejudicial to his compliance with the timber culture act or that the trees suffered either in planting or want of cultivation. On the contrary, from what I can gather from the testimony, he fore stalled the action required by the law in good faith and it operated beneficially.

Then the question arises, shall the Department in dealing with a timber culture entryman, who has acted in good faith, but prematurely planted more than the requisite number of trees hold his entry for cancellation because he has not observed the literal wording of the statute. I think not. In my judgment to do so would be sticking in the bark rather than getting at the real merits of the rights of the parties in this case. Hence, I am disposed to hold that the entryman has acted in good faith, and has satisfied the spirit of the law, and that his entry should be upheld subject to future compliance therewith.

With the appeal before me are certain affidavits, copies of which were served upon the opposite party, with the appeal and argument. These can not be considered. The Department must determine the rights of the parties and dispose of the case upon the record as made on the trial.

The conclusions of the register and receiver meet my approval, and the one appealed from is therefore reversed.

McGLASHAN *v.* ROCK.

Motion for review of departmental decision of September 5, 1892, 15 L. D., 262, denied by Secretary Noble, December 24, 1892.

STATE BOUNDARY—SURVEY—NEBRASKA AND SOUTH DAKOTA.

INSTRUCTIONS.

Secretary Noble to the Commissioner of the General Land Office, December 24, 1892.

I am in receipt of your letter of December 6, 1892, with reference to the survey and marking of the boundary line between the State of Nebraska and the State of South Dakota.

The act of Congress approved August 5, 1892, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1893, (pamphlet laws page 370) contains the following item.

To enable the Secretary of the Interior to cause to be surveyed and distinctly marked by suitable monuments that portion of the boundary line between the State of Nebraska and the State of South Dakota which lies west of the Missouri River, twenty thousand dollars, or so much thereof as may be necessary.

The 43d parallel of north latitude is fixed by act of Congress as the boundary line between the two States west of the Missouri River.

It appears that the line between the Keya Paha River and the west boundary of the State, a distance of two hundred and twenty-four miles, was surveyed in 1874, the line between the Keya Paha River and the Missouri River a distance of about fifty miles, has not been surveyed. You state that some doubt exists in your office as to the absolute correctness of the survey of the line west of the Keya Paha River, that the line varies a trifle, sometimes north of the true parallel, and sometimes south of the same.

Admitting this to be true, the line of the 43d parallel as officially established and marked on the ground, has been recognized for eighteen years, and property rights have attached based upon the said line, which is substantially correct; I am clearly of the opinion, that it was the intention of Congress that this line should be retraced and properly marked, and that the line between the Keya Paha River and the Missouri, should be properly established and marked.

The posts indicating the boundary line should be placed not further than one-half mile apart.

It has been suggested that the half mile posts be of different size from the mile posts, and I think the suggestion is a reasonable one.

The mile posts should be of the same size and material as those used to mark the boundary line between North and South Dakota; the size

being ten inches square and seven feet in length, and placed one-half the length in the ground, the half mile posts should be of the same material, eight inches square and six feet long, and placed one half the length in the ground.

With these general directions, you will proceed to advertise for bids for the proper performance of the work, as soon as practicable.

COPPOCK *v.* TITSWORTH.

Motion for review of departmental decision of August 18, 1892, 15 L. D., 193, denied by Secretary Noble, December 28, 1892.

CONFIRMATION—RULE OF APRIL 8, 1891.

BELLAMY *v.* LEMON (ON REVIEW).

The rule of April 8, 1891, was made for the purpose of speedily disposing of cases wherein the entry was confirmed by section 7, act of March 3, 1891, and only had reference to cases pending before the Department when said rule was adopted.

Secretary Noble to Messrs. Copp and Luckett, Washington, D. C., December 28, 1892.

You have filed, on behalf of William Lemon, the transferee in the case of Bellamy *v.* Campbell and said Lemon as transferee, a motion asking this Department to review and recall the ruling in the above cause, dated September 14, 1892, 15 L. D., 362, as contained in its letter of said date to Copp and Luckett, attorneys for said transferee, because said ruling is erroneous in holding that the circular of April 8, 1891, does not apply to this case.

This case was received with the Commissioner's letter of August 15, 1892, and is pending, on the appeal of Bellamy, from his decision dated June 14, 1892, dismissing Bellamy's contest and holding that Campbell's entry is confirmed under section 7, of the act of March 3, 1891 (26 Stat., 1095).

On the 17th day of August, 1892, you filed a motion, "under rule of April 8, 1891 (12 L. D., 308)," for confirmation under said act. Your motion was denied by letter of September 14, 1892, to you, after reciting the facts above set forth, as follows:

Fraud is alleged on the part of the transferee and in order to dispose of the case, an examination of the record is necessary.

The circular of April 8, 1891, (*supra*) had reference to cases pending before this Department, in which the appeal raised other questions than of confirmation, and did not contemplate the advancement of a case similar to that under consideration.

The act referred to confirmed certain entries made prior to its passage, at which time the docket of cases appealed to the Department was crowded with cases involving many questions pertaining to the

administration of the land laws. Among such cases were many in which the entries were confirmed by the act of Congress.

The rule of April 8, 1891, was made for the purpose of disposing of the confirmed cases speedily, and only had reference to cases then pending here. This appears from the language used in the circular itself. The first sentence says: "All *ex parte* cases, or cases in which the United States is a party, in which the entries are confirmed by the act of March 3, 1891, will be disposed of on written motion, without regard to their places on the docket." The next sentence refers to all other cases. In both instances the reference is to cases on the docket at the time the circular was issued. There is nothing in the circular, nor any reason outside of it, to warrant the conclusion that cases, coming to the Department, involving this question on appeal, after April 8, 1891, should be advanced and take precedence over other appeal cases in their order of disposition.

Your motion for recall of said letter is therefore denied. This conclusion makes it unnecessary to consider, at this time, the affidavits filed in connection with your motion for review.

HOMESTEAD ENTRY—DESERTED WIFE.

PAWLEY v. MACKEY.

A married woman, who is actually deserted by her husband, is entitled, as the head of a family, to make homestead entry, and this right is not dependent upon the period of time that may have elapsed since desertion.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 29, 1892.

The land involved in this controversy is described as the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 29, T. 1 N., R. 5 E., Tucson land district, Arizona.

The record shows that Mrs. Mary F. Stump made settlement on the tract on or about June 3, 1887. At that time her husband was living with her and resided with her on the land in question until about the 12th of May, 1888, when he abandoned her and left the country. On June 13, following, Mrs. Stump made entry of the land in her own right under the homestead law by reason of such abandonment. At that time her improvements consisted of a small frame dwelling with a tent addition and a brush covered shed, and about thirty acres of the tract cleared, a large proportion of which was under fence. She had about seven acres in grape-vines, seven acres in alfalfa and about five acres in fruit trees; five or six horses, a span of mules, two wagons, plow, scraper, harrow, cow, chickens, and household utensils. The improvements were estimated to be worth \$1,000.

A few days after the entry, and before she was able to make a further compliance with law as to residence upon the land in person, she

was taken sick and died. Before her decease, and on June 19, 1888, she made her will by which she devised all her property to her brother Wm. Mackey.

On September 15, 1888, following, James E. Pawley instituted contest against the entry charging

That the said Mary F. Stump was not entitled as a deserted wife to enter said land; that her husband had exhausted his homestead and pre-emption rights; that said land was not subject to entry under any other act; that the desertion of her husband was a collusion between them whereby they might obtain title to the land; that she was not residing upon said land when she made her entry thereon and that she has not since resided thereon up to the time of her death her place of residence was in Mesa City; that she has died since making said entry; that Wm. Mackey, her brother, is the heir named in her will; that said Mackey merely holds this in trust for her husband; that her husband returned after her death.

The local officers gave the usual notice in such cases, citing the parties to appear for trial before J. E. Walker, clerk of the court at Phoenix, Arizona, May 21, 1889, at which time both parties appeared and submitted their testimony. Decision in favor of the defendant Mackey, was rendered by the local officers on the ground that Mrs. Stump was entitled to make said entry as an abandoned wife, and that plaintiff failed to sustain his charges; from which the plaintiff appealed. Under date of February 20, 1892, you reversed the decision of the register and receiver, and gave judgment in favor of plaintiff, whereupon the defendant appeals.

It appears from the testimony that Mary F. Stump had been living with her husband upon the land in dispute and improving the same for over a year previous to the date of her entry; that from some cause the husband neglected to make entry of the land; that Mrs. Stump and her husband did not live peaceably together, and occasionally had serious family quarrels; that Mr. Stump abandoned his wife whereupon she made entry of the land, and subsequently died.

The evidence fails to show any collusion on the part of Mrs. Stump and her husband to secure the land. In fact the witnesses produced by the plaintiff to show collusion really established the fact of their ill will toward each other; and in relation to the charge that Mrs. Stump failed to reside upon the land from date of entry until decease, but resided in Mesa City about three miles from the land, it must be observed that she had established residence upon the land sometime in June, 1887, and had resided upon the same for about a year thereafter; that she was taken sick about the time the entry was made or very soon thereafter, and never recovered sufficiently to occupy the land at any time before her death. Absences occasioned by ill health do not interrupt the continuity of residence once established. James Edwards (8 L. D., 353); Alfred M. Smith, (9 L. D., 146).

The only question now remaining in this case and the one upon which it appears you really based your opinion, was the short period that elapsed between the abandonment of Mrs. Stump by her husband and

the date of making her entry, stated in your decision as "about eighteen days," but as a matter of fact, it was thirty-two days.

I am not prepared to concur in your view on this point. The only question that arises in this point is the *bona fide* intention of the husband to desert his wife, and if it is shown by competent testimony that the wife was actually deserted and left to take care of herself, then she is competent, as the head of a family, to make the entry in question regardless of time that intervenes before it is made. In other words, she was as much an abandoned wife in five days as in as many months, where the fact of abandonment is made to appear. In the case under consideration it was but natural that she should make the entry at the earliest opportunity, in order to protect her improvements valued at \$1,000, from entry by another party. Again, the fact that at her decease she devised her property to her brother is in my opinion presumptive evidence that she did not expect her husband to return and that there was no collusion between them.

After a careful review of the evidence in this case, I can see no just reason for disturbing the homestead entry. Relative to the compliance of law by the devisee, that is a question to be adjusted when final proof is presented.

Your decision is therefore reversed.

PRACTICE—APPEAL—CONFIRMATION.

MILLER v. BOWE ET AL.

Where a case is returned to the General Land Office with directions to proceed under the provisions of section 7, act of March 3, 1891, and the instructions thereunder of May 8, 1891, and the Commissioner holds as the result of such proceedings that the entry involved is confirmed by said act, an appeal to the Department will probably lie from such decision.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 30, 1892.

On December 11, 1878, Russell L. Bowe applied to purchase the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 20, T. 1 N., R. 6 E., in the Otoe and Missouria Indian reservation, for sale at the Beatrice land office, Nebraska, under the provisions of the act of August 15, 1878 (19 Stat., 208), providing for the sale of a portion of the Otoe and Missouria Indian reservation in the States of Kansas and Nebraska.

On July 23, 1883, a final receipt was issued to him by the register and receiver, he then having paid the full price of the land.

On June 22, 1886, Jacob B. Miller filed an affidavit of contest against said entry, alleging that Bowe was not at the date of his purchase, and did not afterwards become an actual settler on said land.

A trial was had, and after considering the evidence submitted, the register and receiver found in favor of claimant and dismissed the contest. Contestant appealed from their finding to you, and, on June 26,

1889, you reversed said finding and held the entry for cancellation. An appeal was taken to the Department, where, on December 2, 1890, your judgment was affirmed. Afterwards, a motion for review was filed, and, on July 24, 1891, it was allowed and the judgment of December 2, 1890, set aside (Press copy-book No. 223, p. 491), and the case remanded to you, with directions to proceed under the provisions contained in the 7th section of the act of March 3, 1891 (26 Stat., 1095), and the instructions thereunder of May 8, 1891 (12 L. D., 450).

For a full history of this case see the similar case of *Fleming v. Bowe* (11 L. D., 546), and the same on review (13 L. D., 78).

On August 24, 1891, you called on the holders of the land and interested parties therein under conveyance from Bowe to furnish the proof provided for by the above cited letter of instructions, showing that the entry of Bowe was confirmed by said act of March 3, 1891.

In response to this call, certain evidence was furnished, and, after considering the same, on June 27, 1892, you dismissed the contest of Miller and held the entry confirmed. Contestant has appealed from your judgment to the Department, alleging a number of errors in said judgment, and under date of September 27, 1892, the attorney for Bowe filed a motion to dismiss said appeal, alleging, substantially, that in rendering your judgment you were following the directions of the departmental letter of July 24, 1891, and that when you held, on June 27, 1892, that the entry was confirmed, your action was final, and that you erred in allowing any appeal therefrom.

The motion to dismiss the appeal evidently is made under the order of January 17, 1891 (12 L. D., 64), providing for the dismissal of cases on motion for jurisdictional reasons.

The motion has been considered, and I am clearly of the opinion that it must be denied.

When the motion for review of departmental judgment of December 2, 1890, was made, it was shown to the Department that proper notices of said judgment had not been served on the interested parties entitled to notice under the rules. Said judgment was accordingly set aside. This action left the entry of Bowe intact, and it was found that, if certain facts alleged were true, then the entry was confirmed by the 7th section of the act of March 3, 1891, *supra*.

The Department did not determine that these assertions were true, but remanded the case to you to be further adjudicated under said act.

The law allows appeals from all final judgments made by you touching the disposition of the public lands, and your judgment holding that the entry should pass to patent under the act in question was final, unless appealed from. Contestant clearly was entitled to appeal from said judgment, and is entitled to have the same passed upon by this Department.

The motion is accordingly dismissed, and the record returned to the files of the Department to await disposition on appeal in the regular order.

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