

DECISIONS

125

OF

# THE DEPARTMENT OF THE INTERIOR

AND

## GENERAL LAND OFFICE

IN

### CASES RELATING TO THE PUBLIC LANDS.

FROM JULY, 1883, TO JUNE, 1884.

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## VOLUME II.

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PUBLISHED UNDER THE DIRECTION OF THE COMMISSIONER  
OF THE GENERAL LAND OFFICE.

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WASHINGTON:  
GOVERNMENT PRINTING OFFICE.  
1884.

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343427

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# DECISIONS

RELATING TO

## THE PUBLIC LANDS.

### DIVISION B.—RECORDS.

#### CLAIM FOR REVOLUTIONARY BOUNTY LAND SCRIP.

*ACTS OF AUGUST 31, 1852, AND JUNE 22, 1860.—STATEMENT OF CASE AND CONSTRUCTION OF STATUTES APPLICABLE.*

**ALGERNON S. SULLIVAN, ADMINISTRATOR DE BONIS NON OF MARY GATES, WIDOW AND SOLE LEGATEE OF HORATIO GATES, ON VIRGINIA LAND WARRANT FOR 5,833½ ACRES.**

The concessions of lands by the State of Virginia to officers in the Revolutionary service having, in the case of Major-General Gates, been satisfied under warrants for 15,000 acres and 2,500 acres, the warrant in question being unauthorized by law, cannot be recognized, and the claim is rejected.

*Secretary Teller to Commissioner McFarland, May 15, 1884.*

SIR: I have considered, on appeal from your adverse decision of May 10, 1883, the application of Algernon S. Sullivan, public administrator of the city of New York and administrator *de bonis non*, with the will annexed, of Mary Gates, widow and sole legatee of Horatio Gates, deceased, for the issue of Revolutionary bounty-land scrip under the acts of August 31, 1852 (10 Stat., 143), and June 22, 1860 (12 Stat., 84), for 5,833½ acres of public land, founded on Virginia land-warrant No. 9947, issued by the register of the Virginia State land office to said Sullivan January 10, 1882, and stated to be "in consideration of Major-General Horatio Gates' services in the Virginia Line from May, 1776, to May, 1783, agreeably to a certificate from the governor and council, which is received into the land office." The register of the land office further certifies by an indorsement on the warrant that, "In pursuance of an advice of council this warrant has issued in conformity with laws of Virginia in force prior to the cession by that State of her western lands to Congress, and that no other warrant has issued from the land office of Virginia on account of the services of Major-General Gates except warrants Nos. 802, 803, 804, 805, 806, and 807 for 2,000 acres each, and Nos. 808 and 809 for 1,500 acres each, and No. 810 for 2,500 acres, and that no grant has issued on this warrant."

These warrants (exclusive of that in question) aggregate seventeen thousand five hundred (17,500) acres, and, as appears from "A list of officers of the Army and Navy who have received lands from Virginia for Revolutionary services, the quantity received, when received, the time of service for which each officer received land, &c., down to September, 1833," were issued June 13, 1783, for the services of Major-General Gates from May, 1776, to that date. (See Journal of the House of Delegates of the Commonwealth of Virginia for the session begun Dec. 2, 1833.)

The allowance upon which these warrants issued (as appears from a certified copy thereof from the records of the Land Office) is in these words:

I do certify that the Hon. Major-Gen'l Horatio Gates is entitled to the proportion of land allowed a major-general of the Virginia line for military service from May, 1776, to this day.

THOS. MERIWETHER.  
BENJ. HARRISON.

COUNCIL CHAMBER, *May 30, 1783.*

Benjamin Harrison was governor of Virginia at the date last named, and this certificate is presumed to have issued as the formal act of allowance to General Gates for the services named by the governor and council of the State; and as no other "allowance" appears among the files it is also presumed that the present warrant issued under the same certificate. I think it also established that General Gates' military services—for which he was entitled to bounty land—continued from May, 1783, or for a period of seven years.

The first section of the act of Congress of August 31, 1852, provided that all outstanding military land-warrants issued or allowed prior to March 1, 1852, 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, might be surrendered to the Secretary of the Interior, who, upon being satisfied that the surrendered warrant was fairly and justly issued in pursuance of the laws of said Commonwealth for military services so rendered, should issue scrip in favor of the present proprietors of the surrendered warrant for the whole or any unsatisfied portion thereof, at the rate of \$1.25 for each acre mentioned in the warrant, which remains unsatisfied, which scrip should be receivable in payment for any land owned by the United States subject to sale at private entry, and should be assignable by indorsement thereon, attested by two witnesses. The second section provided that the act should be taken as a full and final adjustment of all bounty land claims to the officers and soldiers, seamen and marines of the State of Virginia for services in the war of the Revolution, provided that the State of Virginia should, by a proper act of its legislature, relinquish all claims to the lands in the Virginia military district in the State of Ohio.

Pursuant to this last requirement the governor of Virginia, by an in-

strument in writing, after reciting that the general assembly of the State, by resolution of December 6, 1852, approved and accepted the act of August 31, 1852, relinquished to the United States the lands in Ohio therein named, and thus complied with the proviso of the act. A warrant under this act having issued in November, 1857, Attorney-General Black advised the then Secretary of this Department, June 23, 1859, in response to a request for an opinion as to his power therein (9 Op., 354), that he had no power to issue scrip on a military land-warrant not issued or allowed by the State of Virginia prior to March 1, 1852. Thereupon, apparently to remedy the defect in the act, Congress passed the act of June 22, 1860, "to declare the meaning of the act of 1852." It provided that the Secretary of the Interior, in extending the provisions of the act of 1852, should construe it so as to authorize the satisfaction in scrip of all warrants or parts of warrants issued on allowances made by the executive of Virginia prior to March 1, 1852, coming within the principles already recognized by that Department, and whether issued before or since March 1, 1852, provided that no warrant or part of a warrant should be satisfied in scrip founded or issued on any allowance made since March 1, 1852.

It is claimed by the present applicant that under this act, and acts of the legislature of Virginia, and under the allowance of the governor and council of Virginia above stated, the representatives of Major-General Gates (who died in 1806) are entitled to scrip for 5,833 $\frac{1}{3}$  acres of public land, in addition to the 17,500 acres already granted him.

The pertinent Virginia acts are those of October, 1779 (Henning's Statutes at Large, vol. 10, p. 159); October, 1780 (*Id.* 10, p. 375), and May, 1782 (*Id.*, 11., p. 84).

The act of 1799, reciting that no law of the commonwealth had yet ascertained the proportions or quantity of land to be granted, at the end of the present war, to the officers of the Virginia line on Continental or State establishment, or to the officers of the Virginia navy, and that doubts may arise respecting the particular quantity of land due to the soldiers and sailors, granted to every colonel 5,000 acres, lieutenant-colonel 4,500 acres, and so on to subordinate officers, and to soldiers, and also in like proportions to officers of the navy of the same rank as army officers, and to sailors as to soldiers.

It will be noted that this act made no provision for army officers above the grade of colonel.

The fourth section of the act of 1780 provided that—

Whereas no provision has been made in land for the general officers of this State in Continental service, therefore be it enacted that there shall be allowed to a major-general 15,000 acres of land and to a brigadier-general 10,000 acres of land, to be reserved to them and their heirs, in the same manner and on the same conditions as is by law heretofore directed for the officers and soldiers of the Virginia line in Continental service, and there shall be, moreover, allowed to all the officers of this State on Continental or State establishments or to the legal representatives of such officers, according to their respective ranks, an ad-

ditional bounty in lands in the proportion of one-third of any former bounty heretofore granted them.

The 9th section of the act of May, 1782, provided :

That any officer or soldier who hath not been cashiered or superseded, and who hath served the term of three years successively, shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid. And for every year which every officer or soldier may have continued or shall hereafter continue in service beyond the term of six years, to be computed from the time he last went into service, he shall be entitled to one-sixth part in addition to the quantity of the land apportioned to his rank respectively.

General Gates appears to have received warrants for 15,000 acres of land under the first clause of the fourth section of the act of 1780, and for 2,500 acres under the act of 1782, being for "one-sixth part in addition to the quantity of the land apportioned to his rank" for his service beyond the term of six years, a total of 17,500 acres. The applicant claims that he (his representatives) is also entitled to scrip for 5,888½ additional acres under the latter clause of the fourth section of the act of 1780, which grants "to all the officers, \* \* \* according to their respective ranks, an additional bounty in lands, in the proportion of one-third of any former bounty heretofore granted them."

No law prior to this act allowed General Gates bounty land for his military services, and even if this act granted him the additional bounty named in the latter clause of section 4, the allowance would be limited to the one-third additional thereby granted, and would not, I think, include the one-sixth additional granted by the subsequent act of 1782; the act of 1780 expressly limiting the additional bounty land "in the proportion of one-third of any former bounty heretofore granted them." His claim should therefore properly be for one-third of 15,000 acres and not for one-third of 17,500 acres, or for 5,000 acres instead of for 5,833½ acres.

But I concur in your opinion that the grant of the one-third additional, as expressed in the act of October, 1780, was intended only for the benefit of those officers for whose services provision for bounty land had been previously made, and hence that there having been no law prior to this act granting bounty land to a major-general the present claim, for the one-third additional in behalf of General Gates's services, is not within that act. The language of this provision seems clear and unambiguous, and is supposed to express just what the legislature of Virginia intended, and in such case the rules of construction do not require resort to other statutes upon the same subject-matter for the meaning of the particular statute, especially where, as in this case, there is nothing in the others inconsistent with the particular statute. But, however this may be, I do not think I am required to construe these acts of the Virginia legislature as applicable to the present case, after construction thereof by the authorities of Virginia, but, under well-settled principles, to accept such construction as the law of the case and dispose of it accordingly.

In his discussion of the act of August 31, 1852, Attorney-General Black, May 30, 1858, to the Secretary of this Department (9 Ops., 156):

In 1734 Virginia ceded to the United States the largest and most valuable body of land that ever belonged to the public domain of any State in the world. But previous to the cession she had promised to give certain portions of it to the officers, soldiers, sailors, and marines who had served during the Revolutionary war in her Army and Navy. She did not strip herself of the power to fulfill this promise without exacting a pledge that it should be fully redeemed by the Government of the Union. She was generous to her sister States, but she was at the same time true to her own defenders. The obligation of the United States to satisfy the claims of the Virginia officers and soldiers has never yet been denied by any part of their government. Nor has it ever been doubted as a general principle that the claims ought to be settled and adjusted according to the laws of Virginia, and by such tribunals as she, in her own wisdom, might see proper to charge with that duty. What a soldier may be entitled to is a question of State law; and it is not consistent with the spirit or genius of this Government to interfere with the administration of State laws, or to expound their meaning. When a question is incidentally raised upon them before an officer, or in the courts of the United States, the interpretation they have received in the State is of binding obligation.

At every step which Virginia took in this business she asserted, in words or by clear implication, her right to decide, through her own authorities, upon the validity and amount of the claims made for military bounty land under her laws. She conferred the power successively on her register of the land office, commissioner of war, governor and council, without providing in any case for an appeal.

You ask me if these decisions are in the nature of judicial expositions of the law, and therefore binding? Undoubtedly. They are in their character so far like a judicial sentence that they are conclusive upon the parties and their privies. When the constitution or law of any State authorizes a person to decide a given question the judgment of such person is always conclusive. It makes no difference whether it be a court, a legislative body, an executive officer, or a special tribunal appointed for the purpose. The authority to hear, examine, and decide without appeal carries with it the power to determine it forever, to make an end of all controversy about it, and to close it against all future inquiry upon either the facts or the law. When, therefore, the State of Virginia authorized the governor and council to settle these claims a decision regularly made by those officers was as conclusive as if the same jurisdiction had been given to and exercised by the Supreme Court.

In discussing the same act, Attorney-General Cushing said, January 7, 1854 (6 Ops., 243):

If it appear that any provision of the statutes of Virginia is of questionable import, and the courts of that State have considered and construed such provision, their decision is, in my view of the settled principles of law, obligatory on my judgment, so far as any judicial exposition of statute can be. [Referring to *Elmendorff v. Taylor*, 10 Wheaton, 159, wherein Chief Justice Marshall said:] This court has uniformly professed disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to these laws. This course is founded upon the principles supposed to be universally recognized, that the judicial department of any Government

where such a department exists is the appropriate organ for construing the legislative acts of that Government.

See also *Green v. Neal* (6 Peters, 291), where it is held that the received exposition of any statute of a State by the highest judicial authority of such a State becomes as much a part of the law as if such exposition were a statutory enactment; and see also the several other authorities cited by the Attorney-General to the same effect. But, as stated by Attorney-General Black, such exposition need not be made by the courts of the State, but may be by any person or tribunal thereto authorized, and in either case the construction so made is obligatory, not only upon the courts but upon the officers of the General Government. If, therefore, the proper officers of Virginia have construed her bounty land laws in question and, especially, have adjudicated the claims of Major-General Gates thereunder, such construction and adjudication are conclusive upon this Department.

The case then shows that May 30, 1783, the governor and council of Virginia issued a certificate that Major-General Gates was entitled to the proportion of land allowed a major-general of the Virginia line for military service from May, 1776, to May, 1783. This was such an "allowance" as is contemplated by the acts of Congress of August 31, 1852, and June 22, 1860, and under it, June 13, 1783, bounty land warrants were issued to him for 17,500 acres by the proper authorities of the State. This quantity was manifestly granted to him under the first clause of the act of October, 1780 (for 15,000 acres), and under the ninth section of the act of May, 1782, for one-sixth additional land, or 2,500 acres; the two aggregating 17,500 acres. These warrants were issued subsequently to enactment of the laws in question, when the whole subject-matter thereof was fresh in the minds of the authorities, and there was every disposition to accord to the officers all claims to which they were entitled under the law, and when also the officers themselves were present to protect their own rights. The issue of these warrants was therefore a construction of the laws then in force, and an adjudication of "the proportion of land" to which General Gates was entitled, and by implication ignored his right to any land under the latter clause of the act of 1780. The same warrants were accepted by General Gates (so far as appears) in full satisfaction of his claim under these laws, and not until about one hundred years later was it claimed (by the present application) that he was within the latter clause of the act of 1780, and entitled to more land than that already allowed him.

In view, therefore, of my own opinion that the present application is without merit, and that the construction of the Virginia laws is adverse thereto, and knowing of no authority under which the present register of the Virginia land office may readjudicate this matter once determined, I cannot recognize the validity of the warrant of January 10, 1832, based only upon the allowance of 1783, which has been fully satisfied by the warrants of that year.

I affirm your decision.

## DIVISION C.—PUBLIC LANDS.

### I.—DESERT LANDS—

1. Character of Land.
2. Fraudulent Entry.
3. Relinquishment.
4. Settlement.

### II.—HOMESTEADS—

1. Abandonment.
2. Absence.
3. Additional Entry.
4. Alabama Mineral Lands.
5. Amendment.
6. Application to Make Entry.
7. Change of Entry.
8. Commutation.
9. Contest.
10. Contract to Sell.
11. Cultivation.
12. Deceased Claimant.
13. Deserted Wife.
14. Devisee.
15. Duress.
16. Excess of Quantity.
17. Failure to make Proof.
18. Final Proof.
19. Fraudulent Entry.
20. Heirs of Deceased Homesteader.
21. Insane Claimant.
22. Joint Cash Entry.
23. Land Officers.
24. Loss of Crops.
25. Married Women.
26. Minor Entryman.
27. Patented Lands.
28. Preference Rights.
29. Presumption of Death.
30. Previous Contest.
31. Private Entry.
32. Purchase.
33. Quarter Section.
34. Relinquishment.
35. Residence.
36. Right of Purchase.
37. Second Entry.
38. Settlement.

## II.—HOMESTEADS—Continued.

39. Transferee.
40. Unlawful Inclosure.
41. Widow of Deceased Soldier.

## III.—INDIAN LANDS—

1. Kansas Trust and Diminished Reserve Lands.
2. Ottawa and Chippewa in Michigan.
3. Winnebago Homesteads.

## IV.—INSTRUCTIONS—

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4. Examination of Records.
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## V.—MILITARY RESERVATION—

## VI.—PRACTICE—

1. Affidavits.
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4. Attorney.
5. Certiorari.
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7. Examination of Record.
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## VII.—SOLDIERS' ADDITIONAL HOMESTEADS—

1. Certificate.
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## VIII.—SOLDIERS' ORPHANS—

## IX.—TIMBER CULTURE—

1. Acts of Public Officers.
2. Affidavits.
3. Aliens.
4. Amendment.
5. Amicable Agreement.
6. Application to contest.
7. Attorney.
8. Breaking.
9. Change of Entry.
10. Character of Land.
11. Contests.
12. Cultivation.

## IX.—TIMBER CULTURE—Continued.

13. Deserted Wife.
14. Entry by Officer or Clerk.
15. Excess of Quantity.
16. Fraudulent Entry.
17. Offer to file.
18. Place of Official Business.
19. Preference Right.
20. Quantity Allowed to be entered.
21. Relinquishment.
22. Second Entry.
23. Size of Trees.
23. Speculative Purposes.

## X.—TIMBER AND STONE ACT—

1. Married Woman.
2. Minor.
3. Non-contiguous Tracts.
4. Preliminary Affidavit.

## XI.—TIMBER LANDS.

## XII.—UNSURVEYED LANDS.

## XIII.—VALENTINE SCRIP.

## 1.—DESERT LANDS.

## 1.—CHARACTER OF LAND.

## RECLAMATION—IRRIGATION.

## LAY v. HUNTER.

In view of the evidence, the land in question is held to be non-desert in character. The evidence further shows that no effort to reclaim or irrigate the land was made prior to initiation of contest.

*Acting Commissioner Harrison to register and receiver, Bozeman, Mont., June 7, 1883.*

GENTLEMEN: In the matter of the contested case of Lay *v.* Hunter, involving the question of the validity of desert-land entry No. 15, made at your office by Irving Hunter, October 16, 1878, upon Sec. 6, T. 3 S., R. 5 E.

The record shows that by letter of April 3, 1882, you transmitted the application of Nathan C. Lay to contest the validity of said entry upon the ground that the lands embraced therein are not desert in character, and the applicant had failed to comply with the law in regard to reclamation. A hearing was accordingly ordered by this office by letter dated July 7, 1882.

Under date of December 14, 1882, you transmitted to this office the testimony and papers submitted upon such hearing, together with your joint opinion thereon. You state in your opinion, in substance, that you are unable to determine whether the land is desert or not in view of the fact that no attempt has been made to raise crops thereon. You state, however, that if you were to decide that question by applying

the testimony in relation to other lands in the vicinity of that in question you should decide that the land covered by said desert entry is not desert land.

Upon the question of reclamation of the land you state that, "the case upon this point must be decided against him, reference being made, however, to the fact that November 5, 1881, he applied for an extension of time in which to reclaim the land."

You finally "decide and recommend that said contest be dismissed, and that further action in relation to said entry be suspended, in view of the fact that Congress has been asked to amend the desert land act by granting additional time for reclaiming lands entered under said act.

The contestant, Nathan C. Lay, having appealed from your decision, the case comes now before this office for consideration on such appeal.

\* \* \* \* \*

It appears that agricultural crops have been raised without irrigation upon land of the same general character and near that in question, and it appears that the land embraced in said desert entry produces grass suitable for hay.

Under date of July 3, 1882, the honorable Secretary of the Interior held as follows in the case of *Wood v. Meyer*:

While irrigation improves the crops on these lands, it is not essential to their production; and if any agricultural crop will grow thereon, although of an inferior quality, it is not subject to entry as desert land.

I am of the opinion that the testimony in this case establishes the non-desert character of the land in question.

But were the land desert in character, the evidence shows an entire want of good faith by Hunter in the matter of reclamation of the same. The hearing was had August 14, 1882, nearly four years after the entry was made, and the testimony shows that the land had not then been reclaimed by irrigation.

The period allowed by law for reclaiming said land expired October 16, 1881. On the 5th day of November, 1881, Mr. Hunter applied to have the time extended one year; but the testimony shows that nearly all the work of constructing ditches was performed after Mr. Lay filed his application to contest the validity of said entry.

In view of the foregoing, said desert entry is held for cancellation.

Advise Mr. Hunter of this decision, and that sixty days are allowed for appeal.

*IRRIGATION—HUSBANDRY—DEFINITION OF “CROP”.***BABCOCK v. WATSON ET AL.**

Lands that one year with another for a series of years will not, without irrigation, make a fair return to the ordinarily skillful and industrious husbandman for the seed and toil expended in endeavoring to secure a crop, are desert lands within the law.

The term “crop” means such an agricultural production as would be a fair reward for the expense of producing it.

*Acting Secretary Joslyn to Commissioner McFarland, August 7, 1883.*

SIR: I have examined the case of Chester Babcock *et al. v.* David Watson, Samuel N. Watson, and George Thompson, involving the validity of the following desert-land entries, to wit: \* \* \* Susanville, Cal., on appeal from your decision of January 13, 1881, maintaining the desert character of said lands.

These lands are situated in Lassen County, State aforesaid. The entries are contested upon the ground that the lands embraced therein are not desert in character, and no other question is presented by the case.

The testimony submitted is voluminous and conflicting, and in some respects difficult to reconcile.

After the taking of testimony had closed, and at the time of filing counsel's brief for contestant, packages of grass and grain were presented at the local office, accompanied by affidavits alleging that such grass and grain grew upon the land in controversy. Such testimony was not considered at the local office, but was transmitted with the record. The opposite party had no opportunity for cross-examination, or for putting in rebutting proofs; and objection being made to receiving the testimony, it cannot properly be considered. I have, however, considered it in connection with the contestant's suggestion that a further hearing should be ordered in the case.

The tracts are situated in a section of country largely composed of desert lands.

The proofs show that the lands in controversy are mostly sage-brush lands. The testimony is made up very largely of the opinions of the witnesses as to whether the tracts in controversy will “without irrigation produce some agricultural crop.” These opinions are based upon an examination of the soil in respect to its composition and moisture, and observation and experience as to raising crops upon lands of similar character. This has led to considerable discussion as to the amount of the “agricultural crop,” which within the meaning of the statute the land was capable of producing “without irrigation,” in order to save it from being classed as desert land.

Section second of the desert-land act provides:

That all lands, exclusive of timber and mineral lands, which will not

without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this act.

Reference is made by contestants' counsel to my decision of July 3, 1882, in the case of *Wood v. Myer*, in which it was said that "if any agricultural crop will grow thereon, although of an inferior quality, it is not subject to entry as desert land." And from this it is argued that "It is not a question of quantity or of quality, but of capability to produce at all."

Neither the statute nor the decision cited are susceptible of so narrow a construction.

It is undoubtedly true, as claimed, that a large part of the agricultural lands situated in the States and Territories named in the act would be greatly improved, and more abundant crops obtained by means of irrigation; but without irrigation such lands are not therefore desert. It is not necessary, however, that the lands without irrigation should be so sterile and barren that they will not "produce at all." If the lands, one year with another for a series of years, will not without irrigation make a fair return to the careful, ordinarily skillful, and industrious husbandman for the seed and toil expended in endeavoring to obtain a crop, the land may justly be regarded as desert, within the intent of the statute. The crop may be an inferior one, but the land should return a fair compensation for the labor and money expended upon the crop. If such a return cannot be had, the lands would, after trial or without, remain unoccupied and desert. Those lands that will not pay for cultivation or use without irrigation are within the scope of the act. The expression "*some* agricultural crop" does not refer solely to the amount of the crop: it also refers to kind. It may be grass, it may be wheat or barley, or some other crop to which the country and climate in the region of the land are generally adapted. If it will produce some crop of a kind and an amount sufficient to make the cultivation reasonably remunerative, it is not desert.

Force must be given to the term "crop" used in the act. It has a definite meaning; and in the sense in which it is used, it means such an agricultural production as would be a fair reward for the expense of producing it.

The Government grants these desert lands at the usual price, \$1.25 per acre. It grants them in amounts larger than under the pre-emption and homestead laws, because the lesser amount would not justify the outlay of capital necessary to bring water to them. The soil of these lands is presumed to be good, from the price placed upon them by the Government. Such a soil might in some seasons produce even a fair crop without irrigation, but in most seasons would produce a growth that, considered as a crop, would afford no adequate compensation for the expense bestowed upon it.

When the testimony shows, as in this case, that the class of land is such that without irrigation it fails year after year to return even the

seed, and the growth of grain sown is so poor as to be cut for hay, the land may properly be regarded as desert within the statute.

This testimony in the case is corroborated by the physical character of the country. In 1875 (before the passage of the present and more general act), Congress passed a special act, relating only to Lassen County, providing for the sale of desert lands in that county (18 Stat., 479). Lassen County lies within the section of county designated by Powell as the "arid region." "In all this region the mean annual rainfall is insufficient for agriculture." (*Powell's Lands in the Arid Region*, page 5.)

As near as I am able to ascertain from an examination of the tables and charts accompanying Powell's report, the mean annual rainfall in that section does not exceed 20 inches. "The limit of successful agriculture without irrigation has been set at 20 inches; that the extent of the arid region should by no means be exaggerated, but at 20 inches, agriculture will not be uniformly successful from season to season. Many droughts will occur; many seasons in a long series will be fruitless; and it may be doubted whether on the whole agriculture will prove remunerative." (*Ib.*, page 3.)

Even with this amount of rain, much depends upon whether the rainfall is evenly distributed. If it is unevenly distributed, so that a "rainy season" is produced, the question whether agriculture will be successful without irrigation then depends upon the time of the "rainy season," and the amount of rainfall during that season. (*Ib.*, page 2.)

The good faith of these claimants is shown by the large amount expended by them in building a dam, and constructing ditches for the purpose of irrigating the lands. One of such ditches is 6 miles in length, and the amount expended by one of the claimants is \$1,500, and considerable sums by the others. I am satisfied from the testimony that the lands are desert in character within the meaning of the act under a fair interpretation, and that the lands cannot be successfully cultivated without irrigation.

The cases have been long pending, and the controversy in relation to them should be ended; and I must decline to allow any further hearing therein.

The testimony seems to have been carefully considered by the register and receiver, and by your office, and the same result was reached in both cases as to the desert character of these lands. I concur in the conclusion thus reached, and affirm your decision.

**2. FRAUDULENT ENTRY.****ASSIGNMENT.—FRAUD.****JOAB LAWRENCE.**

Where three desert-land entries, aggregating 1,760 acres, were assigned on the day they were made to a third party, and the evidence shows that they were really made for the benefit of the assignee, the entries are held to be illegal, because in violation of the provision of the law which restricts one person to an entry of 640 acres. The entries are held to be fraudulent.

*Secretary Teller to Commissioner McFarland, April 24, 1884.*

SIR: I have considered the appeal of Joab Lawrence from your decision of June 22, 1883, cancelling desert-land entries Nos. 76, 77, and 78, made respectively by Joseph Wise, John Lawson, and Edmund Bird, upon certain tracts in the Salt Lake City, Utah, land district.

Lawrence claims to be the legal assignee of these entrymen, entitled to all their rights and to receive patents for the tracts in his own name.

The act of March 3, 1877 (19 Stat., 377), authorizes any citizen of the United States or any person of requisite age who has filed a declaration of intention to become a citizen, on payment of 25 cents an acre, to file a declaration in the proper local office that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within three years thereafter, and that at any time within such three years, upon satisfactory proof to the local officers of the reclamation of the tract, and upon payment of the additional sum of \$1 per acre for a tract not exceeding 640 acres to any one person, a patent shall be issued to him:

*Provided,* That no person shall be permitted to enter more than one tract of land, and not to exceed 640 acres, which shall be in compact form.

Your circular instructions of March 12, 1877, required as preliminary to the filing of such declaration satisfactory proof in writing by at least two *disinterested* and credible witnesses, that the land applied for was of the character contemplated by the act, whereupon the local officers, upon payment of the 25 cents per acre, were authorized to receive and file the declaration and to issue a certificate to the effect that if within three years therefrom the entryman, or *his assignee* or his legal representatives, should prove reclamation of the land and pay the additional \$1 per acre, *he or they* should be entitled to receive a patent therefor, under *the provisions of the act*, and that at any time within three years from the date of the declaration the *proper party* may make satisfactory proof of having conducted water upon the land.

The declarations in question were each filed, and the 25 cents per acre was paid, *May twenty-fourth, eighteen hundred and seventy-seven*; the proof in the case of Wise, who applied for 480 acres, consisting of the affidavits of Bird and the appellant, *Joab Lawrence*; that in the

case of Lawson, who applied for 640 acres, being the affidavits of Bird and *Lawrence*; and that in the case of Bird, who applied for 640 acres, being the affidavits of Wise and *Lawrence*. (The latter affidavit was prepared for the signature of Lawrence, although, through mistake probably, he omitted to sign it. That he was sworn as a witness for Bird appears from the certificate of the local officers that the "above *witnesses* are credible and respectable persons;" but in view of the facts I cannot think he was a "*disinterested*" witness, as required by your circular.) Upon the same day a certificate was issued to each of the entrymen, certifying that if he, or his *assignee* or legal representatives, should make proof of the reclamation and pay the additional sum required within three years from that date, he or they should be entitled to patent under the provisions of the act; and upon the same day each certificate was assigned to Lawrence, and he was authorized to receive a patent for the lands, the assignment by Lawson being witnessed by *himself* and Bird; that in the case of Wise by Bird and another, and that in the case of Bird by Wise and another; and a marginal note of each assignment was entered on the record as follows: "Assigned to Joab Lawrence May 24th, 1877."

It also appears that upon the same May 24th Wise and Lawson were each made citizens of the United States, apparently under section 2167 of the Revised Statutes, without having previously filed the declaration of intention to become a citizen required by section 2165.

Pursuant to your instructions of August 28, 1880, each of these entrymen was notified to show cause why his entry should not be canceled for failure to comply with the law, but neither filed (nor did Lawrence) objection to the cancellation. October 14, 1882, the local officers transmitted to you the separate affidavits of one Hoyer, one Free, and one Fox, alleging that no steps had been taken for reclamation of the lands in question, and applying for leave to contest the validity of each entry; and November 10th and 11th following you held the entries for cancellation, but allowed the entrymen sixty days within which to state the character and extent of their efforts to reclaim the land. They made no response, but subsequently Lawrence filed an affidavit (and still later others) to the effect that by virtue of his assignments he had made efforts to reclaim the land, and had expended therein several hundred dollars, and that he did not know of the cancellations until January 10, 1883; but it is admitted that no part of the land embraced in either entry was reclaimed within said three years. The case also fails to show that any *bona fide* effort was made to such end by any one within that time, or that either of the entrymen has been heard of in connection with their entries since the dates thereof. So far as they are concerned, they have wholly abandoned the case, whether as parties or witnesses.

Your decision holds that under my predecessor's decision of April 15, 1880, in the case of Downey (Copp v. 7, p. 26), desert-land entries

are not assignable, and that Lawrence acquired no right by his assignments.

It is not necessary to consider this question, nor the want of harmony between my predecessor's decision and your circular of March 12, 1877, because these entries were, in my judgment, wholly in violation of law. The act of March 3, 1877, limits an entry by one person to 640 acres. These three entries aggregate 1,760 acres, and under the facts the conclusion seems to me irresistible that they were each made for the benefit of Lawrence, he using the entrymen for doing that which he alone could not do. But one is not permitted to do and accomplish indirectly, under a statute, that which he cannot do directly, and thus defeat its policy and purpose. This whole transaction manifests an unmistakable purpose on the part of Lawrence to acquire 1,760 acres of land, when the law restricts one person to an entry of 640 acres, and is in fraud of the act.

In view of the whole case, showing that the entries were, in fact, made for the use and benefit of Lawrence, but in the names of the entrymen, and that the lands were not reclaimed within the time allowed therefor, I affirm your decision.

Motion for reconsideration denied by Secretary Teller June 30, 1884.

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### 3. RELINQUISHMENT.

#### *PURCHASE—REINSTATEMENT—NOTICE.*

**JOSEPH WILLIAMS.**

Reinstatement of entries at request of third parties refused.

Purchasers before patent take with notice of all defects, and of contingency that title may not be perfected.

The Government cannot undertake to enforce private contracts by giving substance to an empty conveyance.

*Commissioner McFarland to Curtis & Burdett, Washington, D. C., February 21, 1883.*

**GENTLEMEN:** On September 6, 1882, you filed a motion in this office to reinstate Eureka, Nev., desert-land entry No. 158, made by Joseph Williams, May 19, 1879, and cancelled by relinquishment August 4, 1882.

You also desired that your letter should be treated as a protest against the approval of the selection made by the State of Nevada upon the application of the said Williams, which application embraces a certain eighty-acre tract in question.

In this proceeding you appear as attorneys for Messrs. F. O. Matthiessen and L. B. Ward, who claim to have derived certain interests in said land from Williams through intermediate parties.

Mr. Williams, by his attorney, protests in his turn against the re-

instatement of his desert-land entry, which he states he voluntarily relinquished for the reason that he could not comply with the law.

You file statements showing the nature of the transactions between the New Philadelphia Silver Mining Company and Mr. Williams, and a copy of a deed from Williams purporting to convey to said company whatever rights he possessed to the eighty acres in question, the consideration mentioned being the sum of \$5,000.

You state that the land is used as a site for a stamp mill which has been erected thereon at a cost of over \$50,000, and that by the failure of Williams to obtain title under his desert-land entry, and his ultimate relinquishment of that entry, your clients have been defrauded.

Mr. Williams upon his own part submits a statement of the business transactions referred to, and sets up certain claims of his own against opposite parties to the individual controversy.

With these personal matters this office can have nothing to do. The only questions that can arise in respect to desert land entry No. 158, are whether said entry was properly canceled, and, if so, whether there is good cause shown for its reinstatement, or any proper application before me which could be considered in that behalf.

The relinquishment and cancellation of the entry are in due form, and all the proceedings appear to have been regular.

It is admitted by the party to the entry that the land was not reclaimed. He does not ask for the reinstatement of his entry, and no other person is authorized to make such application in his name. Neither does any cause appear why the entry should be reinstated on its merits.

This office cannot undertake to enforce the obligations of private contracts by attempting to compel a party to take title to land which he does not desire, and to which he has no legal claim.

It is an established principle in the administration of the land laws that purchasers before patent take with notice of all defects, and of the contingency that title may never be perfected.

They are not innocent purchasers, and if their conveyances prove empty they can have no recourse upon the Government to give substance thereto.

The doctrine laid down by Mr. Justice Miller in the case of *Root v. Shields* (1 Woolworth C. C., 342), has been uniformly recognized and followed as the correct rule of law applicable to such cases.

The question of the validity of the State selection will be determined in due course of action thereon by this office.

**4. SETTLEMENT.***CONTINUOUS RESIDENCE—OCCUPATION.***BARROTT v. LINNEY.**

A party who placed on a desert-land claim a few timbers loosely outlining a house, and then moved away to engage in business elsewhere, can claim no rights as a settler on the land when the desert-land entry is cancelled. A naked settlement, without continued residence or other evidence of occupation, is not such a continuous claim to the land as would, after cancellation, have any legal effect.

*Acting Secretary Joslyn to Commissioner McFarland, July 30, 1883.*

SIR: I have considered the case of Leonard Barrott v. Perry Linney, involving the NW.  $\frac{1}{4}$  Sec. 22, T. 2 S., R. 5 E., Bozeman, Mont., on appeal from your decision of July 5, 1882, awarding the land to Linney.

The record shows that said tract had been covered by the desert-land entry No. 3 of one Russell, and that Linney went upon it while so reserved and placed there a few timbers loosely outlining a house; he did not establish his residence on the land, but shortly afterward went to Rocky Cañon, built a house, moved his family into it, and engaged in cutting and selling timber. The desert-land entry was cancelled at the local office on November 17, 1881, and on November 23, 1881, Barrott made homestead entry No. 313 for said tract. On November 28, 1881, Linney, who had never been in possession of the land, and had performed no act of settlement other than that above mentioned, made application to enter it as a homestead, and his application was rejected by the local officers because of the entry already of record. You reversed their action, directed the cancellation of Barrott's entry, and sustained Linney's claim of a preference right under section 3 of the act of May 14, 1880.

If Linney had any such right, he must have acquired it in the character of a settler, "who has settled upon the public lands of the United States," as the act referred to provides; but, being covered by a desert-land entry at the time he placed the timbers upon it, the tract was not public land. As this was the only act of settlement performed by him, it follows that he was not a settler upon the public lands within the meaning of the section cited, and therefore that he had no preference right of entry. The "acts of settlement on the land before the cancellation of the prior entries were without authority of law; he was without its protection, had no legal status, and gained no rights thereby." (*Porter v. Johnson*, 3 Copp's L. O., 37.)

Your decision, however, is based on the theory that "his settlement right took effect simultaneously with the Russell entry cancellation;" but from this I am compelled to dissent, for the reason that a naked act of settlement, not followed by residence or other satisfactory evidence of occupation, is not such a continuous claim to the land as that, after cancellation, it can have any legal effect. The said section extends to

homestead settlers certain privileges heretofore attached to pre-emption settlers, and it is a rule that, in relation to "the doctrine that the right of pre-emption attaches *eo instante* (upon cancellation), it only operates, so far as the claimant is concerned, upon land in his possession." (*Corrigan v. Ryan*, 4 Copp's L. O., 42.)

Your decision is therefore reversed, and Barrott's entry will remain intact.

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## II.—HOMESTEADS.

### 1. ABANDONMENT.

#### CONTEST—MORTGAGE—RESIDENCE.

##### ROACH *v.* FLEMMING.

The testimony fails to show that the homestead claimant has abandoned his claim.

*Commissioner McFarland to register and receiver, Sacramento, Cal., July 11, 1882.*

GENTLEMEN: I am in receipt of your letter of May 20, 1882, transmitting the testimony submitted in the case of *John Roach v. George W. Flemming*, involving homestead entry No. 3342, covering the W.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 27, T. 5 N., R. 11 E. The entry was made June 2, 1881; the contest alleging abandonment was initiated January 17, 1882, and the hearing held before you March 7, 1882. You decided in favor of the claimant, from which decision the contestant appeals.

From the testimony submitted it appears that there is a small house or cabin on the land, an orchard of some 2 acres, and about 35 acres of the land inclosed with a wire fence, about 10 acres of which were sowed in wheat in December, 1881.

Mr. Flemming swears that he was residing on the land at date of entry, having built his house in 1879, that he remained on the land from June 2, 1881, until August 27, when he went to Stockton and worked at his trade, returning to the land three times in September, twice in October, three days in November, and from January 1, 1882, he has been on the land once a week. He swears that he has never abandoned his claim nor acquired a residence elsewhere; that his household effects were left in his house and that it is his only home; that having no team he hired the plowing and sowing of the wheat done. His testimony, as to residence, is in the main corroborated by two witnesses.

The contestant and his two witnesses swear that they did not see the claimant on the land between June 2, 1881, and January 17, 1882; that the land cultivated in December, 1881, was done in the interest of Mrs. Jane O. Green. None of the contestant's witnesses have been in the house, on the land, since day of entry.

There were introduced as evidence two deeds, one from Flemming to Jane O. Green, dated August 19, 1881, quitclaiming the land in question, and one dated January 3, 1882, from Mrs. Green, reconveying the land to Flemming. Mr. Flemming swears that the first deed was considered as a mortgage to secure Mrs. Green for money loaned him, most of which was expended in building the wire fence; that he paid her money at different times; and on January 3, 1882, he made final payment, and she therefore deeded the land back to him.

In this connection I will state that I am in receipt of a letter from the contestant's attorneys, Reddick and Solinsky, dated San Andreas, Cal., the 19th ultimo, inclosing certain affidavits, and asking for a rehearing, on the ground of a relinquishment by Flemming, purporting to have been executed by the local officers at Stockton, and which you failed to take cognizance of. Admitting the allegations contained in said affidavits to be true, it would not affect the case, as the subsequent action of the claimant shows that he has not abandoned his entry, and I must, therefore, decline to order a rehearing.

I concur in your joint opinion, holding that abandonment has not been proven, and you will so advise the parties in interest, allowing sixty days within which to appeal, and in due time report action to this office.

(Decision affirmed by Secretary Teller, June 23, 1883.)

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## 2.—ABSENCE.

### *ACT OF JUNE 4, 1880—CONTEST—PRACTICE.*

#### *GRiffin v. MARSH AND DOYLE v. WILSON.*

The homestead settlers having given notice of absence under the act of June 4, 1880, contest is dismissed, as, six months after, their authorized leave of absence had not expired, and abandonment is the only ground upon which the contest was brought.

Two separate cases should not be forwarded to the Secretary from the Commissioner in one letter of transmittal.

*Secretary Teller to Commissioner McFarland, April 27, 1883.*

SIR: I have considered the case of Thomas I. Griffin *v.* Eustace K. Marsh, involving the NW.  $\frac{1}{4}$  of Sec. 15, T. 3, R. 30; also the case of James B. Doyle *v.* John Wilson, involving the SW.  $\frac{1}{4}$  of Sec. 7, T. 4, R. 31, Oberlin district, Kansas, on appeal by Griffin and Doyle from your adverse decision of April 29, 1882.

It appears that Marsh made homestead entry No. 6146, April 23, 1878, of the former tract, and that Griffin filed affidavit of contest against the same August 22, 1881, alleging abandonment and change of residence "for more than six months since making said entry." June 26, 1880, Wilson made homestead entry, No. 15275, of the latter

tract, and under date of October 1, 1881, Doyle filed affidavit of contest alleging the same grounds therefor. Hearing was had in each case December 13, 1881, pursuant to published notice; but only the contestants appeared.

Upon the *ex parte* testimony adduced at the hearing, the register and receiver recommended that both entries be canceled. Although neither Marsh nor Wilson appealed from such action, both contestants appealed from your decision dismissing the contests, whereby they would be estopped from interposing a plea to the jurisdiction of this Department, even if notice had been brought home to the defendants, which was not done.

Your decision was based on the ground that the contestants alleged no abandonment for more than six months, exclusive of the period during which the defendants were legally authorized to be absent from their claims, nor did they allege any fraudulent absence by the defendants under their extensions.

It appears that they availed themselves of the provisions of the act of June 4, 1880 (21 Stat., 543), whereby homestead settlers on the public lands in Kansas and Nebraska west of the sixth principal meridian were permitted to be absent from their claims until October 1, 1881, where there had been a loss or failure of crops from fortuitous causes in the year 1879 or 1880. And the act further provided that "during said absence no adverse rights shall attach to said lands, such settlers being allowed to resume and perfect their settlement as though no such absence had occurred."

These defendants having regularly applied for such leave of absence pursuant to the rules and regulations prescribed by your office by virtue of the act, were therefore constructively residing on their claims until October 1, 1881; hence it was not competent for these contestants to initiate proceedings against them upon the alleged ground of abandonment during such absence. The reversion to the Government of land so entered could not accrue in the premises, by virtue of the provisions of section 2297 of the Revised Statutes, until the expiration of the period of six months from October 1, 1881, or until April 1, 1882. But these contestants having elected their grounds of contest are thereby precluded from showing any other abandonment than as alleged.

Your decision is therefore affirmed.

It should be observed, however, that although these cases are between different parties and involve different tracts you nevertheless submit them by your letter of September 26, 1882, by reason whereof they have been docketed in this Department as one case. This is bad practice, tending to confusion. You will therefore hereafter transmit each case separately.

Wilson having relinquished his right and title in the premises, you will accordingly take proper action thereon.

**3. ADDITIONAL ENTRY.***ACT OF MARCH 3, 1879.***THOMAS E. SMITH.**

Notwithstanding the original entry post-dates the act by three months, an additional entry is allowed.

*Commissioner McFarland to register and receiver, Huntsville, Ala., October 19, 1883.*

**GENTLEMEN:** I am in receipt of yours of August 8, 1883, transmitting for instructions the application of Thomas E. Smith, to enter under act March 3, 1879, the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 12, 12 S., 7 E.

The records show his original entry, No. 9363, for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , same description, to have been allowed three months subsequent to the act, to wit: June 10, 1879. The affidavit and application, however, bear date November 1, 1878. Claimant swears that the difference as to dates is due to the fact that the land was covered by a prior entry that was not cancelled until June 3, 1879. The act of March 3, 1879, is in a legal point of view, operative from its date, and is of itself constructive notice to all. Entries made subsequent thereto, were not restricted to 80 acres; consequently this class of settlers are not, by law, beneficiaries of said act. But this office construes the law, as applied to the settler, in an equitable spirit, especially this particular statute, and allows a few months to elapse for the promulgation thereof. Therefore, under the circumstances, I am of the opinion that the fact that the entry post-dates the act, is no bar to an additional entry.

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**DECEASED CLAIMANT—ATTORNEY—DELIVERY OF CERTIFICATE.****JAMES BROWN.**

The certificate in this case must be delivered to the attorney appointed by the deceased soldier, and not to the attorney of the widow.

*Secretary Teller to Commissioner McFarland, October 30, 1883.*

**SIR:** I have examined the matter of the additional homestead of James Brown, on appeal by Elizabeth Brown from the decision contained in your letter of July 2, 1883, addressed to Messrs. Heylmun & Kane, rejecting the application made by said attorneys in behalf of Elizabeth Brown.

It is alleged that James Brown, a qualified soldier, having completed an original homestead entry in 1874, for 40 acres, became entitled, under the provisions of section 2306 of the Revised Statutes, to an additional homestead of 120 acres.

On January 14, 1875, under a power of attorney executed in due form to A. A. Thomas, the right to such additional homestead was exercised by application for a tract of land situate in what was formerly the bed of Wolf Lake, Ill., described as the SE. fractional  $\frac{1}{4}$  of sec. 20 west of State line, 62.52 acres.

The application was involved in the Wolf Lake contest, but upon the decision of this Department Mr. Thomas and other parties were notified that the applications would be received, and accordingly said Brown's application was filed before you by Thomas on the 31st day of July last, and the fees and commissions paid.

The power of attorney was coupled with an interest, and said Elizabeth Brown, wife of James Brown, joined in its execution.

Said James Brown died on the 15th day of January, 1881, and on the 7th day of October, same year, Elizabeth Brown, as his widow, made application for an additional homestead entry and to have her rights certified under the rules.

Section 2307 provides that "in case of the death of any person who would be entitled to a homestead under the provisions of section 2304, his widow, if unmarried, \* \* \* shall be entitled to all the benefits enumerated in this chapter."

It is claimed by counsel for Mrs. Brown that the husband died without a legal exercise of his statutory privilege, and the right, being a personal one, died with him.

Under the facts stated I approve your ruling that the attorney Thomas is entitled to the possession of the certificate, and that it should be held subject to his order.

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*AUTHORITY OF SECOND ATTORNEY—PRACTICE.*

*JOSHUA FARMER.*

An attorney acting under a power, as described, may delegate his authority directly to a second person, but not indirectly, through the medium of some other person. The second attorney of record cannot utilize the proof filed by the first attorney, but he must procure and file the required evidence himself.

*Acting Secretary Joslyn to Commissioner McFarland, January 25, 1884.*

SIR: I have considered the appeal of J. Vance Lewis from your decision of March 27, 1883, declining to recognize him as attorney in the matter of the pending application of Joshua Farmer for certification of his right to make additional homestead entry of 120 acres of land, under section 2306 of the Revised Statutes.

From your letter of refusal it appears that additional homestead entry No. 1584 (Sacramento, Cal., series), in favor of Farmer, was canceled by your office February 20, 1879, for conflict with pre-emption cash entry No. 2003.

August 6, 1879, Messrs. Heylmun & Kane filed in your office an order from N. P. Chipman, dated at "Red Bluff, Cal., July, 1879," requesting that certificate of Farmer's additional homestead right (the papers in whose case he had filed as attorney) be delivered to them as his (Chipman's) attorneys. January 14, 1881, Lewis filed in your office certain papers in Farmer's name, and February 23 ensuing a power of attorney from him authorizing Lewis as his attorney in fact to procure the certification of his right, and expressly revoking "all former powers of attorney or authorizations whatever in the premises."

November 22, 1881, you advised Heylmun & Kane that the matter would be held in abeyance until the party in interest should file in your office the duplicate homestead receipt, No. 1584, of the canceled entry, and that unless they could establish their authority to represent the original attorney of record and the right accruing from said entry, the certification, if any, would be made through Lewis as Farmer's attorney. December 30 ensuing said attorneys accordingly filed said receipt, and February 25, ensuing, a paper executed by Farmer March 23, 1876, reciting that he had on the — day of —, A. D. 1875, executed a "power of attorney, creating Charles D. Gilmore" his attorney in fact, &c., and expressly ratifying and confirming "all and singular the acts done or to be done by my said attorney in pursuance of either or both of said powers of attorney."

Upon this state of facts you expressed the opinion that "Messrs. Heylmun & Kane are the proper representatives of the canceled entry, and that they are the proper and first attorneys of record," through whom the certification of the right in question should be issued.

It should be observed, however, that although Farmer appears to have duly ratified the original power executed some time in the year 1875 to Gilmore, the record fails to discover any delegation of power by him to Chipman, who does not therefore appear to be duly accredited or authorized to act in Gilmore's stead. Hence Chipman's authorization to Heylmun & Kane to receive the certification of Farmer's right is insufficient. While Gilmore could delegate such power directly to Heylmun & Kane it would not be competent for him to do so indirectly, through the medium of Chipman or any one else. He having failed to establish his privity with Gilmore his order to your office in favor of Heylmun & Kane cannot be recognized; and unless such privity shall be satisfactorily established within a reasonable time all the evidence filed by or through them should be returned without prejudice to Farmer's right in question.

It is true Lewis has filed a power of attorney direct from Farmer, but he has done nothing thereunder in furtherance of his principal's right, and is not therefore entitled to recognition by this Department as against the attorney in fact under the senior power. It is not competent for Lewis to utilize the evidence filed by the latter, but it behoves

him to produce and file the requisite evidence himself. His appeal is therefore dismissed.

Your decision is accordingly modified, and the papers submitted by your letter of July 13, 1883, are herewith returned for such disposition as the exigence of the case may in your judgment seem to require.

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*SECOND ATTORNEY—DELIVERY OF CERTIFICATE.*

**D. H. TALBOT AND AMBROSE R. CRAFTS.**

Where a soldier's original homestead entry was cancelled, and his attorney's acts can be construed as abandoning his application for an additional homestead certificate, a second attorney, who is given a power of attorney after the original entry is reinstated, should receive the certificate when issued for the additional homestead right.

*Acting Secretary Joslyn to Commissioner McFarland, March 17, 1884.*

SIR: I have considered the appeal of D. H. Talbot from your decision of July 2, 1883, declining to recognize him as attorney of Ambrose R. Crafts, claimant for certification of the right to an additional homestead under section 2306 Rev. Stat.

It appears that Crafts made an original homestead entry in 1868, which was canceled by your office in 1875, for conflict with a railroad grant. On March 25, 1878, Talbot, through W. C. Hill, his agent, filed Crafts' claim for the additional homestead; but on June 21, 1878, he instructed said Hill to withdraw it, and on Hill's request the claim was rejected, and the papers returned to him on August 27, 1878.

Meanwhile Crafts had applied for reinstatement of his entry, and the reinstatement was made on December 3, 1879. In this matter neither Hill nor Talbot were his attorneys.

After the filing of the application for reinstatement, namely, on April 21, 1879, J. V. Lewis, of this city, filed Crafts' claim for the additional homestead, and was duly recognized as his attorney. On June 30, 1879, Hill refiled the application which he had withdrawn as aforesaid. Subsequently Lewis filed a power of attorney from Crafts, dated March 30, 1880, revoking all former powers, and authorizing him to prosecute the claim and receive the certificate. And thereafter Hill filed a power of attorney from Crafts, dated February 20, 1878, authorizing him to prosecute the claim and receive the certificate.

On these facts it is clear that Crafts did not have on file a claim for additional homestead, on April 21, 1879, when Lewis filed one, and that your office was justified in recognizing Lewis as his attorney, and, having recognized him, in refusing to recognize Talbot when the rejected claim was resubmitted. I think that the conditions were not changed when the two powers of attorney were subsequently filed. Talbot's is the earlier, but the claim which Crafts authorized Talbot to file had been dis-

posed of—rejected by Talbot's own request, who prejudged the case without waiting for your office to take it up in its regular order. By Talbot's correspondence, filed with the record, it appears that he instructed Hill to withdraw the claim because, being unassignable, he could make nothing out of it; that he sent the claim and power of attorney to his agent at Crafts' home, with instructions to deliver it to him on repayment of certain moneys which he (Talbot) had advanced to him (Crafts) upon a contract to assign the certificate when issued; and that these facts were made known to Crafts by said agent, though the papers were never in fact delivered to him, whilst it was also known to Talbot that Crafts had applied to other attorneys for legal advice in regard to said claim. I am of opinion that Talbot's action was not only a notice to Crafts that he had abandoned the prosecution of the claim, but that it operated as a revocation of his power of attorney. Thereafter Crafts was at liberty to appoint another attorney, and, having appointed Mr. Lewis, the latter's power of attorney is entitled to recognition.

Your decision is therefore affirmed.

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*SECOND TIMBER-CULTURE ENTRY IN SAME SECTION—PRIOR SETTLEMENT.*

**THEODORE M. PHELPS.**

Where a homestead entry is allowed because of prior settlement on a tract embraced in a timber-culture entry, a second timber-culture entry will not be allowed on another tract in the same section, nor will the second timber-culture application be suspended to await the consummation of the homestead entry.

*Secretary Teller to Commissioner McFarland, May 17, 1884.*

SIR: I have considered the appeal of Theodore M. Phelps from your decision of September 13, 1883, declining to allow him to make timber-culture entry on the SW.  $\frac{1}{4}$  of Sec. 25, T. 119, R. 66, Huron, Dak.

It appears that one Alexander Gorham made timber-culture entry No. 2,708, on the NE.  $\frac{1}{4}$  of said section on August 27, 1883. On August 30, 1883, Phelps made homestead entry for the same quarter section, alleging settlement prior to date of Gorham's entry, and claiming preference right to the land under Sec. 3, act May 14, 1880. At the same time Phelps made offer to file the timber-culture claim, which was rejected on the ground that the records showed one quarter section in said section already covered by a timber-culture entry.

This action was undoubtedly correct. Gorham's entry appropriated the tract for timber-culture purposes, and reserves it until it is shown that Phelps's homestead right is superior. This may never be shown, and consequently it would be very bad practice to allow another tract in the same section to be reserved by a second timber-culture claim pending adjudication of the rights of the first claimant. Counsel for

Phelps urge that his application should be held in abeyance until the contest is settled; but this would be an equally vicious practice, and in any event would not be an appropriation of the NW.  $\frac{1}{4}$  against third persons.

Your decision is affirmed.

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#### 4. ALABAMA MINERAL LANDS.

*ACTS OF MAY 14, 1880, AND MARCH 3, 1883—INCHOATE RIGHTS.*

JAMES A. JONES.

The act of May 14, 1880, does not apply to homestead settlement on lands not subject thereto. The act of March 3, 1883, touching Alabama mineral lands, confers no rights except in entries already made. All lands heretofore reported as containing coal and iron that appear on the official records as vacant are subject to public sale, &c.

*Acting Commissioner Harrison to register and receiver, Montgomery, Ala., June 8, 1883.*

GENTLEMEN: I have considered the appeal of James A. Jones from your decision of March 17, 1883, rejecting his application to enter as a homestead the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 2, 16 S., 6 E., on the ground that the land is classed as coal, &c.

The evidence shows that said Jones made settlement upon said land in the year 1871; and that he has a dwelling-house thereon and has cultivated one acre; total improvements being valued at \$25.

Appellant grounds his appeal upon the claim that, prior to the passage of the act of March 3, 1883, he had an inchoate right under act of May 14, 1880, to enter said lands with settlement relating back to 1871, thus acquiring a vested right in and to said lands; and that the act of March 3, 1883, was intended as a protection to all vested rights, equitable as well as legal.

Said lands were reported to this office several years ago as valuable for mineral, and ordered to be withheld from disposal except under the mineral-land laws; therefore appellant's position as shown above is not a true one, as the act of May 14, 1880, has no application to a settlement on lands not subject to homestead entry, which was the condition of the land in question. Again, the act confers no right except in cases of entries actually made. Congress has specially legislated for this class of lands, thereby cutting off or defeating any rights that ordinarily would have inured to the settler who had failed to file his application at the local office prior thereto. The act of March 3, 1883, provides that all lands heretofore reported as containing coal or iron shall be offered at public sale, &c., referring to vacant lands, *i. e.*, lands that appear vacant on the records.

Upon a legal construction of the statute I am of the opinion that the

application of Mr. Jones cannot be allowed; therefore your decision is affirmed and the appeal dismissed.

You will notify the party in interest of this ruling and of his right of appeal.

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*RELINQUISHMENT—PUBLIC SALE, ACT MARCH 3, 1883.*

THOMAS J. JACKSON.

In view of the relinquishment of the prior homestead entry the tract in question must be offered at public sale.

*Secretary Teller to Commissioner McFarland, October 1, 1883.*

SIR: I have considered the appeal of Thomas J. Jackson from your decision of June 20, 1883, holding for cancellation his homestead entry No. 13,754, made March 27, 1883, for the W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , 32, 14 S., 7 W., Huntsville district, Alabama.

The tract was reported in 1879 by Special Agent Winters as containing valuable coal, but was nevertheless allowed to be entered under the homestead law by one Thompson, January 3, 1883, whose entry was voluntarily relinquished and canceled March 27, 1883.

The act of March 3, 1883 (22 Stat., 487), provides that all public lands in Alabama shall be subject to disposal as agricultural lands: "Provided, however, That all lands which have been heretofore reported to the General Land Office as containing coal and iron shall first be offered at public sale."

This tract being now subject to disposal as public lands, although coming formally into that condition since the passage of the act, falls within the mention of the statute as having been theretofore reported as containing coal, and there is no force in the intervening entry subsequently canceled to prevent the further direction from applying, viz, that it must be offered at public sale. Your action having been taken for this purpose is affirmed.

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5. AMENDMENT.

*MISDESCRIPTION—ERROR OF LOCAL OFFICERS.*

THOMAS HAMMILL.

The homestead entry in question may be amended so as to embrace a contiguous lot, occupied and improved by the settler, but not previously included through erroneous information given by the local officers.

*Acting Secretary Joslyn to Commissioner McFarland, July 27, 1883.*

SIR: I have considered the appeal of Thomas Hammill from your decision of July 26, 1882, rejecting his application to amend his homestead entry No. 3,046, made July 11, 1879, of lot 15 of Sec. 14, and lots 1 and

2 of Sec. 23, T. 2 S., R. 4 E., embracing therein lot 16 of Sec. 14, Stockton district, California.

It appears from Hammill's affidavit, which is corroborated by those of several other persons, that at the time he made his entry No. 3,046 he desired to include lot 16 in his application, but did not do so because he understood the register and receiver to inform him he could not, as said lot was involved in a pending pre-emption contest; that such contest resulted in the cancellation of both filings; that no one, to the affiant's knowledge, claims said lot, nor does the same contain any improvements save those placed there by and in the peaceable possession of affiant; that he is a citizen of the United States; and that lot 16 is agricultural land.

It was held by this Department, under date of April 2, 1883, in the case of *Neubert v. Midendorf*—

Such amendment is recognized by the practice of the Department to obtain the correction of a misdescription in the original papers growing out of accident or mistake, clerical or otherwise, when the settlement of the party is *bona fide* upon a particular tract, and he is in danger of losing his actual home and improvements.

This is fully considered in *Newcomb v. Block* (2 Copp, 162), where the reasons are elaborated. (Brainard's Legal Precedents, vol. 1, p. 55.)

If the privilege of such amendment be recognized in the presence of an adverse right or interest, I think its recognition in *ex parte* cases—where no such right exists—the more reasonable and just.

Although Hammill's original settlement was not upon the lot in question, it was made in good faith upon the other lots (all of which are contiguous), and his allegations touching his intention to embrace said lot in his application in the first instance stand uncontested, and are therefore presumably true. If the register and receiver advised him, as alleged, that lot 16 was not subject to entry by reason of the pending of said pre-emption contest, his rights in the premises were not thereby prejudiced, because "there is no difference in principle between a case where a filing has actually been placed upon record \* \* \* and a case where the filing has been offered and rejected." His expressing the desire to include lot 16 in his claim may be regarded as an intimation of his intention so to do, and was analogous to the case cited, where a pre-emptor offered to file his declaratory statement, but was not permitted.

You rejected his application for the reason that "the mere fact that lot 16 was covered by conflicting pre-emption filings and that a contest was then pending did not prevent Mr. Hammill from including it in his homestead entry, and as he elected not to do so, he cannot at this late date be allowed to embrace said lot in his entry."

While it is the invariable custom to permit homestead entries of tracts covered by pre-emption filings to be made subject thereto, I do not regard the existence of such custom, *per se*, as a sufficient reason for rejecting Hammill's application. It should be observed that his allega-

tions are unquestioned; and, granting the truth of his allegation, that he was so informed by the register and receiver, it seems quite natural that he should have accepted such official statement as correct and authoritative, and acted accordingly. He appears to have placed substantial improvements upon lot 16 in good faith, having inclosed and cultivated the greater part thereof; and as the same is contiguous to the lots already entered, forming therewith a compact body of land, no part whereof is claimed adversely, I can see no reason for rejecting his application.

Your decision is therefore reversed.

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*ADJACENT FARM ENTRY.*

*JONES v. PINKSTON.*

Where the settler intended to make an "adjoining farm" entry, but by mistake made an original homestead entry, amendment is allowed, notwithstanding a contest for abandonment is pending.

*Secretary Teller to Commissioner McFarland, March 27, 1884.*

SIR: I have considered the case of Jacob W. Jones v. William R. Pinkston, involving the latter's entry for the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , and lots 15, 16, 17, and 18 of Sec. 25, and lots 11 and 12 of Sec. 26, T. 26, R. 6 W., Roseburg, Oreg., on appeal by Jones from your decision of July 7, 1883, dismissing the contest and allowing Pinkston's entry to remain subject to his final proof.

It appears that one Wilson owned a tract of about 31 acres, and intending to enter the tracts in question as an "adjoining farm homestead," entered them by mistake as a homestead. He afterwards sold the 31 acres to Pinkston and relinquished his entry; whereupon Pinkston, intending to enter the tracts as an "adjoining farm homestead," made the same mistake, and entered the tracts July 10, 1882, as a homestead. The error was not discovered either by Wilson or Pinkston until after Jones had commenced (January 16, 1883) a contest against Pinkston for abandonment. Pinkston then (January 29, 1883) alleging the facts—which were duly corroborated—applied to have his entry so amended that it might be treated as an entry for an "adjoining farm homestead," and you granted the same February 20, 1883. Jones had not acquired an adverse right at this date, and the allowance of the application was not within the rule which prohibits an amendment of a filing or an entry after acquisition of such right. It was a matter within your discretion, and, under the facts, I think the amendment was properly allowed. Regarding, therefore, Pinkston's entry as an "adjoining farm homestead" entry and not as a homestead entry, residence on the tracts was not necessary, it appearing that he was resident on the 31 acres. He was not consequently subject to the charge of abandonment, and I affirm your decision.

## CONTEST—PRACTICE.

## HIRAM T. HUNTER.

The liberal policy in respect to amendments in judicial proceedings adopted by the States will be recognized and adopted by the Land Department, where adverse rights are not affected.

A defective affidavit of contest sent to the local officers and returned by them for amendment, will be regarded as filed, so as to bar another contest.

*Secretary Teller to Commissioner McFarland, May 20, 1884.*

SIR: I have considered the appeal of Hiram T. Hunter from your decision of October 4, 1883, rejecting his application to contest the homestead entry of Charles F. Kimball, made October 14, 1878, upon the NW.  $\frac{1}{4}$  of Sec. 21, T. 9, R. 19 W., Kirwin, Kans., and allowing Frank Caillonne to contest the same.

It appears that, June 2, 1883, Hunter made an affidavit before the clerk of a county court in Kansas, alleging Kimball's abandonment of his homestead land and applying to contest his entry. The affidavit did not describe the land, nor the number of the entry, nor was the

✓ seal of the court attached to the jurat. It was filed in the local office upon a day which does not appear, but prior to July 7. The officers notified Hunter's attorney of its defects, and he advised them of the description of the land and the number of the entry, which they inserted in the affidavit and then returned it to the clerk for the seal of the court, noting on their records that Hunter applied July 7 to contest Kimball's entry.

✓ The seal was attached July 9, and upon the same day Hunter made an additional (called an "amended") affidavit, in due form, before the same clerk, and both were returned to and filed in the local office on the 11th.

On the 9th, Caillonne applied to contest Kimball's entry, but it was rejected because the entry was already under contest by Hunter.

It thus appears that Hunter first applied to contest Kimball's entry; that amendment of his affidavit was allowed prior to Caillonne's application, wanting only, at the latter date, the seal of the court; and that they, upon their own motion, returned it to the clerk for authentication of his official character. In doing this they did not part with their right to its legal possession, and when Caillonne filed his application,

✓ it was constructively upon their records, and they had recognized it as the commencement of a contest of which they gave due notice on the 11th.

✓ After allowance of the amendments, which was within their discretionary powers, Hunter's right related back to the original filing of his application, and should be sustained, especially in view of

✓ my ruling in the case of *Houston v. Coyle* (Copp, October, 1883), that this Department will not review the sufficiency of the information upon which contest citations are issued, that being within the discretion of

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the local officers. The great liberality in amendments now allowed by most of the States, and especially by Kansas (see General Statutes, Ch. 80, Sec. 3366), in court proceedings, in furtherance of justice, where the amendment does not substantially change the claim or the defense, will be recognized and adopted in the practice of this Department in so far as the amendment does not affect rights. I think Hunter had acquired this right of contest when Caillonne's application was filed, and that his contest should proceed to the exclusion of Caillonne.

I reverse your decision.

#### 6. APPLICATION TO MAKE ENTRY.

*CONTEST—APPLICATION NOT REQUIRED AT INITIATION OF CONTEST—SALE OF RELINQUISHMENT—FRAUD.*

##### BAILEY v. OLSON.

In initiating a contest against a homestead entry the contestant need not make application to enter.

The ordering of a hearing on allegations of fraud is a matter of discretion with the Commissioner of the General Land Office, and cannot be the subject of appeal.

Offering to sell a relinquishment is not sufficient ground on which to order a hearing.

*Secretary Teller to Commissioner McFarland, November 10, 1883.*

SIR: I have considered the appeal of Frank C. Bailey from your decision of the 15th of September, rejecting his application to be permitted to contest the homestead entry of Christopher Olson, made March 16, 1883, for the SW.  $\frac{1}{4}$  of Sec. 17, T. 125 N., R. 64 W., 5th P. M., Aberdeen, Dak.

The affidavit of contest was offered September 6, 1883, less than six months from date of entry, and no allegation of abandonment for that period could be made at that date. Consequently there was no statutory cause of forfeiture, and the charge made was to the effect that said Olson had relinquished said tract to the United States, and offered to dispose of the privilege of filing said relinquishment for a consideration, thus invalidating the entry on account of speculative intent in the homestead applicant.

The application to contest was denied, however, not as generally insufficient, but for the reason that Bailey had not complied with your instructions to the district officers at Huron, of date May 28, 1883, requiring a contestant to file with his allegations of contest an application to enter the land, together with proof of his qualifications to make entry, as an earnest of his intention to claim the benefit of the preference right accorded by the act of May 14, 1880 (21 Stat., 140).

In my judgment, this was not good reason. There is nothing in that act providing for the initiation of contest, the whole law on that subject being embraced in Sec. 2297 of the Revised Statutes. The pref-

erence right allowed is to be exercised by making entry within thirty days from notice of cancellation, and not by a preliminary application. This Department cannot make legislative requirements, nor can it superadd thereto, except to make regulations not inconsistent therewith for carrying into effect the provisions of the law. Now, this provision is a mere privilege, which the contestant may waive even after notice; and, consequently, no obligation can be imposed upon him at the inception of the contest to avail himself of its beneficial grant. He may take or refuse to take the land, at his pleasure.

I do not find that you have issued this instruction to the land offices generally, nor is there any record in the case showing that it had been given to the Aberdeen office, so far as my examination of the papers goes. But possibly you have not transmitted the order for my information.

But while this requirement is not lawful, and should not be made a ground for the rejection of an application to contest a homestead entry, I do not find that Bailey has been in any manner prejudiced by the refusal to direct a hearing upon his affidavit, and he has no foundation for an appeal to this Department. The ordering of hearings is a matter for your discretion, especially when applied for upon grounds not specified in the statute, and where fraud forms the basis of the allegations. Besides, the facts laid in Bailey's complaint, if found, are no evidence of fraud upon the Government in the entry of the land, whatever attempt may have been made to induce strangers to advance money upon the chances of entry at the filing of the relinquishment. Until the expiration of six months, no contest could be brought for abandonment; and a previous relinquishment not delivered to the Government was but a mere paper in the hands of the party himself or of his agent, and not liable to be inquired into by a stranger in a proceeding of this kind.

Nobody could say whether or not it would ever be offered to the Government, or that the homestead would not be settled upon, cultivated, and title acquired thereto, in accordance with law.

The rule as to contests in homestead cases was fully enunciated in my decision of 26th September, in Houston, Jr., *v.* Coyle (10 Copp, 224), and I do not deem further suggestions necessary in the present case.

The appeal of Bailey is dismissed for the reasons stated herein, and to that extent your decision is affirmed.

*ACTS OF APPLICANT—GOOD FAITH—DATE OF CONTEST.***BENNETT v. TAYLOR.**

The petition, in an affidavit of contest against a timber-culture entry, that the contestant "be allowed to enter said tract under the homestead laws," is a sufficient application to validate the contest.

*Secretary Teller to Commissioner McFarland, March 25, 1884.*

SIR: I have considered the case of H. M. Bennett v. James W. Taylor, involving 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. 9, T. 7 S., R. 31 E., Oxford, Idaho, on appeal by the first named from your decision of April 10, 1883, dismissing the contest.

Taylor's entry was made under the timber-culture law, and the reason given for your decision was the failure of Bennett to file application to enter the land at the date of initiating contest. Upon an examination of the facts in the case, I find that Taylor's timber-culture entry was made April 23, 1881; that Bennett's affidavit of contest, alleging failure to comply with the law in the matter of improvement and cultivation, was filed August 11, 1882; that he at that date filed no formal application to enter the land; but in his affidavit of contest, after asking for a hearing to substantiate his charges and have Taylor's entry canceled, he adds, as a part of his application, the following words: "and that he be allowed to enter said tract under the homestead laws of the United States."

On the evidence adduced at the hearing, which was had October 12, 1882, the register and receiver, on the 24th of November, 1882, recommended the cancellation of Taylor's entry, and that Bennett be allowed to make homestead entry for the tract in question.

On the 9th of December, 1882, Bennett filed his formal application to make homestead entry; but it was rejected because the prior timber-culture entry of Taylor was still of record.

The papers were then sent up to your office, and, without going into the merits of the case on the facts presented at the hearing, you set aside the finding of the local office as to Taylor's entry, and dismissed the contest for the reason already mentioned, viz, the failure of contestant to apply to enter at the time of filing his application to contest. You base your decision on that of the Department, made November 14, 1882, in the case of *Bundy v. Livingston* (9 Copp, 173).

The evidence taken at the hearing is quite conclusive as to Taylor's failure to comply with the law in the matter of improvement and cultivation.

In fact he was in default, neither appearing at the hearing nor furnishing any evidence whatever in rebuttal of that presented by contestant.

In view of all the facts and circumstances of the case, I think it

should be disposed of on the evidence referred to; that Taylor's entry should be canceled and Bennett's entry allowed.

The former is evidently not entitled to hold the land under his entry. It is true the latter did not at the date of initiating contest file a formal application to enter, but his request in his affidavit of contest, "that he be allowed to enter said tract under the homestead laws," may, I think, be regarded as sufficient to give him the status of a contestant within the meaning of the Bundy decision, which restricts a contest against a prior timber-culture entry to one who *seeks to enter* under the homestead or timber-culture laws. The petition in the affidavit of contest, "that he be allowed to enter," may be taken as evidence that he sought to enter, which evidence is confirmed and rendered conclusive by the fact that almost immediately after the hearing and decision by the register and receiver, and long before your decision dismissing the case, he proceeded to file, and did file, his formal application to make homestead entry for the tract.

All his acts, so far as the record shows, evidence his entire good faith, and, as I have said, may be regarded as giving him a standing as contestant within the meaning of the law and the decisions of the Department.

Your decision is therefore reversed. You will reinstate Bennett as contestant, cancel the timber-culture entry of Taylor, and allow Bennett's homestead entry as of the date when he initiated contest.

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PENDING UNDECIDED—SECOND DENIED.

SARAH RENNER.

Where an application for reinstatement is pending, an application to enter should not be entertained.

*Assistant Secretary Joslyn to Commissioner McFarland, April 8, 1884.*

SIR: I have considered the appeal of Sarah Renner from your decision of July 9, 1883, rejecting her application (as guardian for William W. Miller, heir of Johnson Miller, deceased, late of the United States Army) to make homestead entry for the SW.  $\frac{1}{4}$  of Sec. 9, T. 1, R. 22, Kirwin, Kans.

It appears that Robert Taylor made homestead entry No. 10,592, for the tract in question, on April 19, 1879. An affidavit of contest alleging abandonment of the land by Taylor having been filed by one Mark Smith, a hearing was ordered and held May 22, 1882. From the testimony adduced on an *ex parte* showing the district officers decided that the allegation of abandonment was proved, and recommended that the entry be forfeited.

On August 22, 1882, your office canceled the entry.

Taylor presented an affidavit and application for reinstatement on April 23, 1883, which was received for further consideration.

On May 23 following, Mrs. Renner presented the application for entry before mentioned, which was rejected on the ground that as the application of Taylor had been received and was then pending and undecided, a subsequent application for entry could not be entertained.

Your decision is affirmed.

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## 7. CHANGE OF ENTRY.

BANKS VS. SMITH.

*HOMESTEAD TO TIMBER CULTURE.*

An application erroneous in form, returned for correction, should take effect from the date when first received at the local land office.

Mrs. Banks relinquished her homestead in the spring of 1878, intending to change it to a timber-culture entry; she remained in possession of the land while the relinquishment was pending; held that, being in possession under color of right, the land was not subject to Smith's homestead entry.

*Secretary Teller to Commissioner McFarland, September 26, 1883.*

SIR: I have considered the case of Sarah J. Banks v. John W. Smith, involving lots 1 and 2, and the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 18, T. 26 S., R. 8 W., Wichita, Kans., on appeal by Mrs. Banks from your decision of September 5, 1882, awarding the land to Smith.

It appears from the record that Mrs. Banks made homestead entry No. 5,353 for the land on September 29, 1874, built a house on and otherwise improved it, and had her home there until the spring of 1878, when she became too old and feeble and sick to work it herself any longer; that, for the purpose of changing her homestead entry to a timber-culture entry, she relinquished all the right, title, and interest which she had acquired "by virtue of my [her] homestead entry," on May 20, 1878; that on said date she had her house, household effects, and growing crops on the land, though she herself was absent by reason of sickness; that said entry was canceled by your office on September 7, 1878, and by the local office on the 16th day of said month; and that on said September 16, 1878, she made timber-culture application and affidavit before a notary, which reached the local office two days after, was rejected because the printed words "under the provisions of the act of March 13, 1874," appeared in it (instead of the act of June 14, 1878), was amended, and her timber-culture entry No. 1,269 allowed on September 26, 1878, during which time she had planted the kind and quantity of timber required by the law.

It appears further that John W. Smith, who was residing on a tract of the Osage lands, and who had full notice of the claim of Mrs. Banks, filed his soldier's declaratory statement for the land in contest on said

September 16, 1878, made homestead entry No. 6,943, and moved upon it in March, 1879, and sowed a crop on part of the land broken by Mrs. Banks.

Hearing was had in order to determine whether the facts warranted the application of the Atherton-Fowler doctrine, and your decision holds that "it does not appear that Smith took violent possession of the tract, or even occupied the dwelling erected by Mrs. Banks," and that therefore the Atherton-Fowler doctrine does not apply; and you rest your decision on the case of *Lawless v. Anderson* (1 Hill's L. Cases, 57).

I find myself compelled to dissent from this view of the law applicable to the case. In *Lawless v. Anderson* the prior settler had not complied with the statute as to inhabiting the land or building a dwelling, and by the express terms of the law (section 2273, Rev. Stat.) he had no right to the land at date of Anderson's entry. But in the case at bar, Mrs. Banks was in possession of the land by color of law at date of Smith's entry; her relinquishment was of whatever homestead right she had acquired by her entry, and she had no intention to abandon her possession of the land; being absent sick, she was not only constructively present in person, but she was there by her dwelling-house, her improvements, and her growing crops, with full notice of which Smith is charged; and she therefore had a valuable property and right with respect to the land, which excluded entrance on her possession, under guise of a settlement claim, as absolutely as did the fences on the unsurveyed lands of the Soscol Ranch.

As held in *Atherton v. Fowler* (96 U. S., 513), the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; the right to erect a dwelling-house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others (*Hosmer v. Wallace*, 97 U. S., 580).

This doctrine is not to be extended to cases where the prior settler is himself a mere trespasser on the public land (*Powers v. Forbes*, 7 Land Owner, 149), or has disregarded statutory requirements (*Lawless v. Anderson*, *supra*); but it is directly applicable to the case at bar, where *bona-fide* entry and improvement had given a legal possessory right to the land, which the claimant continuously asserted, even during the time when she was lawfully changing the form of her entry from homestead to timber culture. A right so acquired and maintained other settlers are bound to respect, and the Government is bound to protect it by every consideration of justice and good faith.

It is my opinion that Smith's entry should be canceled, and that Mrs. Banks is entitled to entry as of September 18, 1878, the date of her first application, the error in said application being merely an error in form.

Your decision is accordingly reversed.

**S. COMMUTATION.****TALKINGTON'S HEIRS v. HEMPFLING.****RESIDENCE—PURCHASE—ACT JUNE 15, 1880**

If the homestead entryman was entitled to patent at date of his death, his heirs succeed to the right.

Where his house was by mistake built thirty yards outside of the lines of his claim, but was occupied by him in good faith, it will be regarded as a constructive residence on the land.

XX Where he paid the commutation price for the land, and the receiver never accounted for it, his heirs must again pay said price before patent will issue.

*Secretary Teller to Commissioner McFarland, October 22, 1883.*

SIR: I have considered the case of Charles Lewis, guardian of the minor heirs of Isaac W. Talkington, deceased, *v.* John Hempfling, involving N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 21, T. 7 N., R. 18 W., Dardanelle district, Arkansas, on appeal by Hempfling from your decision of June 10, 1882.

It appears that Talkington made homestead entry No. 3,886, February 15, 1870, of the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 21, and that the entry was canceled December 1, 1876, for alleged relinquishment. It having been shown subsequently, however, that Talkington had commuted his entry and paid \$2.50 cash per acre for the land, receiving therefor duplicate receipt No. 7,419, dated August 20, 1872, and had died April 20, 1874, and that the relinquishment was fraudulent—the same bearing date June 5, 1876—your office re-instated said entry, April 5, 1878, and directed the register and receiver to advise Talkington's heirs or legal representatives that they could elect one of two methods of acquiring title to the tract covered by decedent's entry, to wit: either to furnish proof of decedent's compliance with legal requirements (in point of residence and cultivation), up to the date of his decease, and of such compliance by the widow or heirs from that date until the expiration of five years from the date of his entry, which proof could be submitted to the board of equitable adjudication, the statutory period having expired; or, to furnish new commutation proof showing residence and cultivation by the ancestor up to the date of the old commutation proof and payment, and to pay the legal price for the land. The heirs having elected to adopt the latter or alternative method, the register and receiver transmitted to your office, per letter dated November 18, 1881, the new commutation proof presented by the guardian, together with certain testimony submitted by Hempfling in support of his homestead entry, No. 14,834, which embraced the tract in question, and had been erroneously allowed by the register and receiver July 7, 1880. Under date of September 4, 1880, your office advised the register and receiver that Hempfling's entry conflicted with Talkington's as to the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and they thereupon (September 13) notified Hempfling. The regis-

ter reported December 8, ensuing, that no appeal had been taken by him from your office action of September 4, but forwarded certain affidavits alleging bad faith on the part of Talkington, and asking that an investigation be ordered with a view to sustain Hempfling's entry. Nothing further appears to have been done in the premises until March 15, 1881, when the said guardian applied at the local office to make final proof in support of Talkington's entry. Citation thereupon issued, fixing April 28, ensuing, for the submission of such proof.

The parties in interest accordingly appeared, and upon the testimony thus adduced the register and the receiver expressed dissenting opinions—the register holding in favor of the heirs and the receiver in favor of Hempfling.

You held the proof to be satisfactory except as to residence, and that, "in view of the passage of the act of June 15, 1880, I do not regard it necessary to submit the proof to the Board of Equitable Adjudication to cure the defect in the matter of residence, which would otherwise be done." You also held Hempfling's entry for cancellation, "for the reason that it was erroneously allowed and was invalid at its inception."

It appears from the proof, that in the year 1860, Talkington built a house, where he resided with his family until on or about March 28, 1872, when the house was burned; that he and his witnesses supposed the house was upon the tract covered by his entry when he made commutation proof, August 20 ensuing, but a survey made after his decease discovered the house to have been some 30 feet outside the quarter-sectional lines bounding his claim, although his other improvements, consisting of a stable, corn-crib, about four acres cultivated to crop, and an orchard, were within such boundary; that these improvements aggregated in value about \$1,000 with the house, but only about \$250 without it; that immediately after his house was burned he removed to his plantation about a mile and a half distant from his claim, where he erected a house, in which he resided with his family until he made said commutation proof, whereupon he removed to Johnson County, Arkansas, where he resided until his demise.

On the other hand, the proof shows that Hempfling has made substantial improvements upon the land covered by his entry, consisting of 15 acres cleared and 20 fenced, upward of three hundred fruit trees, dwelling-house, and other outbuildings, aggregating upward of \$600 in value.

Upon the foregoing state of facts the questions arise: (1). Did said ancestor show such compliance with legal requirements as to entitle him to a patent for the land had he lived? (2). Was the eighty-acre tract in question subject to entry July 7, 1880?

It is true that Talkington's house was not upon his homestead claim. It is, however, conceded that he resided therein supposing that it was, and that the fact of its not being thereon was not discovered until after his death. It has been repeatedly held by this Department that such

a residence in good faith is a constructive residence upon the claim, by reason thereof the settler's right, if any, would not *ipso facto* be defeated. (Vide, No. 27, 1 Lester, 385; also 3 Opinions, pp. 258 and 313.) That he made commutation proof and paid \$200 for the land is evidenced by the receiver's duplicate receipt, as stated aforesaid. Such documentary evidence is merely *prima facie* proof of payment, which may be rebutted either by record proof or proof *aliunde*. And, unfortunately for Talkington, the receiver, John C. Austin, misappropriated said sum, or at least failed to account therefor, and the register's certificate and receiver's receipt of corresponding number to that held by Talkington bear a different date from the same, and were issued to another person, one Aaron S. Dees, for an excess paid on homestead entry No. 8,485; and it further appears that under date of May 16, 1877, the register and receiver reported to your office that a careful examination of their records discovered no evidence of such commutation proof and payment, or that said sum was ever accounted for by said receiver.

But, notwithstanding such record showing, it further appears from the records of your office that, under date of April 26, 1877, the attorneys for the heirs filed therein for patent duplicate receipt No. 7,419, issued at Dardanelle, August 20, 1872, by John C. Austin, receiver, to decedent, for \$200, the same being payment in full for the tract in question at the double minimum valuation; and that across the face of such receipt is noted, "Commutated from homestead entry No. 3,886, dated February 14, 1870." And it also appears from the affidavit of one David Beasley (a neighbor of Talkington's), who was cognizant of all the circumstances of the case, barring the alleged relinquishment, that he accompanied Talkington to the local office, and was one of his witnesses in making his commutation proof; that the other witness is deceased; that he saw the usual papers in such case made by the proper officer, and saw \$200 in cash paid to the receiver; and that the affiant furnished Talkington with a portion of the said sum. Although such proof does not show his compliance with legal requirements up to the date when he commuted his homestead entry and paid said cash, as required by the terms of your office letter of April 5, 1878, it should, nevertheless, be observed that the proof in question shows such compliance until the burning of his house. This was not quite five months prior to the commutation. And although he did not reside nor pretend to have resided upon his claim during such interim, I do not regard such absence either as an actual or constructive abandonment of the land within the meaning of section 2,297 of the Revised Statutes. Nor was it so regarded by your office, for his entry was canceled for relinquishment, and was subsequently reinstated. I am, therefore, of the opinion that he had shown such compliance with legal requirements as would have entitled him to a patent for the tract in question had he lived; that such right has inured to his heirs; and that at the date of Hempfling's entry the tract was covered by a valid, subsisting prior entry, which precluded

his. It should be observed, however, that as the United States have not benefited by the former payment, the heirs cannot be credited therewith; it must be regarded as if it had never been made. And the purchase money having been tendered pursuant to the terms of your office letter aforesaid, such sum should be paid as a condition precedent to the issuance of patent to the heirs.

Your decision is accordingly affirmed.

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## 9. CONTESTS.

### *DILIGENCE—GOOD FAITH.*

#### *LOWN v. CRISWELL.*

Lown began contest against the timber-culture entry of one Jordan; the latter filed his relinquishment in October, 1878, and Lown applied to enter the land, at the same time depositing the fees and commissions; the local officers notified him that his entry would be made of record upon cancellation of Jordan's entry, and on said cancellation sent him notice of it, which he testifies he never received; the land lay vacant for six months, when Criswell entered it as a homestead. Held, that the tract was subject to Criswell's entry.

*Secretary Teller to Commissioner McFarland, May 21, 1883.*

SIR: I have considered the case of Erastus B. Lown *v.* Wm. Criswell, involving the latter's homestead entry, made October 8, 1879, upon lots 3 and 4 and E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 30, T. 25, R. 9 W., Wichita, Kans., on appeal by Lown from your decision of March 30, 1882, allowing the entry of Criswell to remain intact.

It appears that one Jordan made timber-culture entry of the tract August 7, 1873. Subsequently one Eddy initiated a contest against Jordan for failure to comply with the requirements of the law, but afterwards, by an arrangement between the parties which does not appear, withdrew his charges, and the contest was dismissed. On October 17, 1878, Lown initiated the contest in question against Jordan, and on October 28 Jordan filed a relinquishment of his entry, and Lown applied to enter the tract under the timber-culture law. Jordan's entry was canceled on the local records May 7, 1879; and the land remained vacant until October 8, 1879, when Criswell entered it under the homestead law. You afterwards ordered a hearing to enable Lown to submit testimony in support of his claim, and the same was held in June, 1880.

The testimony shows that Lown is a brother-in-law of Jordan; that Lown purchased in October, 1878, prior to the contest, Jordan's improvements on the tract, consisting of about fifty broken acres and valued at \$150. No part of the purchase-money was paid at the date of purchase, nor until March 18, 1879, when Lown gave to Jordan his unsecured promissory note for \$600, payable in one year, no part of which was paid at maturity, nor had been at the date of hearing in June; Lown testify-

ing that its payment was extended by Jordan to await determination of this contest. Jordan, immediately after his sale, rented the land from Lown and cultivated it for his own use, and has furnished money and also signed a joint note with Lown for the expenses of the contest.

Lown applied to enter the tracts at the date of filing Jordan's relinquishment and of initiating the contest, and deposited with the register \$14 (furnished through Jordan), for the fees and commissions on his entry, and was advised by this officer that his entry would be made of record on cancellation of Jordan's entry, of which he would be notified. Annotations on the local records show that your cancellation of this entry was "Received May 7, 1879, 9 a. m., notices May 7 and 8, 1879, 4 p. m.," and a clerk in the office testifies that notice thereof and of Lown's preferred right was mailed and directed to him about that date, at his post-office address. Lown denies his reception of this notice, or that he knew of Jordan's cancellation until after Criswell's entry.

Criswell immediately after his entry built a house upon the land, in which he has since continuously resided, and has made other valuable improvements.

Lown acquired no preferred right to enter the tract by virtue of his purchase (even were that a *bona fide* transaction), nor by reason of his deposit of fees and commissions with the register prior to cancellation of Jordan's entry, the register's reception thereof being an unauthorized act, as held in the case of Hodges (Copp, January, 1881), and it is immaterial as respects the right of Criswell that Lown did not (even admitting it) receive notice of cancellation of Jordan's entry. He did not offer to make entry of the tracts within a reasonable time after cancellation of Jordan's entry, but, not exercising ordinary diligence and inquiry as to his rights, permitted the tracts to lie vacant for nearly six months prior to Criswell's entry.

I am of the opinion (without reference to the question of Lown's good faith and whether or not his proposed entry was in the interest of Jordan, and therefore fraudulent under the law, as the testimony would seem to indicate) that the tracts were subject to Criswell's entry when made, and that it should be sustained.

I affirm your decision.

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*PRACTICE—NOTICE BY PUBLICATION.*

*RYAN v. STADLER.*

An affidavit for contest stating that the whereabouts of the entryman is unknown is not sufficient basis for publication of notice in a contested case.

*Secretary Teller to Commissioner McFarland, May 21, 1883.*

SIR: I have considered the case of Philip Ryan v. Henry Stadler, involving the latter's homestead entry made July 9, 1880, upon the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 33, T. 32, R. 12 E.,

Menasha, Wis., on appeal by Stadler from your decision of May 13, 1882, holding his entry for cancellation, and also refusing his application for a rehearing of the case.

It appears that Ryan instituted this contest September 26, 1881, alleging Stadler's abandonment of the tract; notice thereof was given by publication, the contestant swearing that "the present residence of Henry Stadler is to me unknown." Practice rule 12 provides that "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 personal service cannot be made." I approve your ruling of January 27, 1883, in the like case of *Hewlett v. Darby* (Copp, March, 1883), wherein you held that as the affidavit failed to show that personal service could not be made, but merely alleged want of knowledge of the whereabouts of the defendant, and that as diligence is of the essence of such a proceeding, and no effort was made to ascertain the residence of the respondent, notice by publication was insufficient.

Notice to Stadler in this case, by publication only, was insufficient for the same reason.

The motion for rehearing (supported by affidavits) shows that Stadler erected a house on the land in the spring of 1881, and broke and cultivated a small parcel thereof; that he has not at any time been absent from the tract for the period of six months, and only for the purpose of acquiring the means of livelihood, and of improving the land; and that he has no other home. He did not appear, nor was he represented at the hearing, not having received any knowledge thereof until the day of hearing, when several miles distant from the local office, and when too late to make an appearance.

I modify your decision, and direct that a rehearing be ordered. When report of the additional testimony is made, you will re-examine the case in connection therewith.

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CONTESTEE—NOTICE—PURCHASE, ACT JUNE 15, 1880.

BYKERK *v.* OLDEMEYER.

The local officers, after the hearing, dismissed a contest for abandonment; on appeal by the contestant, the General Land Office reversed said action; contestee appealed to the Secretary, and, pending consideration of said appeal, made offer to purchase under the act of June 15, 1880. Held, that he had the right of purchase under said act.

*Secretary Teller to Commissioner McFarland, June 23, 1883.*

SIR: I have considered the case of Andrew Bykerk *v.* Gerrit J. Oldemeyer, involving homestead entry No. 16,306, of the N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 18, T. 7, R. 7 E., Lincoln district, Nebraska, on appeal by Bykerk from your decision of July 15, 1882, in favor of Oldemeyer.

It appears that the defendant made the entry June 14, 1878. Bykerk initiated contest against the same January 4, 1881, by filing the usual affidavit alleging abandonment, pursuant to the provisions of section 2297 of the Revised Statutes, and of the 2d section of the act of May 14, 1880 (21 Stat., 140). Whereupon citation issued the same day summoning the parties to appear at the local office the 10th of February ensuing. Upon the evidence thus adduced the register and receiver dismissed the contest February 22. Contestant having appealed from such action, you reversed the same April 29, 1882. From this action Oldemeyer appealed July 5 ensuing, filing with his appeal an application to purchase the premises under the second section of the act of June 15, 1880 (21 Stat., 237). Whereupon you rendered the decision in question, holding, under authority of my immediate predecessor's decisions of March 12, 1881, in the case of *Gohrman v. Ford* (8 Copp, 6), that the entryman (Oldemeyer) had the right to purchase at any time prior to the cancellation of his entry.

It is urged, however (*inter alia*), by Bykerk's counsel that the decision cited is inapplicable to the case at bar, because in that case the defendant had applied to purchase before trial, which was never had, whereas in this case Oldemeyer permitted it to go to trial, and did not apply to purchase until after the rendition of your adverse decision. But it should be observed that the decision cited not only holds that the said acts of May 14 and June 15, 1880, are not *in pari materia*, but it is very explicit upon the subject of the entryman's right of purchase, as will be seen from the following citation:

If the contest proceeds to its finality, to wit, the cancellation of the entry, his preference right of entry is thereby established. But if through failure to prove his allegations, or any of the ordinary incidents of trial; or if the homestead party avails himself of the right of purchase of the tract, as provided by the act of June, and thus defeats the cancellation of his entry, I see no reason why the contest should not fail, and the contestant lose his right of entry.

Under this and other laws relating to homestead entries, a person may now continue residence on and cultivation of his land for the time required by law; or he may at any time, in the absence of other rights or claims, purchase the same on payment of the Government price; and I cannot think Congress intended this right should be subjected to the delays and uncertainties of contests oftentimes instituted for oppressive and fraudulent purposes; but that, whenever such person tendered to the Government its price for the land, and the rights of no other person are affected thereby, he should be permitted to purchase the same.

The doctrine thus enunciated was reiterated by this Department, under date of June 2, 1881, in the case of *Johnson v. Halvorson* (8 Copp, 56).

Your decision is accordingly affirmed.

ACT JUNE 15, 1880—CONSTRUCTION OF AGREEMENT—R. S. 2290.

HAWKER v. FOWLKS.

The written agreement to convey at a future time is not such an instrument as is contemplated by the second section of the act of June 15, 1880, but is in contravention of section 2290, Revised Statutes.

*Secretary Teller to Commissioner McFarland, July 5, 1883.*

SIR: I have considered the case of Robert Hawker v. John W. Fowlks, involving the NW.  $\frac{1}{4}$  of Sec. 22, T. 2 S., R. 1 E., Salt Lake City, Utah, on appeal by Hawker from your decision of October 27, 1881, holding the entry of Fowlks for said NW.  $\frac{1}{4}$  intact, and the cash entry of Hawker for the N.  $\frac{1}{2}$  of said NW.  $\frac{1}{4}$ , under the act of June 15, 1880, for cancellation.

It appears that John Fowlks, father of the contestee, made homestead entry of said NW.  $\frac{1}{4}$  May 8, 1869, that the entry was canceled for relinquishment by your letter of July 20, 1871, but the cancellation was not noted on the local records until reception of your subsequent letter of November 23, 1873; and that John W. Fowlks made homestead entry of the tract February 27, 1874.

Hawker filed an affidavit February 15, 1879, alleging that, with his family, he had continuously resided on the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  since the fall of 1869, and had valuable improvements thereon, and that Fowlks had never been in possession thereof, but had agreed to convey the tract to him. A hearing was ordered thereon, and held in April following.

It further appears that in June, 1881, the local officers allowed Hawker to make cash entry for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , under the second section of the act of June 15, 1880.

Hawker's possession of said N.  $\frac{1}{2}$  is not seriously questioned, but the issue is chiefly confined to the alleged contract, which is in the following words:

BIG COTTONWOOD, SALT LAKE Co.,  
April 7, 1874.

This is to certify that I, John W. Fowlks, my heirs and assigns, do promise and agree to give to Robert Hawker a full warrantee deed to the north half of northwest quarter of Sec. 22, in T. 2 S., R. 1 E., containing 80 acres, not later than June, 1879. In consideration whereof, I, Robert Hawker, my heirs and assigns, agree to let the homestead entry on the above-named quarter of section be completed and the patent to issue therefor.

Witness:

JAMES HAWKER.  
JOHN FOWLKS.

This paper seems to mean that Fowlks would convey to Hawker the N.  $\frac{1}{2}$  of said NW.  $\frac{1}{4}$  if Hawker would not contest Fowlks' entry on the NW.  $\frac{1}{4}$ . It was given to Hawker at the date thereof, and has been in

his possession from that time to the date of the hearing. Upon the day of its execution, John Fowlks and John W. Fowlks, at the request of the contestant Hawker, went to the latter's house, for arrangements relative to said N.  $\frac{1}{2}$ . They were accompanied also by Alfred, the brother of John W., but who appears not to have been present when the paper was executed. They there met the contestant, Rose his wife, and James Hawker, his son. The paper was written by James Hawker, who testifies that he left blanks in the body of the instrument for the signatures of John W. Fowlks and Robert Hawker. The Hawkers, father, son, and wife, testify that John W. Fowlks and Robert Hawker signed their names in the appropriated spaces after it was read to them ; that John W. Fowlks in signing his name omitted the letter "W," but that upon, his attention being called thereto, wrote said letter by interlineation. On the contrary, the Fowlks—father and son—testify that John W. Fowlks could not then write his name and did not sign the paper, but that John Fowlks only signed it, and they claim that the letter "W" was interlined afterwards by some person to them unknown, and that that name was not intended to mean John W. Fowlks, but John Fowlks only, thus making a contract between John Fowlks and Robert Hawker, and excluding any agreement on the part of the homestead entryman. This statement, if true, would show that John Fowlks was a mere witness to his own signature. John Fowlks and James Hawker admit their signatures as witnesses.

The testimony further shows that John W. Fowlks is an illiterate person ; that his father signed his name to his original homestead papers (but at his request and in his presence), and has generally transacted for him his business matters.

This conflict of testimony requires elucidation from collateral facts. It appears that Robert Hawker had, at the date of the hearing, been in possession of the N.  $\frac{1}{2}$  of said NW.  $\frac{1}{4}$  from about October, 1869; that he had thereon two houses, a stable and other outhouses, 200 rods of ditching, and about 30 acres under cultivation ; that he bought these improvements or a portion of them from John Fowlks, and procured the relinquishment of the latter's entry, intending himself to enter the whole NW.  $\frac{1}{4}$  upon cancellation of that entry, but upon the understanding that after he had procured title, he should convey the S.  $\frac{1}{2}$  to Fowlks, and retain the N.  $\frac{1}{2}$  only. The cancellation was delayed for some years, as stated, but as soon as he learned of it, in April, 1874, he went to Fowlks for the purpose of completing the arrangement and making his entry, when he ascertained that it had been entered by John W. Fowlks.

It appears also that in 1876 a measurement was made by John W. Fowlks for the purpose of establishing the dividing line between the N.  $\frac{1}{2}$  and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , and that he drove stakes to indicate the same. He has also admitted to others that the N.  $\frac{1}{2}$  belonged to Hawker, and that he had given him (Hawker) a paper securing it to him after he got his own title. He also negotiated with Hawker for purchase from him of

portions of the N.  $\frac{1}{2}$ , that he might add them to the S.  $\frac{1}{2}$  of said NW.  $\frac{1}{4}$ , and also permitted Hawker to make improvements on said N.  $\frac{1}{2}$ , subsequently to his own entry for the whole NW.  $\frac{1}{4}$ , without objection. There had also been conversations between the parties relative to a release by Fowlks from his entry of said N.  $\frac{1}{2}$ , and they visited the land office to ascertain whether this could be done, and Fowlks be permitted to amend his entry by insertion of another 80-acre tract in substitution of said N.  $\frac{1}{2}$ . Upon advice by the officers that it could not be permitted, Fowlks shortly afterwards forbade Hawker's further improvement of the tract, whereupon Hawker commenced the contest.

On these facts the local officers found that J. W. Fowlks executed said paper; that it was in violation of section 2290 Revised Statutes, which requires a homestead entry to be made for the party's exclusive use and benefit, and not directly or indirectly for the use and benefit of any other person, and recommended cancellation of his entry. Your decision holds that Fowlks did not execute said paper; that also if he did, not being under seal or acknowledged, it could not be enforced by reason of Hawker's failure to comply with the required conditions on his part, and that his remedy, if any, was in the courts; and you held Fowlks's entry intact.

Whether or not J. W. Fowlks actually signed this paper is not, in my opinion, material under the statute. If he was present at the time of its execution, knowing the nature of the business for which the parties had met, and permitted his father to sign his (J. W. Fowlks's) name, and to act as his agent, the agreement would be equally binding upon him as if he had signed it; and I cannot doubt, under all the facts, that it was the intent of Fowlks to recognize the claim of Hawker to said N.  $\frac{1}{2}$ , and to convey it to him upon acquisition of his own title to the NW.  $\frac{1}{4}$ . This was in violation of that provision of section 2290, which requires an entry to be for the exclusive use and benefit of the person making it.

I therefore reverse your decision in this respect, and order cancellation of Fowlks's entry.

I also affirm that part of your decision which holds for cancellation Hawker's cash entry of said N.  $\frac{1}{2}$ , under section 2 of the act of June 15, 1880. This entry was allowed in June, 1881, after initiation of the contest, and was in violation of Practice Rule 53, which forbids further action by the local officers affecting the disposal of the land in contest, pending the contest, until so instructed by your office. This entry was allowed without such instructions, and was, consequently, unauthorized. Nor was it, in my opinion, within the provision of the act of June 15, 1880. The second section authorizes one to whom the right of the person making a homestead entry has "been attempted to be transferred by a *bona fide* instrument in writing," to purchase the tract at the Government price. This means an executed or present transfer, and not a mere agreement to transfer *in futuro*. Whether or not, therefore, the

paper in question was executed by Fowlks, and a *bona fide* or valid instrument, being dated in 1874, and not necessarily to take effect before June, 1879, it was not at the date of its execution a transfer or an attempted transfer within the meaning of the act.

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*ATTORNEY—NEGLECT TO INITIATE PROCEEDINGS.*

**PALMER v. CLEVINGER ET AL.**

The party in this case acted on the word of his attorney, and neglected to initiate legal proceedings. He acquired no right under the land laws.

*Secretary Teller to Commissioner McFarland, July 13, 1883.*

SIR: I have considered the appeal of H. G. Palmer from your decision of June 6, 1882, in which you refuse his application to contest the additional homestead entries of Samuel S. Clevinger, No. 6,262, and Martin Wollin, No. 6,263, filed December 1, 1881, on the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 4, T. 154, R. 48 W., and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the same section, respectively, situated in the Crookston district, Minnesota.

Palmer alleges that on June 15, 1880, he presented an application for entry of the SE.  $\frac{1}{4}$  of Sec. 4, T. 154, R. 48 W., with Sioux half-breed scrip in payment, to the register at Crookston, Minn., who refused to accept it; that his attorney then took the papers, and subsequently informed him the same day that the register had agreed to accept them. Palmer thereupon took possession of the tract, erected dwellings, and otherwise improved it. In an affidavit, executed January 10, 1882, before the register at Crookston, Minn., he asks that the above-described entries be canceled, or that an order issue authorizing him to contest the same, on the ground that he entered upon the land in good faith, believing that his application had been accepted by the register, through his attorney.

It appears that Palmer acted on the word of his attorney, without ascertaining whether the attorney had complied with the requirements of the law, and thus neglected to initiate proceedings necessary to the acquirement of a right under the land laws. The first appearance of Palmer on record is by his affidavit referred to. Having neglected, prior to the accruing of the rights of others, to avail himself of the privileges allowed by law, he has not placed himself in the position to complain.

Your decision is affirmed.

***ASSUMPTION—ENTRY OF RECORD—SUBSTITUTION BY LOCAL OFFICERS NOT ALLOWED.*****HOLTERMAN v. CARTER.**

In the absence of papers required to initiate a contest, one cannot be assumed to the detriment of a party who has complied with the law.

When an application has been accepted and an entry becomes of record, the local officers cannot substitute another party. If an entry is inadvertently made it can be vacated only by proper proceedings upon due notice under the established practice.

*Acting Secretary Joslyn to Commissioner McFarland, July 31, 1883.*

SIR: I have considered the case of Henry Holterman v. Sandy Carter, involving homestead entry No. 12,285, made by Carter January 13, 1881, covering the E.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 29, T. 7 N., R. 17 W., situated in the Little Rock district, Arkansas, on appeal by Holterman from your decision of June 29, 1882, affirming that of the local officers, awarding the tract to Carter.

The evidence shows that one Solomon Lents relinquished his entry of the tract in question January 13, 1881; subsequently, on the same day, entry was made thereon by Holterman.

The receiver in a letter states that he issued receipt No. 12,285, January 13, 1881, to Holterman, the register having certified that the tract was vacant. On January 25, 1881, the register informed him that Carter had filed an affidavit of contest January 8, 1881, alleging abandonment of the land by Lents, whereupon the receiver erased the entry of Holterman from his books, substituted that of Carter, and issued a receipt to the latter bearing the same number and date as that given to the former.

There are no papers with the record to show that a contest was initiated as required by Rules 3, 4, 7 of the Rules of Practice.

Section 2 of the act of May 14, 1880, provides that where any person has contested and procured the cancellation of a homestead entry he shall have the preference right of entry.

In the absence of the papers required to institute proceedings, this Department cannot assume that a contest has been initiated to the detriment of one who has complied with the requirements of the law; consequently Carter has no preference right to the entry.

The evidence shows that Holterman purchased the improvements on the land from Lents November 12, 1880; the latter executed a relinquishment of his entry November 15, 1880; Holterman took up his residence on the land December 27, 1880, cultivated and improved it, and made entry as soon as Lents filed the relinquishment. All the facts tend to show that Holterman procured the cancellation of the entry in good faith, and complied with the requirements of the law prior to the application of Carter to make entry.

When the application of Holterman had been accepted and he had re-

ceived his duplicate, his entry became of record, and the register and receiver were not competent to substitute Carter in his place.

If the entry had been made inadvertently it could be vacated only by proper proceedings upon due notice, and regularly carried to decision under the established practice.

Your decision is accordingly reversed. The entry of Carter will be canceled, and Holterman will be permitted to enter the tract, with an indorsement of his right to have the same take effect as of the date of his original application.

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*REVIEW OF THE LAW AND PRACTICE GOVERNING HOMESTEAD CONTESTS.*

*HOUSTON v. COYLE.*

Since the act of May 14, 1880, the rules of practice have required, in order to secure an assurance of good faith, that a contest for abandonment of a homestead entry must be initiated by the affidavits of the contestant and one or more corroborating witnesses. In this case there was no corroborating affidavit, but all the other proceedings were regular.

Held, that under Sec. 2297, Rev. Stat., jurisdiction vests in the local office by the issue of "due notice to the settler," and not by virtue of the affidavit of contest; that the rule of practice must not be permitted to defeat the operation of the law, which provides that the land shall revert to the Government on proof of abandonment; that, when an information has been filed by the contestant, due notice to the settler has issued, and the parties are present for the hearing, the local office has full jurisdiction of the inquiry; and that, generally, any question involving the sufficiency of the information, on which the local office elected to proceed, disappears from the moment that notice is issued to the settler.

*Secretary Teller to Commissioner McFarland, September 26, 1883.*

SIR: I have considered the case of S. D. Houston, jr., *v.* Elliott Coyle, involving the homestead entry of Coyle for the SW. $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 3, and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 10, T. 9 S., R. 1 E., Concordia, Kans., on plaintiff's appeal from your decision of October 12, 1882, dismissing the contest.

From the record transmitted with this case, the following facts appear:

April 10, 1879, Coyle made his homestead entry for the land above described. December 14, 1881, J. W. Dawson initiated a contest, alleging abandonment, and the local office fixed the day for a hearing on February 7, 1882.

December 29, 1881, Henry Thompson filed in the local office a notice of his intention to interplead and asked to be made a party plaintiff in the contest initiated by Dawson; and the request appears to have been allowed and notice issued accordingly.

On the day fixed for the hearing of Dawson's contest, Thompson appeared and filed an affidavit, alleging that Coyle, June 25, 1880, sold

and assigned to him all his (Coyle's) interest in said homestead, and delivered possession of the same to him, and that the affidavit for contest filed by Dawson "was void and not in accordance with law," for which reasons Thompson asked to be made a party plaintiff. The local office held that the only question to be determined was that raised by Dawson's affidavit for contest, and on the evidence adduced by him held the homestead entry of Coyle for cancellation.

During the proceedings before the local office in this contest, Houston & Son, of Concordia, Kans., appeared for the defendant, Coyle, and also for Thompson in his application to be made party plaintiff, and from the decision of the local office both Coyle and Thompson appealed, the above-named attorneys prosecuting the appeal for both parties.

July 5, 1882, you dismissed Dawson's contest, for the reason that no corroborating affidavit accompanied his affidavit for contest, as provided in Rule 4 of the Rules of Practice, as prescribed by your office, and on review, July 31, 1882, you held that Dawson's contest was a bar to the initiation of a contest by Thompson until a final disposition of the former was made. No appeal was taken from your decision of July 5, 1882; and October 9, 1882, you advised the local office that the case was closed.

From an affidavit filed by Houston & Son, February 7, 1882, on behalf of Coyle, and sworn to by S. D. Houston, jr., it appears that Houston, jr., is a member of the firm Houston & Son. July 12, 1882, the said S. D. Houston, jr., filed an affidavit in the local office corroborated by S. D. Houston, sr., for the purpose of initiating a contest against Coyle's homestead entry for the land before described, alleging that Coyle had abandoned the same.

August 5, 1882, the local office, following your decision of July 31, 1882, dismissed Houston's application for a contest; from which decision he appealed August 7, 1882, and the firm of Houston & Son acknowledged service of the notice of appeal for Coyle as his attorneys. October 12, 1882, you affirmed a decision of the local office dismissing Houston's contest.

October 14, 1882, at 9.30 a. m., Dawson filed an affidavit for a second contest against Coyle, alleging abandonment, but the local office rejected his application for a contest, for the reason that Houston's appeal was then pending; from which decision Dawson appealed.

October 14, 1882, at 1.45 p. m., Thompson filed an affidavit for contest against Coyle, alleging abandonment, to which was attached the affidavit of S. D. Houston, jr., as a corroborating witness. The local office refused to allow the contest, for the same reason as assigned in Dawson's second application; from which decision Thompson appealed.

Although no action has been taken by your office on the appeals of Dawson and Thompson from the decisions of the local office rejecting their last applications to initiate a contest, yet in view of the multiplicity of suits instituted and pending, all involving mainly the right

to contest Coyle's entry, and the peculiar state of facts as disclosed by the record, I am of the opinion that this department should now make a final disposition of the entire controversy, the whole record being presented by the appeal.

Section 2297 of the Revised Statutes, following section 5 of the act of May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain" (12 Stat. 392), provides—

That if at any time after the filing of the affidavit as required in section twenty-two hundred and ninety, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the Government.

It will be observed that under the law as above quoted the question of abandonment is one to be settled as between the Government and the settler; and that in the event of such abandonment being proven, the sole party in interest thereafter is the Government, to whom the land embraced in the homestead entry reverts; and further, that the only prerequisite required by the law to confer jurisdiction upon the local office is "due notice to the settler."

In order to secure a regular system in the administration of the foregoing law, your office, December 14, 1865, issued a circular of instructions, in respect to all proceedings before local officers in cases of alleged abandoned homestead entries, defining the manner in which notice of the contest should be given to the settler, and providing that an affidavit setting forth the grounds of contest should be filed prior to the issuance of notice (2 Lester, 259). But in this instruction no corroborating affidavit was required. It was sufficient that the claimant alleged the facts in his own affidavit.

As the law did not provide for the payment of the expenses incident to these contests, your office, in the circular referred to above, directed that such expenses must be paid by the contestant. Now, under the law and practice as it thus stood, the contestant acquired no right by appearing and furnishing the evidence necessary to warrant action on the part of the Government, or by the payment of the costs of the contest. The land simply reverted to the United States, and once more became public land, subject to entry by the first legal applicant. But after the lapse of fifteen years Congress, recognizing the practice of your office as established in the matter of requiring the contestant to pay the expenses of the contest, provided, May 14, 1880—

That 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 such cancellation, and shall be allowed thirty days from date of such notice to enter said lands. (21 Stat., 140.)

By Rule 4 of the Rules of Practice, as prescribed by your office, the affidavit for contest must be accompanied by the affidavits of one or more witnesses in support of the allegations made by the contestant.

From this brief review of the law and the practice governing contests of this nature it will be seen that the right to contest an abandoned homestead entry exists in no one, but that in consideration of being placed in possession of certain information and the payment of certain expenses the Government holds the land in reserve for thirty days, for the purpose of allowing the person who furnished such information and paid such expenses an opportunity to enter the land.

This is akin to the law, as it has from time to time existed, granting a moiety to the informer of the penalty imposed upon violators of the law in criminal cases, and is operative merely as an inducement to parties cognizant of the facts and desirous of securing the land to come forward and furnish the information upon which the proceedings can be based. As in criminal cases, this gives the informer no right to have the proceedings instituted; but upon the acceptance of the information, including the deposit for expenses and the institution of proceedings thereunder, his right accrues to make the proofs and secure the reward appropriated to him by the law. The object of the contest is to clear the record of an abandoned entry and restore the land to the Government, and under the law, whenever a case of abandonment is proved, after due notice to the settler, the land ceases to be appropriated under the homestead law, and becomes the property of the United States. To secure an assurance of good faith on the part of the contestant, a rule, requiring his allegations of abandonment to be corroborated by the affidavits of other persons prior to the issuance of the notice of contest, has been very properly prescribed by the Department; but such rule must not be permitted to defeat the operation of the law. The information having been furnished, the notice to the settler given, and the parties present for the hearing in pursuance of such notice, the local office has then full jurisdiction to pursue the inquiry, and render judgment in accordance with its findings. Any question involving the sufficiency of information on which the local office elected to proceed disappears from the moment that notice is issued to the settler. It is by notice to the homestead settler that jurisdiction is acquired, and not by virtue of any affidavits on which such citation was issued; and this Department will not here review the sufficiency of the information. Due notice of the issue having been given in the words of the statute, or in a manner to answer the requirements of the statute, and satisfactory proof of abandonment made, the homestead entry must be canceled.

Hence, in this case, after judgment on the merits by the district officers, it follows that you erred in your decision of July 5, 1882, dismissing Dawson's contest merely because of his failure to file corroborative affidavits in support of his affidavit for contest. You should have adjudged the case on its merits, as reported to you on the record.

With respect to proceedings initiated by other parties subsequently to the initiation of Dawson's first contest, and based on the same allegations of abandonment as made by him, it is sufficient to say that the same cannot be entertained. The entire question being *in custodia legis*, any other rule would involve the Government in a multiplicity of suits to no purpose. Nor did Thompson by the purchase of Coyle's improvements acquire any right to initiate a contest, and the proof of such purchase would only serve to establish the allegations of Dawson. (Weber v. Shappell, 9 Copp's L. O., 131.)

The true rule in such cases would require the bringing in, if possible, of the parties presenting the allegation of purchase as witnesses for the Government, or nominally for the party contesting, at the hearing already initiated. But if such hearing has already been held, and the testimony closed, the new application to contest must be disregarded, for the reasons above stated. One party having already paid the expenses, submitted his proofs, and procured judgment, is entitled to a final decision on the case as made by him.

An examination of the correspondence in this case reveals the fact that Houston & Son, July 18, 1882, six days after S. D. Houston, jr., had filed his application to contest Coyle's entry, wrote to your office as Thompson's attorneys, with a view to securing a rule permitting Thompson to contest Coyle's entry on the papers filed by the said Thompson, February 7, 1882, at the hearing then held at the local office; and that October 2, 1882, said firm of attorneys addressed your office, ostensibly as attorneys for Coyle, urging that Dawson's contest be declared closed, "as it has hung some time and is a great wrong to defendant Coyle."

In view of the multifarious relations sustained by this firm of attorneys to the various parties involved in this controversy, and their persistent efforts to secure the land in question for their own benefit, at a time when the record discloses them to be the attorneys of two parties, each of whom was asserting independent and adverse claims to the land—I would suggest an investigation by you as to all the facts, for the purpose of recommending appropriate action with reference to the status of said attorneys before the Department.

Your decision dismissing Houston's contest is affirmed, and the application of Thompson to appear as a contestant is overruled.

The evidence shows that Dawson's allegation of abandonment is fully sustained, and from the record it appears that due notice of the contest was given; hence the homestead entry of Coyle must be adjudged forfeited, and canceled accordingly. Although Dawson did not appeal from your decision of July 5, 1882, dismissing his contest, yet inasmuch as he, at the earliest opportunity afforded by the rulings of your office, renewed his application to contest Coyle's entry, he will be remitted to his rights acquired in the first instance, and, on showing the requisite qualifications, be permitted to enter the land within the period awarded by the law to the successful contestant.

## DEFECTIVE NOTICE—TECHNICAL OBJECTION.

## ENGLAND v. LIBBY.

As a material matter was omitted from the affidavit on which publication of notice was ordered, the notice of contest for abandonment is defective. But, in view of the contestee's failure to set up a substantial defense, and of the admission of abandonment in an affidavit of his wife filed with his appeal, this technical objection is overruled, and his homestead entry is ordered canceled.

*Secretary Teller to Commissioner McFarland, February 26, 1884.*

SIR: I have considered the case of Alexander England v. Foxwell C. Libby, involving the latter's homestead entry made May 26, 1879, upon the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 8, T. 13, R. 31, North Platte, Nebr., on appeal by Libby from your decision of July 21, 1883, holding his entry for cancellation.

This contest was initiated August 23, 1882, upon allegations of abandonment. England's affidavit for contest stated "that the residence and post-office address of said Foxwell C. Libby is unknown to this affiant, and personal service of notice of contest cannot, therefore, be had upon him." The notice was by publication, and Libby was not present nor represented at the hearing. The local officers sustained the allegations under the testimony, and you affirmed the same. Libby appeals on the ground of defective notice.

Practice Rule 10 requires personal service of notice of contest to be made in all cases "when possible," and Rule 12 authorizes notice by publication only when it is shown by satisfactory proof that personal service cannot be made. It has been held by this Department (Ryan v. Stadler, Copp, June, 1883), that an affidavit of the contestant stating merely that the residence of the entryman is unknown is insufficient to authorize notice by publication unless it also appears that he has made reasonable diligence to ascertain such residence. It does not appear that England made any inquiry to this end. While, therefore, his affidavit may be true to the extent of its statements, its omission of a material matter rendered it deficient as the basis for notice by publication, and the local officers erroneously authorized such notice; and were this the only question, the contest should be dismissed for the irregularity. But it appears from the affidavit of the wife of Libby, accompanying his appeal, that, with his family, he has an "establishment" and has resided elsewhere in the same county in which the land in question is located for more than three years prior to and at the date of the contest. This accords with the proofs submitted by England that he had not resided upon, cultivated, nor improved the land in question for more than two years preceding the contest, and in connection therewith, I think, establishes his abandonment, and, as the appeal does not claim his residence upon the land, as required by law, or that he was ignorant of the publication, or had any substantial defense to the contest, or has been deprived of any right by your decision, and as his objection is technical merely, and not meritorious, I affirm your action.

*MULTIPLICITY OF CONTESTS—SPECULATIVE PURPOSES.**O'KANE v. WOODY.*

The circular of December 22, 1882, was designed to prevent a multiplicity of contests for speculative purposes, and should not be so construed as to prevent a *bona fide* contestant from dismissing one contest, and commencing another against a different party.

*Secretary Teller to Commissioner McFarland, April 10, 1884.*

SIR: I have considered the appeal of John O'Kane from your decision of June 28, 1883, rejecting his application to contest the homestead entry of one Woody upon certain tracts in Sec. 9, T. 109, R. 61, Huron, Dak.

It appears that March 3, 1883, O'Kane instituted a contest against the homestead entry of one Story. Upon the following day he asked leave to withdraw this contest, and to institute one against Woody's homestead entry of land in the same township, alleging that the land embraced in the latter's entry suited him better than that in the former's. The local officers refused to permit the withdrawal. March 13 he again renewed his application, explaining that from information acquired after he commenced his contest, Story was acting in good faith, and that his charges against him could not be sustained. The leave to withdraw was granted, but the register stated that simultaneously with his (O'Kane's) application another was filed by one Melville to contest the same entry of Woody, and he refused both, but allowed them to bid for the privilege of contest. O'Kane refused to bid, but Melville bidding \$5, was awarded the privilege.

Your decision holds that the local officers properly refused O'Kane's first application to contest Woody's entry, under your circular of December 22, 1882 (Copp, January, 1883), and under your ruling of April 9, 1883, in the case of *Delaney v. Bower* (Copp, June, 1883).

Your circular instructed local officers not to "allow but one contest against a homestead entry \* \* \* to the same party at the same time, and this because of a prevailing practice of speculating in relinquishments of entries on the public lands, and of initiating contests for speculative purposes, and for avoiding a multiplicity of contests against the same entry. O'Kane was not within the reason of this rule, nor within the rule itself, because he did not apply for a contest against Woody until after his contest against Story should be dismissed; and there is no evidence that he was acting in bad faith, or for any speculative or improper purpose.

In Delaney's case it appears that the register reported to you that great abuses were being practiced, in that "parties initiate contests, withdraw before the day of trial, then renew the contests, and so harass contestants, and involve them in continued expenses;" whereupon you very properly ruled "that such contest cannot be regarded as

made in good faith, that oppression and extortion under color of contest cannot be sanctioned by this office", and that "the same party will not be permitted to renew the contest on the same ground." I do not, however, concur in that part of this decision which says, "when a contest has been regularly instituted, and the contestant withdraws at or before the day fixed for trial, he will be regarded as in default, and the case will proceed and be decided accordingly," as applied to a case like that of O'Kane, where there appears to be an entire absence of bad faith, and his only object of contest appears to have been that he might himself enter the tract when the former entry was canceled. I see no reason for compelling further prosecution of a contest, to the annoyance and expense of the contestee, after such contestant applies for its dismissal. Such practice would accord with ordinary legal proceedings, and I know of no principle which renders it inconsistent with the proper administration of the land laws, as a general rule. In exceptional cases, however, where meritorious rights are endangered by contests manifestly initiated for fraudulent or speculative purposes, the disposition of the contest should be subject to your discretionary judgment.

As there is no pretence that O'Kane in his applications to contest either the entry of Story or that of Woody acted otherwise than in the utmost good faith, I think he should have been permitted to withdraw his contest against Story upon his first application therefor, and to initiate another against a different party (Woody) and a different tract.

I reverse your decision, dismiss the contest of Melville, and allow that of O'Kane to proceed.

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*APPLICATION TO ENTER—DEFECTIVE AFFIDAVIT.*

*KOONS v. ELSNER.*

It is not necessary at the time of initiating contest against a homestead entry to make application to enter the tract.

The defects in affidavit of contest are considered as cured by the jurisdiction assumed by the register and receiver under the Secretary's ruling in *Houston v. Coyle* (10 Copp, 224).

Several errors and defects pointed out.

*Commissioner McFarland to register and receiver, Mitchell, Dak., April 15, 1884.*

**GENTLEMEN:** Your letter of August 27, 1883, was received, transmitting the papers in the *ex parte* contest of Henry Koons *v.* Christian F. Elsner, involving homestead entry 18,131, March 7, 1882, for NE.  $\frac{1}{4}$  of 32, 106, 63, from which it appears that contest was initiated April 9, 1883, notice by publication; hearing June 19, 1883, no appearance for defendant; judgment of forfeiture and no appeal.

On November 2, 1883, you transmitted to this office the application of Koons to be permitted to initiate another contest against said entry

because of the illegality of the first. He alleges (1) that the affidavit of contest was made before one of his attorneys of record, (2) that there was no allegation of non-residence of defendant therein on which to base an order of publication, (3) that notice by publication was made without an order to that effect from the register and receiver, (4) that the order to take testimony under rule 35 was not signed by both register and receiver, (5) that said testimony was taken before one of his attorneys of record, and that at the time of initiating said contest he did not make application to enter said tract.

The record substantiates all these allegations; and it is not conceivable that more errors and irregularities could be congregated in a case where the mode of procedure is so plainly pointed out, so simple, and so easy to follow.

As this was a contest against a homestead entry, it was not necessary at the time of initiating contest to have made application to enter the tract, and there was no irregularity in a failure so to do; but the other defects and irregularities are so glaring and numerous that this office must decline to countenance them by affirming your decision.

The very serious defect in the affidavit of contest, because of its being sworn to before plaintiff's attorney, would seem to be cured, under the ruling in *Houston v. Coyle* (10 Copp, 224), when you assumed jurisdiction. In that case the honorable Secretary of the Interior, in speaking of a defective affidavit of contest, said, "Any question involving the sufficiency of the information on which the local office elected to proceed disappears the moment that notice is issued to the settler. It is by notice to the homestead settler that jurisdiction is acquired, and not by virtue of any affidavits on which such citation was issued; and this Department will not here review the sufficiency of the information."

Applying the ruling here laid down, it has been determined to refuse the application of Koons to initiate a second contest, and to remand the present one, with leave to him to file therein the affidavit herewith inclosed, and which accompanied his rejected application as a basis for further proceedings in regular order.

Notify the parties thereof, and of their rights in the premises.

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*RIGHTS OF CONTESTANT—CIRCULAR OF JULY 1, 1879.*

*GILMAN v. NOLAN*

The rights of a contestant should be protected when acting under the authority of the circular of July 1, 1879 (ruling that an entry on land in possession of a *bona fide* settler was invalid), which was in force at the date of initiation of the contest.

*Secretary Teller to Commissioner McFarland, April 22, 1884.*

SIR: I have considered the case of *Henry S. Gilman v. Kavan Nolan*, involving 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. 24,

T. 23 S., R. 43 W., Pueblo, Colo., on appeal by Nolan from your decision of February 8, 1883, holding his entry for cancellation.

It appears from the record that Gilman, who had contested one Thomas B. Nolan's prior homestead entry on this tract, settled on it in February 1879, built a house, and with his family continued to reside there and to cultivate it until date of contest and hearing. Said Nolan relinquished the land pending said contest, and the entry was canceled at the local office July 15, 1879. Nolan obtained early notice of the cancellation and had his brother Kavan, the defendant here, make homestead entry for it. Said entry was made July 17, 1879, and on August 8 following, Gilman was allowed to file a soldier's homestead declaratory statement, and to commence contest against it.

At this time General Circular of July 1, 1879, was in force, providing that an entry on land in the possession of a *bona fide* settler should be deemed invalid. Gilman had a right to rely on this ruling as authoritative, and it was notice to the world that such settlers as he might expect protection against the wiles of speculators and others in trying to deprive them of their homes. By it he was expressly authorized to contest Kavan Nolan's entry, with a view to showing such prior settlement. Having done so, I think that the Land Department is bound to protect him by canceling it on the aforesaid proof of his *bona fide* settlement.

There were two hearings in this case, at neither of which Nolan appeared in person, and at the latter of which it was shown that he was then residing in Santa Fé, N. Mex. Wherefore I am of opinion that his homestead entry was not made in good faith, but with a view of harassing Gilman.

For these reasons your decision is affirmed.

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*SPECULATIVE PURPOSES—PERSONAL BENEFIT.*

*JOHNSON v. BISHOP ET AL.*

Allegation that contest was instituted for speculative purposes. It may be fairly presumed that all contests are originated for the immediate personal benefit of the contestant. The nature of the motive prompting the initiation of a contest would not, on the application of a stranger, form proper basis for investigation.

*Secretary Teller to Commissioner McFarland, April 24, 1884.*

SIR: I have considered the application of the attorney of J. N. Johnson to have the proceedings in the case of *J. N. Johnson v. John Bishop and L. C. Dayton* certified to this Department under Rule 83 of the Rules of Practice.

It is alleged by the applicant that in the contested case of *L. C. Dayton v. John Bishop*, involving Bishop's homestead entry for the NE.  $\frac{1}{4}$  of Sec. 33, T. 117, R. 59, Watertown, Dak., he—Johnson—filed a motion to have the said contest dismissed on the ground that it was initiated

for speculative purposes, and asking that he might be allowed to contest said entry. That said motion was transmitted by the local office to you for instructions, and that December 20, 1883, Johnson's attorney received notice by mail from the local office that you had denied the motion. That February 27, 1884, Johnson filed his appeal from your decision, and March 19, 1884, was advised through the local office that you refused to entertain the appeal, because not taken in time. It is also alleged by the attorney that he supposed he was in time when he filed his appeal, that he believes the notice of said adverse decision was mailed to him the same day that he received it, and that the meritorious case of Johnson cannot be reviewed except through the writ applied for.

From an examination of your decision of March 14, 1884—the one which Johnson says he received notice of March 19—it becomes apparent that a considerable discrepancy exists between the statements in the application and the records of the local office. From the latter it appears that the decision from which Johnson desired to appeal was rendered by you October 10, 1883, that notice of the same was served on Johnson December 17, 1883, and that his appeal therefrom was filed February 28, 1884.

Rule 84 of the Rules of Practice provides that applications to the Secretary under Rule 83 "shall be made in writing under oath, and shall fully and specifically set forth the grounds upon which the application is made."

It is to be observed that Johnson has not furnished copies of the decisions which he seeks to have reviewed, nor set out a specific recital of the same, and in the absence of such a showing no presumption would be raised that error or oversight has occurred in the disposition of the case by your office. *Wright v. Saint Bernard Mining Company* (1 Reporter, p. 90); *Montague Placer Mine* (Brainard's L. P., Vol. 1, p. 53); *Dobbs Placer Mine* (*Id.*, p. 100).

From the record it appears that Johnson's right of appeal had expired prior to the time when he filed notice of the same, and the affidavit of his attorney will not be accepted to impeach the integrity of the record and so establish a right denied by the Rules of Practice.

It in no manner appears that Johnson could in any way be considered as a party to the record in the contest which he sought to have dismissed, or that he occupied such a standing as to entitle him to an appeal from your decision overruling his motion.

It may be fairly presumed that all contests are originated for the immediate personal benefit of the contestant, so far as the motive of the contestant is concerned; but the application of a stranger to the record for the purpose of calling in question the nature of the motive that promoted the initiation of a contest would not form a proper basis for investigation, nor would such an inquiry further the interests of the Government in the pending contest.

The application is therefore denied.

*PREMATURELY INITIATED—REJECTED APPLICATION.***BAXTER v. CROSS.**

In homestead cases six months and one day, exclusive of the day of entry, must elapse before contest can be initiated.

*Secretary Teller to Commissioner McFarland, May 16, 1884.*

SIR: I have examined the appeal of William J. Baxter from your decision, affirming that of the register and receiver, which rejected his application to contest the homestead entry of Byron F. Cross, No. 6,651, made March 11, 1882, of the SE.  $\frac{1}{4}$  of Sec. 25, T. 131, R. 48 W., Watertown, Dak.

September 5, 1882, Baxter presented his affidavit of contest, alleging as cause abandonment for six months prior to the date thereof. The register and receiver received and filed the affidavit, entered the case in the contest docket, and duly issued notice of trial for the 7th day of November, at 11 o'clock a. m.

Subsequently, the register and receiver discovered that the contest had been illegally allowed, because at the time it was initiated, six months had not elapsed since the date of the entry. Thereupon they notified the contestant, through his attorney, that the contest was dismissed, and requested the return of the notice—which request was complied with.

October 3 following, Baxter presented to the register and receiver another affidavit of contest, alleging the same cause.

In the meantime, September 12, one William J. Smith had, upon proper application, been allowed to contest said entry, and such contest was pending at the time Baxter made his second application; and for that reason Baxter's last application was rejected.

The substance of the several errors assigned upon the appeal is:

First. That the register and receiver erred in dismissing the contest upon their own motion, without a hearing, and before the day assigned therefor.

Second. That the register and receiver erred in rejecting the second affidavit of contest, and in not permitting appellant to file it as supplemental to the first one, and that such rejection was in fraud of his rights as an adverse claimant under the act of May 14, 1880.

If it be conceded that the appellant is correct in his proposition that the register and receiver had no right to dismiss the appeal upon their own motion without his consent, it cannot avail him in this case. He assented to the action of the local office in returning the notice or summons, which had not been served to the office as requested, by taking no further action under it, and by treating that contest as abandoned by filing a new application for another contest after the six months from the date of the entry had elapsed, and long before the day assigned for hearing upon the first application. Such new application was entirely inconsistent with the idea that the first contest was pending, because

he could not have had two contests pending at the same time between the same parties in the same tribunal for the same cause of action. It is obvious that the first contest must have failed because of its premature initiation, and the appellant, who acted through counsel, seems to have readily assented to the action of the office upon his attention being called to the error.

The second proposition, that the subsequent affidavit was supplemental to the first, is not tenable. It does not purport upon its face to be supplemental or additional, but is independent and complete in itself, as the basis of a new contest. The first contest having been dismissed and treated as abandoned by the appellant, there was nothing to support a supplemental affidavit.

There is, however, another question in this case not raised by the parties or referred to by you, but apparent on the face of the record, viz., whether the application of Smith, made September 12, 1882, was not also premature. Cross's entry was made March 11, 1882. That day would be excluded from the computation (*Bennett v. Baxley*, Secretary's decision of January 22, 1884), and six months would include the whole of the 11th day of September following (*Tripp v. Stewart*, Copp's P. L. L., 707).

Section 2297 of the Revised Statutes provides that if the homestead entryman shall, at any time before the expiration of the five years, "actually change his residence, or abandon the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

Forfeitures are not favored, and statutes declaring them should be liberally construed to avoid them.

The abandonment must be "for *more* than six months" in order to work the forfeiture and cause the reversion. To make a period of *more than six months*, it would be necessary to take some part of the 12th day of September, on which Smith made his application to contest; and since we cannot regard fractions of a day, the whole of said twelfth day must be included in order to make more than six months' abandonment. The forfeiture of Cross's entry was not therefore complete until the 13th, and the contest initiated by Smith before that time was premature.

The question of construction in such cases has been a vexed one for many centuries. In *Griffith v. Bogert* (18 How., 158), after considering the rule at some length, the court said: "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to such cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any *bona fide* transaction or title."

In accordance with these views, Smith's contest should be dismissed, and Baxter's rejected application of October 3 should be allowed. I reverse your decision.

**10. CONTRACT TO SELL.****VOID—STATUS OF CLAIMANT.****ALDRICH v. ANDERSON.**

A contract for the future conveyance of part of a homestead claim is void, and will not affect the legal status of the claimant. Only an absolute conveyance will defeat his right.

*Secretary Teller to Commissioner McFarland, December 29, 1883.*

SIR: I have considered the case of Elisha B. Aldrich *v.* Joseph Anderson, on appeal by Aldrich from your decision of April 6, 1882, dismissing the contest. This case was initiated July 22, 1880, on allegations that Anderson was "holding the land for speculative purposes, and had already sold one-half thereof—having made a written contract therefor."

It appears that Anderson filed a soldier's declaratory statement September 15, 1876, for the SE.  $\frac{1}{4}$  of Sec. 10, T. 8, R. 10 W., Bloomington, Nebr., and made homestead entry therefor March 7, 1877. On December 16, 1876 (as appears from the date thereof), he signed a written contract with one Carkins, whereby, for the consideration of \$100, he agreed to make and execute to Carkins, on or before May 1, 1881 (at which date it was supposed Anderson would have acquired title to the tract), a warrantee deed for the S.  $\frac{1}{2}$  of the tract. The testimony is conflicting as to whether this contract was actually made upon the day of its date, or subsequently to the date of Anderson's entry; nor is this material for the purposes of this decision, because the principle to be applied will embrace either date.

The question involved is as to the effect of this contract upon Anderson's entry; and the rulings of your office and of this Department have generally held that, if a contract of this character could be enforced against the homestead entryman, it was fatal to his claim; otherwise not. Further consideration of the question leads me to the conclusion that such a contract, if not absolutely forbidden by statute, is hostile to the whole spirit and purpose of the homestead law, and to the public policy relative thereto, and cannot be enforced. This view is held by the court in *Dawson v. Merrille* (2 Nebraska, 119), in which they say that if the provisions of the homestead law do not directly prohibit the making of such contracts, they do most clearly indicate a policy adverse to them, and hence that, being against public policy, a court will not lend its aid to enforce them. And in *Oaks v. Heaton* (44 Iowa, 116), where the question was like that in the present case, the court held that an occupier of land under the homestead law cannot make a valid contract to convey his homestead when he shall have acquired the legal title.

If such contract is not valid, it is void, and cannot be enforced

against the party making it; and being without legal significance, it is not the *alienation* which the law prohibits.

The rulings in Nebraska and Iowa accord with the well-settled doctrine that a contract inconsistent with public policy cannot be enforced. (*Coppell v. Hall*, 7 Wall., 542; *Marshall v. R. R. Co.*, 16 How., 314; *Scudder v. Andrews*, 2 McLean, 464; *Leavitt v. Palmer*, 3 N. Y., 19.)

I am of the opinion that a contract made prior to the acquisition of title to convey land embraced in a homestead entry, after the entryman shall have acquired title, is, if not illegal, against the public policy, and cannot be enforced, and that an absolute conveyance only can defeat his right; and hence that Anderson's contract to convey to Carkins a portion of the land embraced in his entry was of no legal effect, and cannot change his status upon the record.

I affirm your decision.

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## 11. CULTIVATION.

*RESIDENCE—PURCHASE—R. S. 2301.*

LORENZO A. PADDOCK.

Where a homestead claimant applies to purchase, under Sec. 2301 R. S., the land embraced in his entry, he must show cultivation of the land as well as residence thereon.

*Commissioner McFarland to register and receiver, Fergus Falls, Minn., January 16, 1883.*

GENTLEMEN: Lorenzo A. Paddock made homestead entry No. 7,299, February 15, 1882, for S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  6, 136, 36. November 10, 1882, he applied to purchase the land as provided by section 2301 Rev. Stat. The proof submitted shows that he established a residence upon the land on February 17, 1882, built a frame house 12 by 16 feet thereon, and resided continuously in said house from date of establishing residence on the land to the time of making proof—a period of eight months and twenty-three days—and that he has cleared one acre of the land, but had "not had time to break and cultivate" any portion of the same.

The application to purchase was rejected by you on the day presented, for the reasons, as shown by your indorsement on the proof, "that the proof does not show cultivation," and thirty days were allowed for appeal.

On December 8, 1882—within the thirty days—the claimant, by his attorney, Fred. H. Lake, filed in your office his appeal, based on the ground that "he has built a house, cleared some of the land, and resided thereon for six months." This appeal, with the other papers relating to the case, was transmitted to this office for consideration with your letter of December 28, 1882.

Section 2301 Rev. Stat. permits purchase of the land as contemplated in this case upon presentation of proof of settlement and "cultivation" as provided by law.

The proof presented by the claimant does not only fail to show cultivation, but clearly establishes the fact that no portion of the land was cultivated by him. I am, therefore, of opinion that your decision rejecting his application to purchase was correct.

The appeal is, therefore, dismissed and your action sustained. Inform the party, through his attorney, respecting the action of this office in the premises, and advise him fully respecting his right to appeal to the honorable Secretary of the Interior within sixty days, as provided by the Rules of Practice.

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*CONTEST—GOOD FAITH NOT SHOWN.*

*JACKLIN v. SAMUELSON.*

The testimony shows that defendant failed in cultivation of the land, and his residence thereon is too meager to indicate good faith. No satisfactory excuse is pleaded for failure to comply with the homestead law. Exceptions stated where claimants are not obliged to reside upon their homesteads.

*Commissioner McFarland to register and receiver, Crookston, Minn., December 5, 1883.*

**GENTLEMEN:** I have considered the case of Rudolph Jacklin *v.* John Samuelson, involving the latter's homestead entry No. 5,918, made September 27, 1881, for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  31, and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  32, 155, 43, on appeal by the defendant from your decision adverse to him.

Contest was instituted July 22, and hearing held November 13, 1882, the charge being abandonment. Both parties appeared.

The testimony shows that the defendant went upon the land for the first time March 15, 1882, and remained four days at work in the erection of a house thereon in which he slept on the last night of his stay there, having slept the other three nights at a neighbor's, who furnished him his meals, which he ate on the land. He then absented himself from the land until April 25, 1882, when he returned to the land, and, after remaining thereon three days, again absented himself therefrom and did not return thereto until after the initiation of the contest.

The cause of his continual absence from the land the defendant attributes to the alleged fact that from date of entry, September 27, 1881, to July 27, 1882, excepting the few days he was on the land, as hereinbefore shown, he was employed at work in Crookston, Minn., part of the time chopping wood for his board and for fifty cents a day, and part of the time, namely, from April 27 to July 27, 1882, at work for the railroad company. He testifies that while working for the company his wages were \$1.50 per day during the first month and \$1.75 per day during the last two months.

This, the counsel for plaintiff makes the point, would indicate that the defendant was not so financially distressed as not to have been able to have the land improved during his absence, which the evidence fails to discover was attempted by him.

In this view I fully concur, the more especially as the defendant himself admits that when he went to Crookston, on March 19, 1882, to resume his work there, he was not "out of money." And although claiming in this connection that he had "nothing to live on," he does not make the plea of poverty as an excuse for his failure to meet the requirements of the law; nor could such plea avail him anything under the state of facts presented.

The real question at issue, and the one upon which it would seem the defendant mainly relies to sustain his entry is, does the fact of his being engaged at work which required his attendance at a place other than his homestead, excuse his failure to meet the requirements of the law in the matter both of residing upon and cultivating the lands?

Clearly not, for the homestead law *insists* on settlement or residence, and cultivation for a period of five years (John Wineland, 4 Copp, 103), and that the defendant was not ignorant of at least one of these requirements—that of inhabitancy—is manifest from his attempt to keep up a show of residence by going upon the land and remaining thereon four days at one time and three at another.

A homestead claimant who remains over night on the land once or twice in six months fails to establish the residence contemplated by law. (*Byrne v. Catlin*, 5 Copp, 146.) Furthermore, it must have been apparent to the defendant at date of entry that by reason of his occupation, as above, he was not in a position to comply with the plain provisions of the law, and, hence, that in making the entry he did so at his risk. The only cases in which a claimant is excused from residing upon his homestead are (1) where such residence having once been established is afterward rendered impracticable by reason of the claimant's appointment to a public office, requiring his residence at a distance from the land covered by his entry (*Harris v. Radcliffe*, 10 Copp, 209); and (2) where the claimant is the widow or heir of the deceased homestead settler (Official Circular issued October 1, 1880, p. 15), but in either case the land must be cultivated for the required period.

Such rule, therefore, would not apply to the case at bar, wherein it is clear from the evidence the defendant never established the residence contemplated by law; and as it is held (*Byrne v. Catlin, supra*) that where it is shown that such failure was not the result of ignorance or uncontrollable circumstances, the entry should be canceled, I must hold that the defendant has forfeited his entry.

As regards the further point raised by plaintiff's counsel, that the defendant attempted to dispose of the land for a valuable consideration, and with this purpose in view relinquished his entry on the back of his duplicate receipt, which, however, was never delivered, the same

is not sustained, as an attempted sale of the land embraced in a homestead entry is not sufficient ground for cancellation, although raising, as it does, a strong presumption of bad faith. (*Guyton v. Prince*, 10 Copp., 70; *Bailey v. Olson*, 10 Land Owner, 290.)

Your decision is affirmed, and the entry held for cancellation. You will so advise the parties in interest, allowing the usual privilege of appeal. At the proper time report action taken.

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## 12. DECEASED ENTRYMAN.

*DEATH OF ENTRYMAN—SALE—ASSIGNEE—PURCHASER, UNDER REV. STAT. 2292.*

### J. B. WOODS.—*AUSTIN v. HUNT.*

There being no widow, the homestead in this case was sold for the benefit of infant heirs. Contest for abandonment, under the circumstances, is dismissed. Irregularity of homestead affidavit considered. The purchaser, under section 2292, R. S., need not pay cash under the act of June 15, 1880, as title in him is complete on payment of fees and commission.

*Commissioner McFarland to register and receiver, Gainesville, Fla., August 10, 1883.*

GENTLEMEN: Referring to your letter of August 6, 1881, and July 7, 1883, transmitting application of J. B. Woods, as assignee of the minor heirs of Thomas W. Hunt, deceased, to purchase the land embraced by said Hunt's homestead entry No. 1,864, under the act of June 15, 1880, and the contest papers, evidence, &c., in the case of *W. J. Austin v. Thomas W. Hunt*, I have to state that the records of this office show that Hunt made said homestead entry No. 1,864, on the 11th day of August, 1875, for the SE.  $\frac{1}{4}$  of Sec. 15, T. 17 S., R. 30 E., Gainesville series, Florida.

By the evidence submitted in support of Mr. Woods' application to purchase, it is shown that Mr. Hunt died very suddenly a few weeks after making the entry. That prior to his decease he devised his property, including the homestead, to his four minor children, and appointed Joseph Crow and Drury Sanders, of Franklin, Simpson County, Kentucky, executors of his last will and testament, and charged them with the care and education of his children.

Furthermore, it is shown that on the 20th day of January, 1877, the executors sold the homestead in question, there being no widow, to J. B. Woods, he being the highest bidder, and gave a quitclaim deed, divesting the heirs of whatever title they possessed in the land, and placing it in Mr. Woods.

The will was duly probated in the court of Simpson County, Kentucky, and it is shown that said executors accepted the trusts imposed on them; that the sale of the homestead to Woods was made by the advice and

consent of the court, and subsequently thereto confirmed by the court, and the amount received accounted for by the executors in the adjustment and settlement, as part of the assets of said Hunt deceased.

In the contest above referred to, you render an opinion that the charge of abandonment against Hunt has been sustained, and the entry should be canceled.

Section 2292, Rev. Stat, provides that—

If case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, &c.

In the case under consideration the homestead party died, being the only surviving parent, leaving four infant children; therefore, under the section above quoted, the right and fee in the homestead in question inures to their benefit, and as the land was *sold by the executor*, duly authorized and qualified under the State courts, *within two years* from the decease of said Hunt, for the benefit of said infant children, it falls within the provision of the section quoted, granting *absolute title to the purchaser*.

This being the case, I am of the opinion that the entry in question is not one that is subject to a contest for abandonment, as it seems, from the language of the law, to have been the intention of Congress to secure to such infant children the right to dispose of the land within two years, without any further requirement as to settlement and cultivation.

In regard to the charge of fraud made against the homestead party in making his original affidavit before the clerk of court, the evidence does not bear out the charge, as the party does not state in said affidavit that he resided on his entry, only that he is a resident of the county.

Such cases are held by this office to be irregular, but not illegal, and are cured by making proper affidavits before the register or receiver.

With this view of the case, I have decided to dismiss the contest, and, as your decision was in favor of the contestant, sixty days will be allowed within which he may appeal from this action; and in relation to the application of Mr. Woods to purchase under the act of June 15, 1880, as assignee of the minor children, it is unnecessary to state further than has already been done, that he is the purchaser under section 2292, and therefore entitled to a patent on payment of the office fees, the evidence of payment of the purchase-money for benefit of the heirs being satisfactory; therefore, the application to purchase from the United States, the right to the land already being in Mr. Woods, is declined.

At the expiration of the sixty days allowed for appeal, if no appeal is taken, you will allow Mr. Woods to consummate his purchase from the minor children referred to, and issue the necessary papers in the case.

*APPLICATION—EQUIVALENT TO ENTRY—HEIRS.***TOWNSEND'S HEIRS v. SPELLMAN.**

Where an application is made by a party to enter land as a homestead, and the party dies before the entry is perfected, his heirs may make the desired entry.

*Secretary Teller to Commissioner McFarland, October 16, 1883.*

SIR: I have considered the case of A. C. Townsend *v.* Hiram Spellman, involving the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and the SW.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 24, T. 1, R. 27, Kirwin, Kans., on appeal by the heirs of Townsend (deceased) from your adverse decision of September 2, 1881.

On appeal from your decision of July 21, 1879, in this case, holding that Spellman had the superior right and should be permitted to enter the tracts under his homestead entry, my predecessor, Secretary Schurz, reviewing the law and the facts, vacated your decision, March 18, 1880, and directed a hearing to determine the rights of the parties as in cases of simultaneous applications. The testimony at this hearing shows that Spellman had abandoned the tracts and removed from the State of Kansas. Whatever right he formerly had to it became thereby forfeited, leaving only for consideration the right of Townsend, as against the Government. Townsend died September 20, 1880, having made certain improvements on the land with intention of moving thereon and making it his home, which by reason of long-continued ill-health he was unable to do.

The question presented is, whether or not his heirs are entitled to any right under section 2291, which provides for a certificate of entry and for patent to "the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisee."

The record shows that Townsend filed a timber-culture application for the tracts August 28, 1878, and that Spellman filed a pre-emption declaratory statement November 23 following, alleging settlement the same month. Townsend's application was rejected by your office February 12, 1879, and on April 12, 1879, Spellman made homestead entry for the tracts. On April 15, Townsend applied to enter the tracts under the homestead laws, but his application was rejected by reason of Spellman's prior entry. The local officers then notified Spellman that his entry had been removed from the records because Townsend's adverse claim had attached under his timber-culture application prior to his (Spellman's) settlement, and that they would consider the claims of the two as made simultaneously. This accords with the views announced by my predecessor in his decision of March 18, 1880, wherein he held, among other things, that Townsend's application to enter the tract under the homestead law was equivalent to actual entry as respected his rights. Concurring in this opinion, and there being no other party in

interest, and Townsend having since died, his heirs become entitled to perfect the entry he initiated.

Your decision that, as Townsend died before actual entry of the tracts, his heirs have no rights, notwithstanding his application to enter them, is reversed; and Spellman having removed from the State and no longer prosecuting his claim, his entry will be canceled, and the application of the heirs of Townsend be allowed.

### 13. DESERTED WIFE.

*FINAL PROOF—PURCHASE—ACT JUNE 15, 1880—AGENT.*

*BRAY v. COLBY.*

A deserted wife cannot make final proof or obtain patent in her own right by virtue of her husband's entry. Nor has she a right of purchase under the act of June 15, 1880, by virtue of her husband's entry. Five rules are laid down, which recognize a deserted wife or child as the absent husband's agent.

*Secretary Teller to Commissioner McFarland, January 29, 1884.*

SIR: I have considered the case of Frank S. Bray v. Walter E. Colby, involving the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 24, T. 20 S., R. 27 E., and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 19, T. 20 S., R. 28 E., Gainesville, Fla., on appeal by Bray from your decision of August 15, 1882, dismissing his contest.

It appears from the record that Colby entered the land in March, 1878, placed his family thereon, and in October, 1878, deserted them; and that some ten months thereafter, his wife, Eva A. Colby, with their child, left the land and the State (for the purpose of supporting herself, as she says), and that during her absence she sold the improvements on it. Contest against her husband on the ground of abandonment was initiated January 17, 1881, and judgment against him was rendered August 23, 1881, from which there was no appeal, and which, therefore, became final. On January 27, 1881, Mrs. Colby returned to the land, and on June 19, 1882, made cash entry, number 3,292, in her own name, as the "abandoned wife of Walter E. Colby." Your said decision dismisses the contest on the ground that, as a deserted wife may make final proof upon her husband's homestead entry, she should be allowed to make cash entry under the act of June 15, 1880.

If a deserted wife may have the right of purchasing her husband's entry under said act, she can obtain it only by virtue of her legal identity with him, as his wife or his agent, and therefore she can have no greater right than her husband can have. Under the ruling of this Department in the case of Charles W. Wright (10 Copp, 324), Mrs. Colby's husband would have had no right of purchase on June 19, 1882, as against the contestant, for the reason that judgment against him had become final. Consequently Mrs. Colby herself could have had no right

of purchase on said date, and her cash entry should therefore be canceled.

Consideration of the case might cease at this point, were it not for the fact that your said decision has been published (9 Land Owner, 116), and has thus widely disseminated the doctrine that a deserted wife may in her own name prove up, and, under the act of June 15, 1880, may in her own name purchase her husband's homestead, a doctrine to which I find myself unable to assent, and which is hereby overruled, for the reasons stated below.

We are dealing here with the legal rights of a deserted wife (for even equity cannot create a right which the law denies), and, if there is such a right, it must be found in the language of the statute. And not only so, but since it is claimed only under a law creating a right, the case must be brought strictly within the law. The law with regard to final proof is found in section 2291, Rev. Stat., which provides that, when land is entered for homestead purposes, final proof may be made by "the person making such entry—or, if he be dead, his widow—or, in case of her death, his heirs or devisee." It seems to me indisputable that, if a married man makes homestead entry, the statute expressly refuses recognition to his wife until she becomes a widow; the fact that she is not mentioned as a wife, and that she is mentioned as a widow, renders any other conclusion impossible. Since Congress provided for her, and provided for her only as a widow, it is clear that they did not intend to provide for her in any other manner. In the case under consideration the wife is not "the person who made the entry," or "his widow"; and it follows that she cannot make final proof or obtain patent in her own right, by virtue of her husband's entry. So it was long since substantially ruled by this Department in the case of John Dillon (Copp's Public Land Laws, 246): 245 (Year 1875)

The act of June 15, 1880, creating the right of purchase, expressly limits it to "persons who have entered lands," or their transferees. The right of a deserted wife to purchase must be decided on the same principles as those governing the question of her right to make final proof. As the right of purchase is limited to two classes of persons, and since she is included in neither class, it is clear that she has no right of purchase by virtue of her husband's entry.

It is to be observed that your decision concedes the right of purchase to a deserted wife, for the reason that the practice of your office concedes her the right of making final proof; and I admit that if there is good cause for conceding the latter, there is equally good cause for conceding the former. If this right of purchase is permitted, it follows that any right hereafter given to the entryman must also be allowed by the Land Department to his deserted wife, and it is therefore important that the authority for the concession of the right of final proof should be examined. If the practice of your office in this regard is

unfounded it should cease, for it inevitably leads to other and wider departures from the law.

It appears from the case of Keziah Card (2 Land Owner, 50) that the practice of your office has varied, and from the case of Thompson *v.* Anderson (6 Land Owner, 125) that it crystallized into the existing practice in 1878. In the latter case the ground of the decision is that Rule 27 of the rules of the Board of Equitable Adjudication recognizes the wife's equities and affords her relief. The reasoning is unsound, first, because if the wife has no legal rights she can have no equities, and second, because said rule becomes operative, not in all cases where the wives of entrymen have been deserted by their husbands, but in one case only, namely, in an *ex parte* case where the wife has been allowed to make final proof for the entryman. The rule does not purport to establish the practice of permitting a deserted wife to make proof in her own right, but simply declares that final proof may be made by her, and her husband's entry confirmed, where there is no adverse claim. But your practice treats his entry as her entry, and shuts off all contest, not only at but before date of final proof. To extend the jurisdiction of the Board thus is to violate the express provisions of law (section 2457 Rev. Stat.), and it is not to be presumed that such was the intention of the authors of Rule 27. A law which remedies an evil resulting to the entryman is not to be construed as remedying an additional evil resulting to his wife; and therefore Rule 27, based on said section, is not to be construed as sanctioning the illegal practice of allowing a deserted wife to acquire rights under her husband's entry.

Since said rules and practice were established the Supreme Court has decided the case of Vance *v.* Burbank (101 U. S., 514), and therein enunciated a doctrine which must govern this class of cases in the future. The doctrine is directly applicable, for that case was a suit in equity, with strong equities in favor of the orphan children of a deceased settler, claiming through his deceased wife, their mother. It arose under the Oregon donation act, which not only gave the husband the right to acquire certain land, but declared that, when acquired, one-half of it should inure to his wife, "to be held by her in her own right." But the husband there had not done all the acts which the law required in order to acquire the land—as, in the case now before me, Colby had not continued to reside on the land or made application to purchase it—and, in ruling against the claim of the wife and her children, the court said:

The settler is made by the statute the actor in securing the grant. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts; his abandonment, her abandonment; his neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband. If contest arise, he is the party to be notified. He represents

the claim, and whatever binds him binds all interested through him in the question to be decided.

If, therefore, in such a case, where statutory rights are expressly given the wife, he alone represents the claim during his life, *a fortiori* he alone represents a homestead claim, and the right of final proof, commutation, or purchase resting upon it, where no statutory rights are given to the wife.

In thus overruling your present practice, I am not unmindful of the expediency of indicating the proper practice in such cases, whether the wife has already been recognized or claims recognition hereafter. This decision, then, shall not be construed to affect any case where the deserted wife has been permitted to make final proof, commutation, or purchase, prior to its promulgation by your office.

For all other cases of desertion the following rules are prescribed:

1. When the entryman has established a residence and placed his wife upon the land, no one but his wife shall be heard to allege the desertion, in proof of his change of residence or abandonment, during the period of seven years from date of the entry, provided that she maintains a residence on the land.

2. Within seven years from date of the entry, if the wife, maintaining her residence on the land, shall allege and prove her husband's desertion of her, said entry shall be canceled, and she shall be permitted to enter the land in her own name, provided that she is the head of a family or that she has the legal right to acquire real property as a feme sole.

3. At the date that final proof of the husband's entry is required by the laws and regulations, if the deserted wife has not made entry, as above provided, she shall be permitted to make final proof as her husband's agent, and in his name (except that her affidavit of non-alienation shall cover her own and his acts); and his entry shall be regarded as suspended, and shall be referred for confirmation to the Board of Equitable Adjudication.

4. A deserted wife may, as her husband's agent, commute his entry or purchase it under the act of June 15, 1880; and the entry shall be regarded as suspended, and shall be referred for confirmation to the Board of Equitable Adjudication.

5. Where the entryman's wife is deceased, the foregoing rules shall apply to his child, who is not twenty-one years of age at date of the offer to purchase, commute, or make final proof as an agent, or at date of the offer to enter; provided that in the latter case the child shall be the head of the family.

The reasons underlying these rules require but a brief consideration. Since only the family can actually know that the entryman's absence is a desertion, only they should be heard to allege it. Since the Land Department holds that excusable absence does not forfeit the homestead right, it is bound to regard any absence as excusable until the contrary

is shown, and to treat the land as the entryman's home so long as his family occupy it. Since under the homestead law a minor may be the head of a family (section 2289 Rev. Stat.), and since a deserted wife may be the head of a family under the decisions of the Land Department (*Wakeman v. Bradley*, 2 L. O., 162), and of the courts (*Wells v. Thompson*, 13 Ala., 793), either is entitled to make homestead entry if so qualified. Since the husband's settlement is the wife's settlement (*Vance v. Burbank, supra*), it has been held by this Department that the rights of a deserted wife cannot accrue until date of her own entry (*Larsen v. Pechierer*, 9 L. O., 97); and so of the minor child—since, where a deserted family have continued to reside on and cultivate the land, the only requisite to final proof lacking is the affidavit of non-alienation, that may be supplied by the wife or child under Rule 27 of the rules of the Board of Equitable Adjudication, and his entry confirmed. The doctrine of agency underlies said rule, it having been judicially decided that a deserted wife is her husband's agent in the management of his business and property (Bishop's Law of Married Women vol. 2, sec. 406, *et seq.*), and it applies equally as well to commutation or purchase as to final proof. It applies in various cases to a minor child whose father has absconded (*Chitty on Contracts*, 11th Amer. ed., vol. 2, p. 213, and notes), or where it is exercised for his benefit (*Schouler's Domestic Relations*, 2d ed., 330); and I think it is particularly applicable to the homestead laws, whose prime object is to settle a family on the public land and to supply them a home. It may be added that, where a child comes of age after the desertion, it is competent for him, equally with the rest of the world, to contest the entry for abandonment.

Your decision is reversed; and you are directed to promulgate these instructions to the several local officers.

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#### 14. DEVISEE.

PURCHASE.—ACT OF JUNE 15, 1880.

ALLSOP *v.* DUMAS.

The devisee has the legal right of purchase under the act of June 15, 1880, as the transferee by will. Especially in view of the equities of this case, where the widow deserted the homestead claimant several years before his death, and his daughter, the devisee, is the actual head of the present family, and has occupied and improved the land since her father's death.

Commissioner McFarland to register and receiver, Gainesville, Fla., June 28, 1884.

GENTLEMEN: On November 28, 1874, Covington Dumas made homestead entry No. 1,026 for lots 2, 3, and 4, Sec. 30, 17 S., 25 E.

On July 26, 1881, you allowed Charlotte E. F. Dumas, as widow of

said Covington, to make cash entry of the land under the second section of the act of June 15, 1880.

Affidavits have been filed by Sarah F. Allsop, alleging that she is the daughter of Covington Dumas by a former wife; that she and a minor brother, now dead, lived upon the homestead with their father; that he devised the same to them by will, which has been probated and a copy of which is transmitted; that she carried on the farm after the death of her father and brother; that its present value is the result of her labor; and that her father's second wife, the said Charlotte, who had no children by the marriage, deserted him several years before his death, and never lived upon the land nor had anything to do with it, and should not be permitted to purchase it against the rights of the homestead party.

Arguments for and against the right of the widow to make her entry under the circumstances stated have been filed by counsel for the respective parties. Counsel for Mrs. Dumas do not deny the facts set forth by complainants. But they contend, accepting said statements as true for the purpose of the argument, that Mrs. Allsop is entitled to no relief under the statute.

Counsel rely upon the provisions of section 2291, prescribing who may make final proof under the general homestead laws, and upon decisions of this office holding the widow of a deceased homestead party entitled to purchase under the act of June 15, 1880.

The latter proposition is the one in connection with which the present case is to be considered. The act of June 15, 1880, does not provide for succession rights, which are thus left to the operation of general rules of law and proper official determination.

In the case of Herrington, cited by counsel (8 Copp, 56), it was held that the *legal successors* of a deceased homestead settler are entitled to purchase under said act. In that case the widow was found to be the legal successor. In the present the children of the homestead party are his legal successors, taking by will, and, under the laws of Florida, would have been such successors had the father died intestate.

In the case of Bray v. Colby (10 Copp, 360), also cited, it was held that a deserted wife may purchase under the act of June 15, 1880, as her husband's agent. It has never been held that a wife who deserts her husband is in an analogous position to a wife who is deserted by her husband, or that the rights and equities designed to be saved in the latter case can therefore be availed of or constructively claimed in the former.

It is the presumption of the homestead law that a wife, upon the husband's decease, succeeds to the headship of the family, and that the completion by her of an entry initiated by the husband would inure to the benefit of the family. A constructive recognition of the right of the widow to make entry under the act of June 15, 1880, would rest upon the same presumption. In the present case the facts, if correctly stated,

overthrow the presumption, and would take the case out of any such rule.

The homestead entry was not made by Dumas in privity with his wife. She had previously deserted him. The actual family of the homesteader consisted of himself and his children, and to secure the children in their natural inheritance he willed the property to them. Under the general homestead law he could not, by deed or will, alienate the right to perfect the entry against the widow and children. In event of his death this right would remain first with the widow. But the claim of Charlotte Dumas is not made under this provision of the law. She has not sought to avail herself of this provision, and it would appear that she could not do so for want of residence or cultivation, if there were no other obstacle. Her claim is made under the second section of the act of June 15, 1880. This statute recognizes a transferable right in the homestead party to lands entered before its passage, which right was not previously recognized, but was inhibited by express provisions regulating the descent of the homestead.

Under the act of 1880 a transfer, or a *bona fide* attempted transfer, to a stranger, made before the passage of the act, defeats the rule of descent laid down in section 2291 Rev. Stat. Dumas could, by deed, executed prior to June 15, 1880, have conveyed the homestead away from the wife and children so far as the right of purchase under said act is concerned. He devised it to his children, and thus, to the extent of his power and in event of his death, conveyed it away from the wife who had abandoned him, and secured it to the children for whom it was intended.

Conveyances may be by deed, taking effect upon delivery; or by devise, taking effect upon death of devisor. A conveyance by will, becoming effective, is as complete and absolute a transfer as one made by deed. A proven will must certainly be regarded as a *bona fide* instrument in writing, attempting, in this case, to transfer the homestead; and actually transferring all the right accrued or accruing which the homestead party had to convey. This, under the act of June 15, 1880, is the right of purchase which is vested in the transferee when a *bona fide* attempted transfer in writing has been made.

It would be an anomaly to hold that Dumas might have attempted to convey his homestead to a stranger, and so have clothed the stranger with a right of purchase under the act of June 15, 1880, but that he could not do the same thing with his own children. What he could do by deed he could do by devise, the latter becoming effective. The will bears date November 25, 1877. Dumas died April 27, 1878. Will admitted to probate June 1, 1878. When Mrs. Dumas made her cash entry in 1881, the rights of the devisees had already vested. The land was then, and had been, and as alleged still continues to be, in their possession and occupation.

My conclusions are: 1. That the devisee has the legal right of purchase under the act of June 15, 1880, as transferee by will.

2. That Dumas' surviving daughter is his legal successor, by law as well as by devise, and as such is entitled to purchase in accordance with the principle laid down in the Herrington case.

3. That the widow, in this case, is equitably barred as a claimant under said act.

4. That the legal rights and the equities appear to be merged in the complainant.

Cash entry No. 1,772 made by Mrs. Charlotte E. F. Dumas is accordingly held for cancellation, and Mrs. Allsop will be permitted to make entry of the land under the second section of the act of June 15, 1880.

Notify all parties of this decision, allowing the usual time for appeal. The resident attorneys will be notified by this office.

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*FORMAL APPLICATION—CROSS-EXAMINATION—COSTS.*

*WINTERS v. JORDAN.*

As Winters, a single man and qualified settler, made formal application before his death to homestead the land in contest, he was competent to devise his right. The cost of cross-examination of contestant's witnesses must be paid by the defendant.

*Commissioner McFarland, to Register and Receiver, Olympia, Wash.,  
June 30, 1884.*

GENTLEMEN: I have examined the papers and testimony in the case of John C. Ward, devisee of John J. Winters, *v.* William L. Jordan, forwarded with your letter of March 7, 1884, involving the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 30, T. 21 N., 6 E.

Jordan made homestead entry No. 5,114, May 15, 1883, for lots 1, 10, and 11, NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of said Sec. 30, alleging settlement January 1, 1882.

Winters made homestead application May 31, 1883, for lot 8 and the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of said Sec. 30, alleging settlement August 1, 1878, and claiming improvements to the value of \$1,000, which application you refused June 4, 1883, for the reason that a portion of the land applied for, to wit, the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , was embraced in homestead entry No. 5,114, made May 15, 1883, by William L. Jordan.

Plat of the survey of T. 21 N. of R. 6 E. was approved March 16, 1883. Winters made his application May 31, 1883, which was in due time under the act of May 14, 1880.

Winters died in the hospital at Seattle a few days after making his application, to wit, on June 9, 1883, bequeathing to John C. Ward "all of his property, both real and personal, of every kind and nature."

August 2, 1883, Ward, as devisee of Winters, filed an affidavit with you, alleging that Winters had fully complied with the law from date of settlement up to the time of his death, and that he (Ward), as devisee, should be allowed to enter the tract involved, and asked that a hearing be ordered to determine the matter of the priority of settlement, and, to this end, that Jordan's entry be canceled as to the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and that he, as devisee of Winters, be allowed to make homestead entry of the same.

You set October 7, 1883, as the day of hearing, personal notice was served, both parties appeared, and the testimony was taken.

You rendered your joint opinion that Jordan's entry should be canceled as to the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 30, 21 N., 6 E., and Ward allowed to enter the tract.

Jordan appeals to this office.

The testimony shows that Winters complied with all the requirements of the statute from the date of his settlement up to the date of his death; that he was qualified to make a homestead entry; that he applied in due time to make homestead entry of the tract involved, and that he was a single man.

Mr. Winters, had he lived, would have been entitled to the tract involved, and inasmuch as he made formal application therefor, I am of the opinion that he was competent to devise his right to said land.

Your decision is therefore affirmed, and Jordan's homestead entry, No. 5,114, is held for cancellation as to the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of said Sec. 30.

Your action holding that defendant must pay all costs for the cross-examination of contestant's witnesses was in accordance with the instructions of this office, and is affirmed.

Advise the interested parties of this action, allowing the defendant sixty days in which to appeal therefrom, and in due time make the proper report to this office.

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### 15. DURESS.

#### *DEED EXECUTED UNDER—FINAL PROOF.*

#### *LORENZO VAN GIESON.*

Where a homestead claimant's final proof is satisfactory, except that he has made a quitclaim deed for the land in question, he should be allowed an opportunity to prove his allegations that such deed was made under duress.

*Acting Secretary Joslyn to Commissioner McFarland, January 22, 1884.*

SIR: I have considered the appeal of Lorenzo Van Gieson from your decision of January 19, 1883, refusing to order the issuance of final papers on the proof submitted by him under his homestead entry, No.

1,758, for the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  Sec. 12, T. 13 N., R. 8 E., M. D. M., Sacramento, Cal.

You state that the proof is in all respects satisfactory, except it appears that the claimant on the 22d of January, 1881, executed a quitclaim deed of the tract in question to one J. A. Hoagland.

Claimant himself testifies to the execution of said deed, but says he was forced, through threats of personal violence from Hoagland, to make the transfer, he being at the time indebted to said Hoagland to the amount of two hundred dollars.

He also alleges, and the proof goes to show, that he is still in quiet and peaceable possession of the land, never having surrendered the same. On these facts you find that he cannot make the affidavit of non-alienation required by section 2291 of the Revised Statutes, and you therefore decide that he is not entitled to final certificate, at least not until the deed in question shall have been annulled by the proper court or a reconveyance shall have been made by Hoagland of his interest in the land. You suspended the homestead proof presented by claimant, giving him a reasonable time within which to submit evidence showing annulment or reconveyance, as indicated.

I am unable to agree with you in your conclusion that the execution of the quitclaim deed was necessarily such an act as to deprive claimant of the right which he had otherwise acquired to receive final certificate for the tract entered by him as a homestead. It is true section 2291 of the Revised Statutes forbids the alienation, prior to completion of title (except as provided in section 2288), of any part of land covered by a homestead entry; but claimant avers that through threats of great bodily harm, and in order to protect his life, he was forced to sign the quitclaim deed to Hoagland. If this averment be true—and the circumstances point to its verity—I do not think his act can properly be regarded as a violation of section 2291 of the Revised Statutes. Consent is the very essence of a contract. Without free agency there can be no contract, because there is no consent. Where there is compulsion there is no free agency, no actual consent, and consequently no contract in law. A deed or other written obligation or contract procured by means of duress is inoperative and void. (*Brown v. Pierce*, 7 Wall., 214; *Baker v. Morton*, 12 Wall., 157; *United States, Lyon, et al. v. Huckabee*, 16 Wall., 431.)

By duress, in its more extended sense, is meant that degree of severity, either threatened and impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. (2 *Greenleaf on Evidence*, 293.)

This doctrine was adopted by the court in the cases above cited.

According to the allegations of the homestead claimant, it is applicable to this case.

If he signed the quitclaim deed under duress, as above defined, the instrument should be treated as inoperative and void, and his act should

not be held to be an infraction of the law (section 2291 Rev. Stat.) in such a sense as to take away any homestead rights which he may otherwise have acquired. He should have an opportunity to furnish proof in support of his averments, and if the facts are found to be as he states, his entry should be finally allowed and patent should issue, the proof being in other respects satisfactory. Your decision is modified; and you will be governed in further considering the case by the views herein expressed.

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## 16. EXCESS OF QUANTITY.

### APPROXIMATING 160 ACRES—EXCESS.

HENRY P. SAYLES.

Where the excess above 160 acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included; but when the excess is greater, it is excluded.

*Commissioner McFarland to Secretary Teller, September 8, 1883.*

SIR: On the 3d instant you transferred to this office, for report thereon, a communication from H. P. Sayles, esq., of Saint Lawrence, Dak., relative to a ruling made by me. I have the honor to state that the records of this office show that Henry P. Sayles made homestead entry No. 1,748 January 17, 1883, for lots 1 and 2 and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 1, T. 112, R. 67 W., Dakota, containing 230.15 acres. By my letter C, August 17 last (copy herewith), said entry was suspended, and the party required to approximate his entry to 160 acres. It is of this action Mr. Sayles complains.

It is held by this office that the legal subdivisions embraced in said entry do not comprise a technical quarter-section. Paragraph 5, section 2395, Rev. Stat., provides as follows:

Where the exterior lines of the townships which may be subdivided into sections or half-sections exceed or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half-sections in such township, according as the error may be in running the lines from east to west or from north to south. The sections and half-sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats, respectively, and all others as containing the complete legal quantity.

It is assumed that this provision applies to the lands in question, as they are of the class therein referred to.

If this be not so, then it follows that any number of acres, under like circumstances, may be embraced in an entry, which certainly was not contemplated by the homestead law.

It will be seen by reference to a tracing showing the northern tier of

sections in T. 78 N., R. 31 W., Iowa, that as much as 400 acres could be included in one entry. \* \* \*

It is an established rule of this office that where the excess above 160 acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary when the excess is greater than the deficiency.

The area of lots 1 and 2 is 150.15 acres, only 9.85 acres less than 160 acres. Add to the lots either of the two forties, comprising S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , and the area is 190.15 acres, an excess of 30.15 acres, and adding the remaining 40 acres—as Mr. Sayles did—the excess is 70.15 acres. But if either of the lots and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  were embraced in the entry, then the deficiency would be less than 5 acres.

It is readily observed that the entry can easily be made to approximate 160 acres under the rule above announced. \* \* \*

Approved by Secretary Teller, September 17, 1883.

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#### 17. FAILURE TO MAKE PROOF.

##### *EXPIRATION BY LIMITATION—NOTICE BY LOCAL OFFICERS.*

CHARLES H. DARLINGTON.

*Commissioner McFarland to clerk of the circuit court, Phillips, Wis., September 6, 1883.*

SIR: In reply to your letter of the 28th ultimo I have to advise you that local land officers are required to notify homestead claimants who have not made proof within the statutory period, and allow them thirty days within which to show cause why their entries should not be canceled, and at the expiration of that time to report result to this office.

It sometimes occurs that entries of that nature are overlooked by the district land officers, and remain of record eight or more years. In cases where the party has actually abandoned his entry, which has expired by limitation, and some other party settles on the land, he can acquire no rights prior to cancellation of such abandoned entry; and as he is in one sense a trespasser, the local officers are not supposed to know of his settlement, and are not expected to notify him of the cancellation of the existing entry. While, no doubt, such settlers sometimes lose their labor and improvements by another party being first to make entry, I see no relief; they must exercise such diligence as will best enable them to protect their settlement rights.

**18. FINAL PROOF.**

*AFFIDAVIT—CLERK AT COUNTY SEAT—COUNTY LAND IN TWO DISTRICTS.*

T. C. SAUNDERS.

Where a county embraces land in two districts, a claimant who applies for land in one district may, under the act of March 3, 1877, make the required proof, &c., before the clerk at the county seat, though such county seat is located in the other land district.

*Commissioner McFarland to clerk of the district court, Minnewakan, Dak., July 13, 1883.*

SIR: I am in receipt, by reference from the honorable Secretary of the Interior, of your letter of the 25th ultimo, in which you state that your county, Ramsey, embraces land in both the Grand Forks and Devil's Lake land districts, and that the county seat is situated in the latter land district. You ask if final proof in support of homestead and pre-emption claims, and the affidavit of a homestead applicant, where he or some member of his family is residing on the land, can be made before the proper officer at the county seat where the land is in the Grand Forks district.

In reply I have to advise you that it can. The act of March 3, 1877, provides that the proof of residence, the affidavit of non-alienation, and oath of allegiance required to be made by section 2291, Rev. Stat., may be made before the judge, or, in his absence, before the clerk of any court of record of the county and State, or District or Territory, in which the land is situated, and the act of June 9, 1880, authorizes the same to be done in pre-emption cases.

Section 2294, Rev. Stat., authorizes in certain cases the preliminary affidavit to be made before the clerk of the court for the county in which the land is situated.

The letter written to De Coster and Flemington (Copp's L. O., June 1, 1883), to which you refer, had reference only to the affidavits of timber-culture claimants.

The act of June 14, 1878, provides that the affidavit may be made before the register or receiver, or the clerk of some court of record, or officer authorized to administer oaths "in the district where the land is situated."

TIME PRESCRIBED—ACTS MARCH 3, 1879, AND JULY 1, 1879.

JEMIMA BENBOW.

Parties making new or additional entries under the acts of March 3, 1879, and July 1, 1879, have seven years within which to make final proof.

A homestead entry must remain of record until legally relinquished, contested, or canceled for failure to make final proof.

*Commissioner McFarland to register and receiver, Tracy, Minn., August 8, 1883.*

GENTLEMEN: I am in receipt of your letter of July 30, 1883, containing the following:

Jemima Benbow made original homestead entry No. 8,152, dated October 19, 1874, for W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 34, 106, 37, and made final proof therefor July 19, 1881, final certificate No. 4,461; and she made additional homestead entry No. 11,004, dated July 19, 1881, for the E.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 34, 106, 37. After the expiration of two years from date of said additional entry No. 11,004, notice was given advising her that the time fixed by statute had expired without the requisite proof being filed by her, and that 30 days would be allowed within which to show cause why her claim should not be adjudged forfeited and her entry canceled.

This office has no knowledge of a statutory provision limiting the time within which final proof may be made upon a homestead entry to two years from date thereof. The only statutory provisions respecting time for making final proof upon homestead entries known to this office are those contained in Revised Statutes, sections 2291 and 2305, and the acts of March 3 and July 1, 1879. The first of these provides that "if at the expiration of such time" [five years], "or at any time within two years thereafter"—that is, seven years from date of entry—the party "proves by two credible witnesses," &c. The second, third, and fourth provide that no patent shall issue until the homestead settler shall have "resided upon, improved, and cultivated his homestead for a period of at least one year," thereby forbidding the acceptance of final proof prior to the performance of those acts.

It is held by this office that a homestead party making an additional or new entry under the acts of March 3, or July 1, 1879, is entitled to the same time in which to make final proof as is granted to settlers by section 2291, Rev. Stat.; that is, seven years from date of entry.

Your notification in the case above referred to was, therefore, unauthorized and of no binding force.

You add:

We are now informed by her son, W. H. Benbow, that his mother (Jemima Benbow) is dead, and that the heirs do not intend or desire to perfect title to said additional entry, and prefer that the same be canceled.

We would, therefore, respectfully recommend that said additional homestead entry 11,004 be canceled.

Action cannot be taken in accordance with your recommendation.

The entry must remain upon the records until legally relinquished, contested, or canceled for failure to make final proof within the period prescribed by law—seven years from its date.

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### 19. FRAUDULENT—ENTRY.

#### *RELINQUISHMENT—FRAUD.*

ALLEN B. LEMMON.

Ruling under circular letter A, of January 12, 1883. Relinquishment within a month after entry is presumptive evidence of fraud.

*Commissioner McFarland to register and receiver, Wichita, Kans., June 16, 1883.*

GENTLEMEN: I am in receipt of your letter of the 6th instant, transmitting the relinquishment, dated June 2, 1883, by Allen B. Lemmon, of his timber-culture entry No. 1,755, made April 24, 1883, for lots 5 and 6, the SE. $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 6, T. 22 S., R. 10 W.

You state that Mr. Lemmon's reputation is good in your community, and you have no personal knowledge of fraud in the case, but that, in view of the fact that the entry is of such recent date, you forward the same for my consideration, under instructions contained in circular letter A, of January 12, 1883.

Lemmon states in his relinquishment, which is indorsed on the back of the duplicate receipt, and is signed by himself and Clara M. Lemmon, that it is "for value received."

At the time he made the entry he stated under oath that it was for the cultivation of timber and for his own exclusive use and benefit, and that he made the application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever, and that he intended to hold and cultivate the land and to fully comply with the provisions of the law.

A little more than a month thereafter he relinquishes his entry for a valuable consideration, according to his own statement, which of course is proof conclusive that the relinquishment, at least, was made the subject of speculative negotiation, and it is also presumptive evidence, and, in my own opinion, clearly indicates that the entry was fraudulent in its inception, the party's allegations to the contrary notwithstanding, and it is therefore not capable of being relinquished.

Your action in withholding your acceptance of such relinquishment is accordingly sustained, under paragraph 1 of the instruction in the circular referred to by you, and the said entry is this day canceled for fraud, pursuant to paragraphs 3, 6, and 9 of the said instructions, there being

no proof to overcome the presumption of fraud, as provided in paragraph 7 thereof.

You will advise Lemmon at once, and in case the party who purchased the relinquishment has filed an application to enter the tract, you will not allow him any preference right in the matter, but hold the land subject to proper entry by the first legal applicant after the receipt of this letter.

Note the cancellation on your records, and inform this office thereof, as heretofore instructed in such cases.

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*ACT OF JUNE 15, 1880—FRAUDULENT INCEPTION—COLLUSION.*

UNITED STATES *v.* AUGUSTUS SMITH.

A question of alleged fraud and illegality considered.

*Commissioner McFarland to register and receiver, Montgomery, Ala., June 18, 1883.*

GENTLEMEN: I have considered the case of the United States *v.* Augustus Smith, involving his homestead entry, made April 14, 1877, for the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  Sec. 4, 17 S., 3 W., and the validity of his cash purchase thereof, under the second section of the act of June 15, 1880, cash entry No. 16,992, June 20, 1881.

A hearing in said case was directed by office letter of December 12, 1881, upon information from the special agent, to the effect that said entry was fraudulent in its inception, and maintained and perfected by collusion between certain parties with the intent of defrauding the Government, &c. The hearing was set for February 12, 1882, postponed to March 20, 1882, and again postponed to June 27, 1882, when Augustus Smith, John H. Brown, Richard G. Bradley, John T. Milner, Howard Douglas, and Gilbert Jacks appeared at your office and gave their testimony. From the evidence adduced you decided, in substance, that Smith's original entry was fraudulent at its inception, that he had not complied with the law as to residence and improvement, and that John T. Milner, by his agents, furnished said Smith the money with which to make said cash entry, the latter thereafter to convey the land to him for a consideration of \$300 per acre.

The testimony and Smith's original homestead affidavit establish the fact that the said affidavit was not made in conformity with section 2294 Rev. Stat. This fact would no doubt render the homestead entry illegal because not made according to law, and would be good cause for cancellation of the same, but *per se* is not evidence of fraud, and there is no other evidence in the record that establishes fraud in the entry at its inception. Smith simply abandoned the land after entry, and afterwards, at the instance of John H. Brown, relinquished the same, and at-

tempted to make a transfer to him. Brown, who is the real complainant in this case, does not testify that this entry was made in his interest, even though he loaned Smith the money with which to pay the fees, commissions, and other expenses incident to the entry.

I conclude, therefore, with the whole record before me, that Smith's entry was *not* fraudulent at its inception, and so decide.

The irregularity or even illegality of the homestead entry at its inception is, in my opinion, no bar to a purchase of the land embraced therein under the second section of the act of June 15, 1880, as that act was passed, it seems, for the express purpose of enabling claimants, in the *absence of a compliance with the law*, to acquire title to the land by payment of cash therefor.

There is no evidence in the record that the land involved is coal or mineral land, though it seems to be situated in a part of the State where coal has been discovered and probably mined.

As to the attempted transfer by Smith to John H. Brown, when the matter was before this office for consideration it was decided, in substance, that the alleged transfer was not sufficient to entitle Brown to the benefits of the act of June 15, 1880 (*vide* office letter of June 9, 1881). No appeal therefrom having been taken, the question of transfer assumes the nature of a *res judicata*, and should be eliminated from further consideration.

As to the issue of collusion, the evidence shows that John T. Milner purchased, through the agency of other parties, said land from Smith, which was contracted for *prior* to Smith's application to purchase under act of June 15, 1880, but not deeded to said Milner until subsequent thereto. It appears that the motive that prompted the purchase was to build a railroad across the land for the purpose of connecting with adjoining lands owned by said Milner, and not with any fraudulent intent.

The act of June 15, 1880, permits settlers who have failed to comply with the homestead laws to acquire title by purchase, provided the land was properly subject to such original entry and no subsequent adverse right has attached thereto, unfettered, however, by parol agreement of alienation to third parties. Therefore, the fact that Smith contracted to convey said land does not disentitle him to the benefit of said act. Further, the mere fact that Smith, subsequent to the issuance of the final receipt, conveyed by deed his interest in said land, does not, in the absence of fraud, invalidate his entry. Such evidence is irrelevant to the issue, except it forms part of the *res gestae*.

In summing up the testimony I am of the opinion that the issue of fraud and collusion has not been established; therefore the hearing is hereby dismissed.

You will notify all parties in interest of this conclusion.

*NOT FOR PURPOSE OF A HOME—VOID AB INITIO.*

SMITH v. BRANDES.

As the entry of Brandes was made for the purpose of securing the land for the use of one Rodolph, and not for the purpose of a home, his claim was invalid *ab initio*. If in a contest for abandonment the charge is not proved, but the evidence shows an illegal inception, the entry will be canceled.

*Secretary Teller to Commissioner McFarland, September 19, 1883.*

SIR: I have considered the case of Henry H. Smith v. William Brandes, involving the homestead entry of Brandes for the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 26, T. 12 N., R. 4 W., Marysville, Cal., on defendant's appeal from your decision of July 29, 1882, holding his entry for cancellation.

The township plat was filed in the local office July 1, 1880, and Brandes made his homestead entry July 13, 1880, alleging settlement November 11, 1876.

The contest was initiated by Smith, December 11, 1881, who filed an affidavit alleging "that the said William Brandes has wholly abandoned said tract, and changed his residence therefrom, and that he never has resided on said lands, as provided by law, to entitle him to claim the land; that said abandonment has been for a longer period than six months since making his said entry, and prior to the date herein; that said tract is not settled upon and cultivated by said Brandes, as required by law." Whereupon the local office issued a citation to Brandes, December 23, 1881, directing him to appear "and furnish testimony concerning said alleged abandonment."

By a stipulation of counsel, entered into at the beginning of the hearing, it was agreed that the plaintiff's affidavit should be so amended as to include only the six months next preceding the initiation of the contest.

It appears from the evidence that for several years prior to Brandes's entry of the land it had been used by one Rodolph, in connection with other lands, as a sheep range; that Rodolph had erected thereon a cabin and barn and inclosed a few acres; that Brandes is a "herder," and has been in Rodolph's employ for five or six years, and in the course of his employment has moved about from place to place whenever it was necessary to procure a new range for his flock, being frequently on this tract for short periods of time prior to his entry of the same. It also appears that in March, 1880, Brandes claimed a different tract, and posted a notice of his possessory right thereon. He testifies that he purchased the improvements on the tract in question from Rodolph, that he paid one dollar therefor two days before he filed; that he "paid cash and got a writing." And again he states that the consideration for the improvements was permission for Rodolph to graze his sheep on the land. It appears that provisions to the amount of four dollars per

week were furnished to Brandes by Rodolph, for which he claims to have settled two days before the hearing.

From the evidence introduced by the contestant it appears that Brandes was generally only present on the claim when in charge of Rodolph's sheep, but it does not appear that he was absent therefrom six months at any one time since the date of entry.

The contestant, Smith, settled on the land in March, 1880, built a house, and moved into it in May. He alleges that owing to the miscarriage of a letter he failed to learn of the filing of the township plat in time to make his entry within three months after the plat was filed.

From a careful examination of the testimony of Brandes it is apparent that his entry was in fraud of the homestead laws, being made for the purpose of securing the land for the use of Rodolph, and not for the purpose of a home; hence his claim was invalid *ab initio*. While it is true that he may have maintained a nominal residence on the land, if such residence was in the interest of another it can avail nothing as against the Government. In contests of this nature the Government is necessarily a party, acting on the information of the contestant, and whenever such a state of facts is developed as establishes conclusively that an attempt is being made to acquire title to public land in fraud of the existing laws, this Department, in the exercise of its supervisory powers, has always maintained the right of the Government to take such summary action as may be necessary to protect its interests. In the affidavit filed by the contestant, on which the citation was issued, sufficient was charged to warrant an inquiry on the part of the Government as to the character of the homestead entry, and such information having come within the knowledge of the Government, a subsequent stipulation between the contestant and homestead claimant limiting the investigation to a period of six months next prior to the initiation of the contest will not operate to deprive the Government of the full value of the information and the results to which it may lead.

Your decision is therefore affirmed.

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SUMMARY ACTION—CONTEST.

CONDON *v.* ARNOLD.

Where a party makes an entry in fraud of the homestead laws, a contest may be ordered at any time to defeat such fraud and protect the interests of the Government.

*Secretary Teller to Commissioner McFarland, November 17, 1883.*

SIR: I have considered the case of Mahala Condon *v.* Isaac Arnold, involving the adjoining farm homestead entry made by Arnold for the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 36, T. 24 N., R. 33 W., Springfield, Mo., on Arnold's appeal from your decision of November 23, 1882, holding for cancellation said entry.

April 7, 1882, Arnold made his entry for the land above described, and May 25, 1882, Mrs. Condon filed an affidavit for contest, alleging that Arnold owned 160 acres of land adjoining the tract entered at the time of making the said entry.

On the hearing, the facts as developed by the evidence showed that Arnold, prior to April 4, 1882, was the owner of and resided upon the NE.  $\frac{1}{4}$  of Sec. 35, T. 24, R. 33, the said quarter section lying contiguous to the land included within his adjoining homestead entry, and that on the date last mentioned Arnold made a bond for the W.  $\frac{1}{2}$  of the land last described, to one Rogers, in consideration of \$400, conditioned upon the payment of said sum within three years to the said Arnold, that then Arnold would execute to Rogers a deed for the land. It was stipulated, however, in the said bond, that until the payment of said sum Arnold was to retain full possession and control of the land.

It also appears that, at the time Arnold made his entry, Mrs. Condon had commenced the erection of a dwelling-house upon the land in contest, with a view to entering the same under the homestead laws, but was prevented from so doing by the prior entry of Arnold.

It is alleged by the attorney for Mr. Arnold that the local office had no authority under the law or the Rules of Practice to order a hearing on the question raised by Mrs. Condon's affidavit.

The entry as made by Arnold was in fraud of the homestead law. Section 22:9 of the Revised Statutes provides 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."

The execution of the bond to Rogers conditioned upon the contingency named therein, with the possession and control of the land reserved to Arnold, did not operate to deprive the said Arnold of the legal ownership of said land; hence at the time of his entry he was not competent under the law to make the same, for the reason that he "already owned and occupied" 160 acres.

Under the law, your office and this Department are charged with the execution of the laws relative to the distribution of the public land among competent applicants, and this Department has always maintained the right to take such summary action as may be required to protect the interests of the Government, whenever such a state of facts is shown as establishes conclusively that an attempt is being made to acquire title to public land in fraud of the existing laws. (*Smith v. Brandes*, 10 Copp's L. O., p. 209.)

I am of the opinion that, while the law makes no express provision for contests of this character, nevertheless the Department being advised as to the facts in the case, and the entry appearing fraudulent, it should be canceled.

Your decision is accordingly affirmed.

**20. HEIRS OF DECEASED HOMESTEADER.***ALIEN HEIRS—ACT JUNE 15, 1880.*

To whom the rights of a deceased homesteader descend. Alien heirs may purchase under the act of June 15, 1880.

*Acting Commissioner Harrison to register and receiver, Taylor's Falls, Minn., May 21, 1883.*

GENTLEMEN: I am in receipt of your letter of May 5, 1883, as follows:

In case of a man dying, and at the time holding a homestead, can an alien heir or heirs enter his homestead land under the act of June 15, 1880? An entry-man has died here, and his relations reside in Canada.

Before any heirs can legally be permitted to purchase the land embraced in the entry of a deceased homestead party, it must be shown that the entryman left no widow. This fact being established, the rights of infant children, under section 2292, Rev. Stat., must next be protected. If it be shown that neither widow nor infant children survive the entryman, then the rights of other heirs may be considered, and they may be permitted to acquire title in any of the methods prescribed by law. In the event that they elect to purchase the land, as provided by second section of act of June, 1880, it is immaterial whether they be citizens or aliens. There is nothing in the statutes prohibiting aliens from purchasing lands subject to private entry, and the effect of the second section of act of June 15, 1880, is to render lands affected by it subject to private entry by the persons entitled to the benefit of its provisions.

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*CASH ENTRY, ACT JUNE 15, 1880.—SEGREGATION CONTESTANT.*

**WHITNEY v. MAXWELL.**

While a homestead entry remains uncancelled, another entry of any kind cannot be allowed. A contestant acquires no right to the land until the entry is cancelled. The cash entry in question by the heirs is allowed to stand.

*Secretary Teller to Commissioner McFarland, June 13, 1883.*

SIR: I have considered the appeal of James M. Whitney from your decision of July 3, 1882, approving the purchase by the heirs of George H. Maxwell, deceased, under the act of June 15, 1880, of the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SW  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 25, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 24, T. 6, R. 3, Deadwood, Dak., and also the appeal of Hiram Mahoney from the same decision, involving the same lands, holding his entry for cancellation.

It appears that George H. Maxwell made soldier's homestead entry of the tracts March 20, 1879, and died January 1, 1881; that Whitney commenced a contest against this entry January 27, 1882, alleging Maxwell's death and abandonment of the tracts, and that on March 6th following, on the day assigned for, but before, the hearing, David B. Maxwell, in behalf of himself and the other heirs at law of George H. Max-

well (who left neither widow nor children), applied to purchase the tracts under the second section of the act of June 15, 1880. The proceedings in contest were thereupon suspended by agreement of parties to enable the local officers to take your instructions in the matter. On July 3 following you authorized the heirs' purchase of the tracts, and on August 26 they made cash entry therefor. Whitney and Mahoney appealed from your decision, and no further proceedings have been had in the contest.

On February 7, 1882, Mahoney was permitted to make homestead entry of the tracts, subject to Maxwell's entry and to Whitney's contest. This entry was clearly erroneous. A homestead entry is a segregation and an appropriation of the land covered by it, and while it remains uncancelled the land is not subject to further entry. Mahoney's entry, made during the existence of Maxwell's entry, was illegal, and I affirm your decision holding it for cancellation.

The only question is, therefore, between Whitney and the heirs of George H. Maxwell, and the former has no right by virtue of his contest, which is his only claim. The case of Gohrman *v.* Ford (Copp, April, 1881), and subsequent decisions of this Department, are to the effect that a contestant acquires no right under the act of May 14, 1880, or other law, prior to cancellation of the entry he contests, and that the entryman may purchase at any time prior to cancellation of his entry under the act of June 15, 1880. His entry remaining intact on the records, George H. Maxwell, if living, might have purchased at the date of application therefor by his heirs, and this right descends to them upon his death under section 2291 of the Revised Statutes.

I affirm your decision approving the cash entry of the heirs.

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FINAL CERTIFICATE—FEME SOLE.

CORA E. HARPER.

In this case the title in which to issue final certificate should be "Cora E. Harper, orphan child of Reuben S. Harper, deceased," with a right as *feme sole* to another homestead in her own person.

*Commissioner McFarland to register and receiver, Fargo, Dak., June 22, 1883.*

GENTLEMEN: I am in receipt of your letter of September 14, 1882, in which you transmit for instructions from this office "final proof" offered by Cora E. Harper, on homestead entry 9172, made October 13, 1881, NE.  $\frac{1}{4}$  6, 135, 55, by Amanda J. Harcourt, guardian of Cora E. Harper, minor orphan child of Reuben S. Harper, deceased. (Section 2307, Rev. Stat.)

From evidence submitted, it appears that this homestead entry 9172 was initiated by one person and perfected by another, though the claim *in esse* remains.

Record evidence (from War Department) shows that Reuben S. Harper performed about four years of military service during the war of the rebellion. Amanda J. Harcourt, the mother of Cora E. Harper, minor orphan child, &c., did, as guardian, make homestead entry, seeking to utilize aforesaid military service of her deceased husband aforesaid, in behalf of his child, she (Harcourt) having lost the *usus fructus* of said military service by reason of another marriage.

She testified in her petition to the probate court (seeking letters of guardianship) that Cora E. Harper was nineteen years of age August 25, 1880.

Cora E. Harper testifies (form 4369) that she was twenty-one years of age on 25th August, 1882; and it also appears that previous to attaining her majority, to wit, August 8, 1882, she initiated and kept up actual residence on the land in question.

"House 12 by 14 feet, lumber, and well, and 27 acres broken (crop of 8 acres)" constitute the improvements as shown; "value, \$275.00."

The "proof" is still deficient in two instances, viz: It was made September 12, 1882, before Charles D. Austin, clerk district court, Ransom County, Dakota, who neglected to certify to the absence of the judge (Act March 3, 1877), and the register failed to certify as to the posting of published notice, &c. You will cause these omissions to be properly supplied.

This done, the case resolves itself into a question as to proper title in which to issue final certificate and receipt. Of this I would decide that "Cora E. Harper, orphan child of Reuben S. Harper, deceased," would meet the case.

For it accurately sets forth the basis upon which patent should issue and embodies the fact that Cora E. Harper, in the status of a *feme sole*, is possessed of a homestead right in her own person, apparently not yet utilized.

Upon payment of final commissions, and supplying deficiencies cited above, you will issue final certificate and receipt, with a reference thereon to this letter "C" by date.

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*ENTRYMAN UNNATURALIZED—FINAL PROOF.*

*MINOR CHILD OF AMADUS SUCKFÜLL.*

Final proof by the minor child of a deceased entryman who was unnaturalized at date of death.

*Acting Commissioner Harrison to A. B. Hays, Cullman, Ala., August 18,  
1883.*

SIR: Referring to yours of the 8th instant, asking whether the minor child of Amadus Suckfull, who made homestead entry No. 7324, April 18, 1877, for the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 24, 9 S. 3 W., can make final proof

in support of said entry (the settler died July 9, 1879, not having obtained a certificate of naturalization, but having filed his declaration of intention to become a citizen), I have to say, that if the cultivation was continued after the settler's death by the minor child, either in person or by proxy, final proof may be made by the child (she being nineteen years of age, by your statement), or by her guardian, upon filing therewith satisfactory evidence that she took the oaths prescribed by law as required by section 2168, Rev. Stat.

For further information you are respectfully referred to the local offices.

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*FINAL PROOF.*

**MINOR CHILD—GUARDIAN.**

If child becomes of age prior to time of making final proof the final affidavit must be made by the beneficiary.

*Commissioner McFarland to J. F. Folsom, Grand Rapids, Nebr., Febarary 18, 1884.*

SIR : In reply to your letter of the 4th instant, referred to this office by the honorable Secretary of the Interior, I have to advise you that where a guardian makes a homestead entry for the minor orphan child of a deceased soldier, and said child becomes of age prior to time of making final proof, the final affidavit must be made by the beneficiary, as the guardianship ceases when the child becomes of age. In such an event the child would not have to establish residence on the land, but would be responsible for keeping up the improvements and cultivation from the date of becoming of age.

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**21. INSANE CLAIMANT.**

*GUARDIAN—FINAL PROOF, ACT OF JUNE 8, 1880.*

**SUSAN E. FINDLEY.**

Proceedings suggested to protect the interests of a homestead claimant who has been sent to an insane asylum.

*Commissioner McFarland to John G. Winston, sr., Meltonsville, Ala., November 30, 1883.*

SIR : I am in receipt of yours of the 19th instant, stating that Susan E. Findley, who made homestead entry No. 10307, at Huntsville, Ala., January 29, 1880, for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 7, 7 S., 5 E., has been sent to the insane asylum, and asking how you, as her next friend, must proceed in order to save harmless her homestead, &c.

In reply I have to state that under the provisions of the act of June 8, 1880, the duly appointed guardian or trustee of a homestead settler who has become insane prior to making final proof can, after the expiration of five years from date of entry, make the required proof and payment for the benefit of the insane party, without reference to the requirements of the law as to residence and cultivation during the existence of the insanity, provided, however, the settler complied in good faith with the homestead law up to the time the disability began.

Should the insane party become sane at any time prior to the expiration of five years from date of entry she will be required to resume her residence on and cultivation of the land.

It would be advisable for the guardian or trustee to file in the local office proof of his authority to act, together with his address, in order that he may be notified of any attack that might be made upon the entry.

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*ADVERSE CLAIM—WIFE OF INSANE SETTLER.*

**EBEN BUGBEE.**

A homestead entryman found upon his land the family of an insane settler. Notwithstanding there was no adverse claim of record, he was allowed to make another homestead entry elsewhere without prejudice, and the wife of the insane settler was permitted to enter the land in her own name.

*Commissioner McFarland to register and receiver, Fargo, Dak., January 11, 1884.*

GENTLEMEN : I am in receipt of your letter of October 25, 1883, transmitting—

The application of Eben Bugbee, for cancellation of his homestead entry No. 12685, April 27, 1883, SW. $\frac{1}{4}$  20, 130, 62, and restoration of his homestead right.

You further state—

After examining the case carefully, we are of opinion that this is one of those cases which should receive the relief asked for, not only on account of the hardship it would entail, but also upon the merits of the case itself.

What you base your opinion on does not appear from the case as presented by your office, or by the duly corroborated affidavit of the said Eben Bugbee, submitted. For although it is alleged (in the affidavit) by Claimant Bugbee that "when he came to said tract with a view to commencing his settlement and improvements thereon (on or about the 6th day of May, 1883) he discovered that one Townley Brown had prior to the date of his (this deponent's) homestead entry made settlement on said tract, to wit, on April 12, 1883 (as this deponent is informed and verily believes); that the said Townley Brown had, on or about said 6th

day of May, 1883, a habitable dwelling and about five acres of breaking on said tract, and was residing in said house;" yet it does not appear from our tract book that any prior adverse claim has been made of record.

The letter of Eben Bugbee, dated December 7, 1883, addressed to Hon. Horace Austin, Fargo, Dak., is before me, and becomes an accident of the case.

It affords apparently reliable information, and throws considerable light upon the alleged facts, and as from its annotations it appears to have been returned to the writer (and by him submitted to this office) by you, uncontradicted as to its statements, it is presumed that the writer fairly presents his case therein.

Mr. Bugbee states in said letter:

And on visiting said tract found it occupied by one Townley Brown, who had made improvements thereon, according to my best knowledge and belief. I then advised with Mr. Skuse, who said my right would be restored. After hesitating as to the best course to pursue, I was shown letter from you to McCarty & Geer, of Ellendale, Dickey County, Dakota, who assumed to act for Mrs. Townley Brown, after succeeding her *insane husband* on the above-named quarter, he, Townley Brown, being but a short time prior removed to Kalamazoo, Mich., Insane Asylum, by the county commissioners, the substance of which was, if it could be shown by two creditable affidavits, that myself, Bugbee, relinquished in the interest of peace, harmony, and good will, and for no valuable consideration. I apprehend she, Mrs. T. Brown, will have no trouble in making *final proof*.

(Signed,) \_\_\_\_\_

HORACE AUSTIN.

Mr. Bugbee refers, as to the facts alleged, to a physician, to the county commissioner of Dickey County, and to sundry citizens, and I see no reason to doubt the accuracy of his statement (in his letter), as well as the allegations of his affidavit.

In view of all the foregoing I will recognize the plea that Eben Bugbee has made a homestead entry subject to the prior rights of an actual settler, and I have this day canceled homestead entry No. 12685, as without prejudice. You will so advise Mr. Bugbee, and instruct him at the same time that the matter of "with credit for fee and commissions already paid," will be subject to instructions as laid down in circular M, December 1, 1883.

You will at the same time notify the so-called Mrs. Townley Brown, that since her husband is in a state of "civil death," she will be allowed thirty days (from date of notice) within which to make entry for the SW.  $\frac{1}{4}$ , 20, 130, 62, as an actual settler, and in her own name and right as head of a family.

For it will be observed that as Townley Brown has not initiated a claim which was of record prior to his being declared insane, his case does not come within the provisions of the act of June 8, 1880. [Vide circular July 17, 1880.]

**22. JOINT CASH ENTRY.***SEVERAL ENTRIES EMBRACING SAME TRACT.***STONE V. BANEGRAS AND HOLLORAN.**

A part of the township, including the tract in dispute, was surveyed and the plat thereof filed in local office in 1857. The remainder of the township was surveyed in 1881, and the plat of the whole was filed (in local office) July 8, 1881. Each of the entries was made within three months from that date, and was, therefore, within the required time under the third section of the act of May 14, 1880, and the three conflict as to the tract in question. Stone and Banegas allowed to make joint cash entry.

*Secretary Teller to Commissioner McFarland, December 28, 1883.*

SIR: I have considered the case of Mathias Stone, jr., v. Manuel Banegas and William Holloran, involving the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 33; T. 11 S., R. 2 E., Los Angeles, Cal., on appeal by Banegas and Holloran from your decision of February 28, 1883, holding their entries as to the tract in dispute for cancellation and awarding it to Stone.

Stone made homestead entry of the tract (with others) September 7, 1881, alleging settlement in April, 1873; Banegas made a like entry for the tract (with others) July 25, 1881, alleging settlement in 1863, and Holloran made a like entry for the tract (with others) September 28, 1881, alleging settlement in June, 1878.

A part of the township, including the tract in dispute, was surveyed and the plat thereof was filed in your office in 1857. The remainder of the township was surveyed in 1881, and the plat of the whole was filed in the local office July 8, 1881. Each of the entries was made within three months from that date, and was, therefore, within the required time under the third section of the act of May 14, 1880, and the three conflict as to the tract in question. Neither party resides upon it, but Stone and Banegas had improvements upon it before the filing of the plat. Banegas undoubtedly settled before Stone, but whether the tract in question was within his claim prior to the settlement of Stone is a disputed question, which the testimony does not conclusively settle. Hence you differ from the local officers in this respect, they awarding the tract to Banegas. There is also unsatisfactory testimony as to certain alleged arrangements between them respecting their dividing line, and also as to whether certain private surveys of the claims clearly show the tract to belong to either.

In view of the doubts as to the legal rights of Stone and Banegas, I adopt my ruling of October 1, 1883, in the case of Barton v. Stover (between a pre-emptor and a homestead entryman), which held that the spirit of section 2274 of the Revised Statutes had in view the settlement rather than the nature of the claim, and that its provisions would embrace a homestead settlement, although its terms had reference to

a pre-emption settlement only, and hence that in such case a joint entry might be awarded. This view is enforced by the provisions of the act of May 14, 1880, which extends to persons claiming under the homestead law the same rights in respect to the date of their settlement as are allowed to pre-emption settlers.

I therefore award to Stone and Banegas a joint cash entry of the tract in dispute, directing that if either fails to unite therein within ninety days from notice hereof, the tract be awarded to the other; and as Holloran had no improvements on the tract his entry as to it will be canceled.

Your decision is modified accordingly.

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### 23. LAND OFFICERS.

#### *SISTER OF RECEIVER—ENTRY VALID.*

##### *LIVINGSTON v. PAGE.*

A homestead entry by a sister of the receiver is not objectionable on that account alone.

*Commissioner McFarland to register and receiver, Mitchell, Dak., June 21, 1883.*

GENTLEMEN: I have considered the case of James F. Livingston *v.* Cynthia B. Page, involving homestead entry No. 20471, made June 16, 1882, for the NE.  $\frac{1}{4}$  of Sec. 13, T. 102, R. 63, Mitchell series.

Hearing ordered by this office February 24th last, the complaint alleging illegality of the entry because of the intimate and confidential relations existing between claimant and Hiram Barber, jr., receiver; also abandonment.

Notice of contest issued March 15, and parties cited to appear before W. L. Warren, probate judge of Davison County, Dakota, April 19, 1883.

The evidence discloses (and it is not denied) that Cynthia B. Page is a sister of the receiver, but this fact is the only allegation in the complaint touching the validity of the entry that is supported by the evidence. This fact, of itself, is not sufficient to invalidate the entry. Nor does it appear from the evidence that claimant is a member of the receiver's family, or that she is an employé of your office; therefore, following my decision in the case of Charles L. Cronk *v.* Paul E. Page, Mitchell, Dak., the contest is dismissed.

Notify the parties in interest and allow the usual time for appeal.

*REGISTER—INCEPTION RIGHT—RESIGNATION—FINAL PROOF.*

F. H. MERRILL.

Merrill filed desert-land declaratory statement in 1881, was appointed register of a land office in 1882, resigned in 1883, and, after his resignation was accepted, but whilst still performing the duties of the office, applied for permission to relinquish part of said land and enter it as homestead. Application denied.

*Secretary Teller to Commissioner McFarland, April 24, 1884.*

SIR: I have considered the case presented by the appeal of Mr. F. H. Merrill from your decision of November 20, 1883.

It appears that Mr. Merrill July 5, 1881, filed his desert-land declaratory statement for 640 acres in Secs. 4 and 5, T. 29 N., R. 13 E., Susanville, Cal., under the act of March 3, 1875 (18 Stat. 495), providing for the sale of desert lands in Lassen County, California.

In 1882 Mr. Merrill was appointed register of the local office at Susanville. October 30, 1883, he made application to your office for permission to file a relinquishment for 160 acres of said land, and make homestead entry therefor. He assigned as reasons for such application that his resignation as register had been accepted; that he had expended a large sum in the purchase of certain improvements situated on said tract; that he feared he would be unable to secure title under the desert-land act because of his inability to procure the water necessary for the reclamation of the land; that if the application was granted he would be enabled to save his improvements, which he otherwise was in danger of losing. He also asked whether, if allowed to make the desired homestead entry, he would be credited thereon with the period of his occupancy of the land under the existing filing, such credit being desired with a view to making final proof as provided in section 2305 of the Revised Statutes.

You held that until his successor was appointed he could not be allowed to make the desired transmutation, and that if he did make the homestead entry at that time, his right would not relate back to cover the period of his occupancy under the desert-land claim, because it did not appear that he ever established his residence on the land.

Section 452 of the Revised Statutes provides that—

The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land.

In the act of April 25, 1812 (2 Stat., 716), under which the General Land Office was established, the prohibition now included in the section as above quoted was substantially formulated in section 10 thereof; and the act of July 4, 1836 (5 Stat., 107), for the reorganization of the Land Office, contained in section 14 the substance of the same provision.

In the case of the State of Nebraska *v.* Dorrington (Copp's L. L., 1882,

p. 647) this Department held that the rule of your office prohibiting registers and receivers and their clerks from making entries of the public lands, although not perhaps based on positive statutory provisions, was a wise and just rule, based upon principles of sound public policy, and one that your office was authorized to prescribe. In the same decision instructions were given for your office to promulgate, by official circular, this construction of the law, such instructions being to the effect that the persons named above would not under any circumstances be permitted to make *any* entry of public lands at the office over which they have control, or in which they are employed.

The above decision was made August 3, 1876, and August 23 an official circular was issued by your office in accordance with said decision and instructions.

Under the law and its interpretation as set forth in the foregoing, should the application of Mr. Merrill be allowed?

By the filing of his declaratory statement he acquired the right to purchase at \$1.25 per acre 640 acres of the public land—such right being, however, conditioned upon his reclamation of the land. This inceptive right existed in him at the time he assumed his official duties. There is nothing in the desert-land act by which his official position would render him incompetent to make his final proof and payment. No residence is required under that act, and residence on land held under such claim would in no manner strengthen a claim for title under said law. But under the homestead law residence is an essential element, and he now seeks to convert his former right into one that substitutes residence for cash payment, and to avoid the requirement as to residence by availing himself of the right conferred upon soldiers in section 2305 of the Revised Statutes to have their period of service deducted from the term of residence required under the homestead law, if to such period of service he is permitted to add the time he has occupied the land.

If his application was granted, what would be his position?

I concur in your conclusion that in the consideration of this application the acceptance of the resignation of the register cannot affect his position under the law, so long as he continues to discharge the duties of his office.

Section 2287 of the Revised Statutes provides that—

Any bona fide settler under the homestead or pre-emption laws of the United States, who has filed the proper application to enter not to exceed one quarter section of the public lands in any district land office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the pre-emption laws by furnishing the proofs and making the payments required by law to the satisfaction of the Commissioner of the General Land Office.

Under this section he could not make final proof even as a pre-emptor, while exercising the duties of his office, because his right to do lies upon a bona fide settlement under the homestead or pre-emption law, and the proper initiation of a claim under said laws *prior* to the

official appointment. If it be held that under section 452 he is not prohibited, while holding the office, from perfecting a right acquired before his appointment, such conclusions would not warrant the allowance of the proposed transmutation by which his rights would be placed on a different basis and enlarged. For many reasons it has seemed necessary to exclude *all* entries of this nature, and from the history of the law and the rule based thereon, the policy of Congress and the Department would seem to be well settled.

Your decision rejecting Mr. Merrill's application is therefore affirmed. In the present status of the case, the right of the applicant to receive the benefit of the period of his occupancy under his present claim, in the event that he at some future period effects the homestead entry, cannot be properly considered.

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*ENTRYMAN APPOINTED RECEIVER—ENTRY ILLEGAL.*

**CARLAND v. McELRATH.**

As the evidence shows that McElrath failed to establish residence on the land prior to his appointment as receiver, and that he has since failed to comply with the requirements of secs. 2287 and 2305, Rev. Stats., his entry is ordered canceled, notwithstanding withdrawal of contest.

*Secretary Teller to Commissioner McFarland, November 21, 1883.*

SIR: I have considered the case of Willis W. Carland *v.* Thomson P. McElrath, involving the NE.  $\frac{1}{4}$  of Sec. 26, T. 8 N., R. 47 E., M. M., Miles City (formerly Helena) district, Montana, on appeal by Carland from your decision of December 8, 1882, dismissing his contest.

It appears that McElrath filed soldier's declaratory statement No. 56 (in the Helena office) August 9, 1880, for the tract. Subsequently a new land district was established in said Territory, embracing the tract in question, with the local office at Miles City. McElrath having been appointed the receiver thereof entered upon his official duties October 9, 1880. And in order to comply with the law (section 2309, Rev. Stat.) requiring him to make his actual entry and commence his settlement upon and improvement of the land within the time (six months) prescribed by section 2304 of the Revised Statutes, he accordingly made homestead entry No. 25 of the tract January 6, 1881.

Under date of December 22 ensuing Carland initiated contest against the same, filing an affidavit alleging, in addition to the stereotyped allegation of abandonment—

That said entry was not made in good faith, but for speculative purposes; that claimant McElrath has abandoned his rights to said land by voluntary relinquishment; and that he has attempted to transfer and sell the same for a valuable consideration.

The parties having been duly cited to appear at the hearing to be held

at the local office January 23, 1882, accordingly appeared, and upon the testimony thus adduced the register and receiver rendered dissenting opinions; the register deciding against, and the receiver in favor of McElrath.

By your decision you held, to wit:

I am of the opinion that defendant might perfect his entry as he did under the circumstances, and it would not be a violation of the statute or render his entry invalid, as it is not an act prohibited by the statute. (See Rev. Stat., p. 76, sec. 452.)

During the time from October 9, 1880, while McElrath was receiver of the land office at Miles City, to the 20th day of August, 1881, he was obliged to reside at Miles City, and the law by which he was bound as such receiver does not contemplate his residence anywhere but at the place where his duties as such receiver are to be performed; meanwhile the law is in abeyance as to his residence on his entry, and if he went on to his land in due time *after he was relieved of the duties of his said office* the law will have been complied with.

But I have not so learned the law, nor do I concur in such view of the case.

It should be observed that section 452 of the Revised Statutes, cited by you as applicable to the premises, has no relevancy whatsoever, inasmuch as it should be construed as *in pari materia* with, or at least as a concomitant prohibitive statutory provision with sections 243 and 244 of the Revised Statutes, which have their basis in and are in furtherance of the old law as embodied in the eighth section of the act of 2d September, 1789 (1 Stat., 65). Hence the question whether or not defendant's manner of perfecting his entry was in violation or rather contravention of said section 452 is immaterial and impertinent to the issue. But I cannot concur with you in the reasons stated by your decision as a basis for such action, because they are in contravention of another implied statutory prohibition which unquestionably governs this case and fixes McElrath's status in the premises, to wit, section 2287 of the Revised Statutes. It provides that—

Any bona fide settler under the homestead or pre-emption laws of the United States, who has filed the proper application to enter not to exceed one quarter section of the public lands in any district land office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the pre-emption laws by furnishing the proofs and making the payments required by law, to the satisfaction of the Commissioner of the General Land Office.

Thus it appears in the light of the law cited that it was not competent for McElrath to make said homestead entry inasmuch as such procedure was not permissible in any case, the statute prescribing a different method of acquiring title where the applicant is eligible. But McElrath cannot be so regarded, for even in the light of his own testimony it nowhere appears that he had done a single act in the premises prior to his official appointment evidencing or tending to evince a bona fide intent to comply with legal requirements in point of settlement

upon and improvement of the land; while there is abundant and convincing evidence showing contrariwise.

In the case of *Benson v. Western Pacific Railroad Company* (1 Copp, 37), it was held by this Department that where a bona fide settler had established a residence upon his claim, and was subsequently appointed to an office the duties whereof necessitated his absence from his claim, such absence would not work a forfeiture of his rights, but in the case of *Harris v. Radcliffe* (10 Copp, 209) I held that—

I would regard it as highly impolitic, as well as illegal, to extend the rule beyond cases where an actual residence has been established before the intervention of an adverse right. A rule which sanctions the constructive performance of a duty, upon which rights are dependent by force of positive law, may be properly employed to save rights acquired by a partial performance of such duty, but not to confer rights upon one who has made no effort to perform it.

In the light of the evidence there can be no doubt that McElrath had failed to establish a residence upon the land prior to his appointment as receiver, nor is there a doubt that he has since failed to comply with legal requirements as prescribed by sections 2287 and 2305 of the Revised Statutes as intimated aforesaid. Indeed, a preponderance of testimony shows that up to September 25, 1881, he had not established his residence upon the land, and that his entire family have resided in Miles City, about two miles and a half distant. And although it appears that since the appeal was taken from your decision Carland has withdrawn the same, and also his contest, so that no adverse rights appear to have intervened, the register having certified, under date of August 13 last, that "there are no adverse claims of record;" and although it appears that McElrath filed notice of his intention to make final proof August 2 last (which notice the register duly published pursuant to the provisions of the act of March 3, 1879, 20 Stat., 472), and that he accordingly submitted such proof August 13, I am nevertheless of the opinion that there appear to be no equities to justify any other action in the premises than the cancellation of his entry; for not only was the same made while he was receiver, but it was allowed in contravention of an implied statutory provision prohibiting such entry. Moreover, it appears that the basis of the same, to wit, his declaratory statement, was neither filed by himself nor by his duly authorized attorney in fact, as required by your office regulations. Granting the correctness of your statement that the record shows that McElrath applied to file a soldier's declaratory statement at the Helena office in May, 1880, it should also be observed that the records of this Department disclose that he was appointed to the office of receiver May 28, 1880, and as hereinbefore stated he filed his soldier's declaratory statement August 9, 1880, and made his homestead entry January 6, 1881, after he had been appointed, and while he was acting as receiver. If such procedure were held to be permissible it would be in contravention of the spirit and reason, and also of the very letter of the statute,

for that unquestionably presupposes that the application to enter had been filed prior to such appointment of one "who has been subsequently appointed a \* \* \* receiver." Upon such state of facts I cannot refer his entry to the Board of Equitable Adjudication.

Your decision is accordingly reversed.

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#### 24. LOSS OF CROPS.

*ACT OF JUNE 4, 1880—PROOF.*

**ARNOLD v. COFFEY.**

It is competent for a party contesting a homestead entry to show that the entryman, who claimed the benefit of the act of June 4, 1880, on account of the loss of his crop, did not in fact meet with such loss.

*Secretary Teller to Commissioner McFarland, December 27, 1883.*

SIR: I have considered the case of Charles C. Arnold v. Thomas J. Coffey, involving the SE.  $\frac{1}{4}$  of Sec. 1, R. 3, T. 25 W., Bloomington, Nebr., on appeal by Arnold from your decision of August 10, 1882, dismissing his contest.

It appears that Coffey made homestead entry No. 8,412 for said tract on March 31, 1880, and in May following partially put up a cabin and broke some ground. On July 26, 1880, he gave notice to the local officers that he had planted 6 acres of corn in the spring, which had failed because of continued drought, and that he desired to take advantage of the benefits of the act of June 4, 1880 (21 Stat., 543). Said act allowed him, if the statement of fact in his notice were true, to remain absent until October 1, 1881; hence he could not be said to have abandoned the land for six months prior to March 1, 1882. The affidavit of contest alleging abandonment was filed on February 27, 1882, or before the expiration of said six months. You held that a contest will not lie under these circumstances, which is in accordance with my decision in *Griffin v. March* (10 Land Owner, 67).

But the contestant urges that he has shown that the said act does not apply to this case, because Coffey never in fact planted a crop. This is true only in a negative sense, and I am not satisfied with the proof. But as Coffey is shown to have remained away from the land after October 1, 1881, and to date of the hearing, namely, May 1, 1882, and to have made no defense of his claim, I am of opinion that Arnold should be allowed to show that in fact Coffey never met with "a loss or failure of crops from unavoidable causes" in the year 1880, and so obtain his preference right of entry. You will please order a rehearing for that purpose.

Your decision is modified accordingly

## 25. MARRIED WOMAN.

REVISED STATUTES, SECTION 2289.

RACHEL M. MCKEE.

A married woman is not authorized by section 2289 of the Revised Statutes to make homestead entry.

*Secretary Teller to Commissioner McFarland, June 20, 1883.*

SIR: I have considered the application of Rachel M. McKee, dated September 11, 1882, to make homestead entry for the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 32, T. 1 S., R. 66 W., Denver, Col., land district, on appeal from your decision of the 7th of December last rejecting the application on the ground that she is a married woman.

Her attorney, Daniel Witter, esq., has filed an argument with me, to show that section 2289 of the Revised Statutes has not at any time heretofore been properly construed by this Department.

I have carefully considered the questions raised in the case, in connection with the arguments of counsel and your decision; and I am compelled to reach the conclusion that the view expressed by you contains the proper construction of section 2289. This view is in accordance with the practice of the Department since the enactment of the homestead law, and I see no reason whatever for setting it aside.

Your decision is affirmed.

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CANCELLATION—HUSBAND PERMITTED TO MAKE ENTRY.

MARTHA O. MURRAY.

A homestead entry made by a married woman for the alleged purpose of protecting the family property and securing a home is canceled, but the husband, if qualified, is permitted to make entry and date settlement from the time he went upon the land with his family.

*Commissioner McFarland to register and receiver, Montgomery, Ala., November 12, 1883.*

GENTLEMEN: I am in receipt of yours of August 17, 1883, transmitting final proof by Daniel Murray, widower of Martha O. Murray, deceased, in support of the latter's homestead entry No. 7,018, April 8, 1876, N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 12, 9 N., 13 E.

It seems that at date of entry Martha O. Murray was the wife of the aforesaid Daniel Murray, a fact which the latter does not attempt to disguise; but swears that both he and his wife thought an entry in the name of either was legitimate, &c. That their sole object was to provide a house for the mother and helpless children free and independent of the personal liabilities of the father.

The evidence shows that he, with his wife and five children, made settlement on the land April 1, 1875, more than one year anterior to entry, and has continued to reside upon and cultivate the land ever since, and has valuable improvements thereon.

Although the intent of the homestead law would in the case at bar have been realized by the applicant, yet the manner of procedure varies from that prescribed by law, which variance is fatal to the existing entry, rendering it illegal; therefore, I have this day canceled the aforesaid entry.

You will note the cancellation on your records, and advise the applicant that if he is qualified he will be allowed to enter said tract; and if there should be public land contiguous thereto, he may include sufficient thereof in his entry to aggregate 160 acres.

In view of the claimant's prior settlement, and the fact that the entry was made for the purpose of protecting their home and improvements, their interests being identical, Murray will be entitled under act May 14, 1880, to have his right relate back to date of settlement made before the inception of his wife's entry.

You will so inform him; also, that the fee and commissions paid on the canceled entry may be refunded upon the proper application therefor.

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## 26. MINOR ENTRYMAN.

### CANCELLATION—RELIEF.

W. T. BOSTWICK.

The minor's entry, which was made before his majority, is cauceled, but he is allowed to make another entry of the land with credit for settlement from the date he became 21 years of age.

*Commissioner McFarland to register and receiver, Gainesville, Fla., January 19, 1883.*

GENTLEMEN: Referring to your letter of the 16th of March last, inclosing petition, proof, and other papers in the case of W. T. Bostwick, homestead entry No. 1,729, Gainesville series, I have to state that it appears by the evidence submitted and your report that the homestead party was not of the age of twenty-one years at the date of making his homestead entry, to-wit, July 7, 1875; that he was under the impression that he was entitled to make the entry as the head of a family, he alleging that at that time, and up to the present time, he has supported his mother and two younger children, and did not find out that his entry was illegal until he applied to make final proof in December, 1881. Mr. Bostwick further shows that he has strictly complied with the requirements of the homestead law as to residence upon and cultivation of his entry from the date thereof, never having been absent

therefrom ten days at any one time, and that he became of age (twenty-one years) on the 19th day of February, 1877.

Mr. Bostwick now desires relief, so as to be enabled to secure title to the land upon which his improvements and house are situated; but as his entry is illegal from its inception it will necessarily have to be canceled; therefore, said entry No. 1,729 is hereby canceled, and in view of the good faith shown by Bostwick in the case, you will allow him to re-enter the land, with credit of money paid on the canceled entry, after which, as he is entitled to credit for residence upon the land, under act of May 14, 1880, you will inform him that he may make final proof upon the new entry from the date he became twenty-one years of age to the present time, which will cover the period of five years required by law.

I return herewith the application and affidavit of Mr. Bostwick for a new entry, and you will inform him of the action taken in his case, noting the cancellation on your records.

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#### SOLDIER'S ORPHAN—ENTRY BY GUARDIAN—BENEFICIARY.

*Commissioner McFarland to E. J. Records, 430 Walnut street, Philadelphia, October 4, 1883.*

SIR: In reply to your letter of the 27th ultimo, I have to advise you that the patent in a homestead entry made by a guardian for the benefit of the minor orphan child of a deceased soldier must issue to the beneficiary, whether he or she is of age at date thereof or not.

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#### 27. PATENTED LANDS.

*ACT JUNE 15, 1880—RE-ENTRY.*

**THORP WILLIAMS ET AL.**

Lands entered and patented under the general homestead law are not the subject of purchase by the same parties under the act of June 15, 1880.

*Acting Secretary Joslyn to Commissioner McFarland, March 19, 1884.*

SIR: I have considered the appeal of Thorp Williams, Paul Brothers, and Alfred Billingslea from your decision of May 18, 1883 (10 L. O., 92), declining to allow them to purchase certain lands in the Montgomery, Alabama, land district.

It appears that said lands were entered by said parties under the homestead laws in 1870, and that patents therefor issued to them on April 9, 1878. In April and May, 1883, they severally applied to make cash entry, with tender of fees, &c., for the same tracts, under section 2 of the act of June 15, 1880 (21 Statutes, 237), which was refused by the local officers, and, on appeal, by your office. Their counsel states

that their reason for applying for the benefits of said act is that they are informed that bills in chancery have been filed in the United States court at Huntsville to vacate said patents, and that, to save the expense and trouble of answers and defense, they ask relief under said act. Their argument is that it has been repeatedly ruled by the Land Department (cases cited) that the said act was intended to relieve against all disqualifications, irregularity, or fraud in attempting to procure title under the homestead law, upon the single condition that the entry was made prior to its passage; that it declares that persons so entering, who cannot acquire a good title under the homestead law, "*may entitle* themselves to said lands by paying the Government price therefor;" that it does not describe such persons as those who have not obtained patent, but expressly as those who have "*entered*" lands, and that therefore the act is to have the liberal construction which all remedial acts require.

I have considered the aforesaid argument attentively, but am unable to concur in the conclusions sought to be drawn from it. To my mind it is clear that the act of June 15, 1880, in so far as the question of acquiring title is concerned, had in contemplation one state of facts alone, namely, that patent had not yet issued for the lands so entered. It refers in terms only to land "*entered*," which in all other laws relating to the public domain means land to which persons are seeking to acquire title, and not that to which they have already acquired title. Land which has been entered and patented is no longer entered land; the entry, by which the inceptive right to the soil is acquired, has merged in the patent; the land is no longer the land of the United States, over whose disposition the Land Department has jurisdiction; the patent itself, in so far as the Land Department is concerned, is to be deemed to have passed the legal title of the United States, if it is regular, and can be inquired into only by the courts. All acts of Congress referring to public lands are to be executed by this Department in conformity with these principles and judicial rulings, and therefore this act, which authorizes the patenting of certain lands to those who have entered them prior to its passage, must be construed as applying only to those lands for which patent has not yet issued.

In this case the appellants in effect declare that they are not satisfied with the title to the land which they have acquired under the homestead law, and request that the Land Department give them title under another law. To do so that Department must have jurisdiction over the title after patent, which, under settled rulings, it has not. In *Moore v. Robbins* (96 U. S., 530) the court say that when it has been decided by the officers of that Department that a "*party has, by purchase, pre-emption, or by any other recognized mode, established a right to receive from the Government a title to any part of the public domain,*" "*and the patent, issued under the seal of the United States and signed by the President, is delivered to and accepted by the party,*

the title of the Government passes with this delivery. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed." So long, therefore, as the land herein involved is in its existing condition, *i. e.*, patented land, this Department has no authority or control over it, and hence cannot sell it or patent it to any one. It was decided in 1878 by the proper officers that the appellants here were entitled under the homestead law to the tracts entered by and afterwards patented to them; that decision stands until annulled by judicial proceedings, and it is an absurdity to suppose that, prior to such annulment, the Department can decide that the parties are entitled under the act of June 15, 1880.

Your decision is affirmed.

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*SCRIP LOCATION—JURISDICTION.*

WILLIS F. STREET.

When patent has issued for a tract of land, the Land Department has no further jurisdiction over it, and cannot allow another to enter it.

*Secretary Teller to Commissioner McFarland, December 28, 1883.*

SIR: I have considered the appeal of Willis F. Street, from your decision of May 19, 1883, dismissing his appeal from the decision of the local officers, which rejected his application to enter certain tracts in the Saint Cloud, Minnesota, land district, because they were covered by Chippewa Half-breed scrip, No. 173 C., in the name of Sophia A. Lambert, located November 12, 1864.

The appeal claims that this scrip issued without authority of law, and that its location is consequently void.

Your decision, that as patent has issued upon this scrip location its regularity cannot now be questioned by your office, and that you have no further jurisdiction in the matter so long as the patent is outstanding, conforms to those of this Department and of the Supreme Court in like cases, and is affirmed.

## 28. PREFERENCE RIGHTS.

## CONTEST—RELINQUISHMENT—RE-ENTRY—CANCELLATION.

## NELSON v. MCLEOD.

A homesteader, whose entry was about to be contested, relinquished and made a timber-culture entry of the land; the contestant, having settled upon the land prior to relinquishment, is entitled to make a homestead entry, and the timber-culture entry is held for cancellation, with credit for fees or repayment if desired.

*Acting Commissioner Harrison to register and receiver, Benson, Minn., June 5, 1883.*

GENTLEMEN: I am in receipt of your letter of May 23, 1883, transmitting papers relating to the appeal of Augustinus F. Nelson from your decision rejecting his application to enter the NE.  $\frac{1}{4}$  32, 116, 46, under homestead law.

The facts in the case, as shown by the papers, are that John McLeod made homestead entry No. 11,295 June 10, 1882, for the land described; that on March 15, 1883, Augustinus F. Nelson executed an affidavit of contest against said entry, which was transmitted to your office in due time, and the application to contest was rejected for the reason that the affidavit was not corroborated by two witnesses, as required. On April 3, 1883, McLeod appeared at your office and relinquished his homestead entry, and made timber-culture entry No 2,106 for said tract. On or about April 10, 1883, Nelson filed in your office his perfected affidavit of contest, which was returned to him with the information that the homestead entry had been relinquished and the timber-culture entry made. On May 2, 1883, Nelson appeared at your office and applied to enter the land as a homestead, and you rejected his application for the reason that the tract was covered by the timber-culture entry of McLeod. From this decision Nelson appeals. Accompanying the papers relating to Nelson's rejected application to enter the land is an affidavit by him, corroborated by one witness, alleging that he was residing upon said land above described, with his family; that he had made and now possesses valuable improvements thereon," and that he had resided upon and improved said tract long prior to April 3, 1883, the date of the timber-culture entry No. 2,106, and it is presumed that this affidavit accompanied the homestead application when filed in your office. The allegations of Nelson's affidavit of contest and the affidavit last referred to that he had made actual settlement and improvement upon the land prior to April 3, 1883, and that McLeod had never resided upon or improved the same, are corroborated by other testimony. McLeod's action in relinquishing his homestead entry and entering the land under timber-culture law after an attempt to initiate a contest against said entry, indicates a doubt on his part of his ability to show compliance with legal requirements or to defend his entry against the attack about

to be made, and in a measure may be accepted as corroborating the allegations of illegality and abandonment.

An affidavit is on file in this office, received with a letter from Nelson, dated May 15, 1883, signed by Nelson and corroborated by five witnesses, in which it is alleged that McLeod "never built a house on said land, never dug a well thereon, never broke a furrow on said land, and never lived on the land for a single day, nor did he make any improvements whatever on said land," and that Nelson "settled on said land about the 1st day of January, 1883, and has plowed said tract [10 acres], and put the same into crops."

From the evidence before this office I am of opinion that the tract described was uncultivated and unimproved land at the date of Nelson's settlement thereon, and that his right as a settler under third section act of May 14, 1880, accrued *instanter* upon the cancellation of the homestead entry of McLeod—No. 11,295—at 9 o'clock a. m. April 3, 1883, as shown by your indorsement upon his relinquishment transmitted to this office with your letter of April 9, 1883, and that he was entitled to make homestead entry for the land within the time prescribed by said act. The timber-culture entry No. 2,106 is therefore held to be subject to Nelson's preference right to enter the land.

Had the act of May 14, 1880, never been adopted, Nelson's rights would still be superior to any which McLeod could acquire by virtue of his timber-culture entry made subsequent to Nelson's actual settlement upon and improvement of the land. In the case of *Shadduck v. Horner* (Copp's L. O., vol. 6, p. 113), the honorable Secretary of the Interior held that "under a proper and correct construction of the 'act to encourage the growth of timber on western prairies,' it must be held that the entry contemplated in the statute should be made upon vacant unimproved land; not upon cultivated land covered by the valuable improvements of another, and in the possession of another."

McLeod will therefore be allowed sixty days in which to show cause why his timber-culture entry No. 2,106 should not be canceled and the homestead entry of Nelson allowed, and should he fail to take action in the matter within that time, the action above indicated will be had. Upon the cancellation of the timber-culture entry 2,106 the party will be entitled to make a new entry of the same class, with credit for the fee and commissions already paid, or he may apply for the repayment of the sum so paid, and thereafter make a new entry the same as if the canceled entry had not been made. McLeod may appeal from this ruling to the honorable Secretary of the Interior within the time above mentioned.

Inform all parties in interest respecting the contents of this letter. G. W. Baillet, esq., of Gary, Dak., is attorney for Nelson. At the expiration of the sixty days mentioned report action in the premises.

CONTEST—*FRAUDULENT INCEPTION*—R. S. 2297.BISHOP *v.* PORTER.

Where a party believes that as a settler he had a better right to the tract than the entryman, he should initiate contest by filing his application to enter within the period prescribed by law, and not by allegations of fraudulent entry.

*Secretary Teller to Commissioner McFarland, November 14, 1883.*

SIR: I have considered the case of *Thurlow Bishop v. John H. Porter*, involving the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 32, and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 33, T. 22 S., R. 30 E., Gainesville, Fla., on appeal by Porter from your decision of October 23, 1882, holding his entry No. 8,751 for cancellation.

The record shows that Bishop has not made an application to enter, and that he contests Porter's entry on the ground of a fraudulent inception. Your decision holds that "the intention of each of the parties to appropriate the land by *bona fide* entry under the homestead law is evident from their acts," and in this I concur. Consequently there was not fraud, though there was irregularity, in Porter's entry. Said decision proceeds to argue that the irregularity may not be cured (as it might be if the question were between the Government and Porter alone), for the reason that Bishop had acquired an interest in the tract by settlement and improvement; and it concludes by giving him the preference right of entry under the act of May 14, 1880.

The evidence in this case, except so far as above recited, need not be discussed. It is sufficient to point out that Bishop has not shown that Porter has forfeited his entry, and consequently he can obtain no preference right under the act of May 14, 1880, which contemplates a contest under section 2297 Revised Statutes. The contest is therefore dismissed.

If Bishop believed that as a settler he had a better right to the tract than Porter, the proper method of initiating contest was by his filing an application to enter within the period prescribed by law. Without such an application the Land Department cannot consider the respective rights of parties based on priority of settlement or claim.

Your decision is therefore reversed.

Motion for reconsideration dismissed July 15, 1884.

**29. PRESUMPTION OF DEATH.***CONTEST—TIME OF ABSENCE—PROOF.***DODD v. GAMBLE.**

In the absence of positive proof, there is no presumption of the death of a party until after the expiration of seven years.

*Secretary Teller to Commissioner McFarland, December 28, 1883.*

SIR: I have considered the case of W. C. Dodd *v.* Reason Gamble, involving homestead entry No. 11,492, made by Gamble July 7, 1874, under the provisions of the act of June 8, 1872, covering the SE.  $\frac{1}{4}$  of Sec. 29, T. 7, R. 3, Concordia, Kans., on appeal by Dodd from your decision of February 14, 1881, dismissing the contest.

The records of the War Department show that Gamble served two years nine months and twenty-one days as a volunteer in the United States service, during the late war.

On July 7, 1877, Samuel P. Gamble, the father of the entryman, offered final proof, claiming that the latter died on or about March 1, 1876, leaving neither widow nor children, and that, as heir of the deceased entryman, he is entitled to the benefits granted by the soldier's homestead act of June 8, 1872.

On December 4, 1877, your office declined to issue final certificate, for the reason that the act of June 8, 1872, applied to no other persons than the widow and minor children of the deceased soldier.

A contest hearing was ordered on the ground of abandonment, and held June 6, 1878, at which it was shown that Reason Gamble built a dug-out, broke and cultivated 10 or 15 acres of land to corn during 1874, and resided thereon until February or March, 1876; becoming discouraged by the continual devastation of the crops by grasshoppers, he, with his brother, left Kansas, ostensibly for Dakota. During June, 1876, information was received in an indirect manner that Reason had been killed near Deadwood, Dak.

A decision was rendered by your office July 16, 1879, adjudging the entry forfeited, by reason of abandonment of the land by the entryman for more than six months.

On a review of the proceedings it was decided by your office that a rehearing should be granted, for the reason that the entryman was entitled by law to an absence from the land during the period of alleged abandonment. At the rehearing, held February 14, 1880, the proof offered was directed towards determining the question of the alleged decease of the entryman. No direct evidence of death was presented. One witness stated that during the summer of 1876, in Deadwood, Dak., he met one of the parties that accompanied the entryman, who informed him that Reason Gamble had been shot and killed by soldiers while attempting to escape from their custody. Another witness testifies that

he saw a letter, written by Reason's brother, in which it was stated that Reason had died from the effects of a gunshot wound; while a third witness states that he was in Deadwood, Dak., during March, 1878, when two men were brought in on a charge of horse-stealing; that a chance acquaintance of witness told him they were the Gamble boys, whom the informant knew in Kansas. Excepting the testimony of this last witness, nothing appears to show that Reason has been seen or heard of alive since the alleged date of decease.

It is the general belief of the people living in the vicinity of the claim that the entryman is dead; but when all the circumstances surrounding the affair are considered, it appears that sufficient doubt is raised to preclude a reasonable presumption of death; which doctrine cannot be applied, in the absence of positive proof, until seven years after the disappearance of Reason.

It appears that the father of the entryman, Samuel P. Gamble, on learning of the alleged decease of Reason, immediately entered into possession of the land, and has continually resided thereon since, cultivating and improving it from year to year, as the representative of the entryman.

The allegation by Dodd of abandonment, having no foundation in fact, drops out of the question, and as a consequence he cannot be considered a party.

Your decision dismissing the contest is affirmed.

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### 30. PREVIOUS CONTEST.

#### SETTLEMENT—IMPROVEMENTS—PREFERENCE RIGHTS.

##### MASSINGILL *v.* HAWKINS.

An adverse decision based on the standing of a party or interpleader in a previous contest should, as a rule, not affect a case based upon matters arising subsequently to such decisions. Rights since accrued should be adjudicated without reference to the prior decisions.

*Commissioner McFarland to register and receiver, Dardanelle, Ark., July 28, 1883.*

GENTLEMEN: I have considered the case of Newton Massingill *v.* William Hawkins, involving the latter's additional homestead entry No. 16,325, made under the act of March 3, 1879, upon the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  29, 10 N., 27 W.

The case is before me on appeal by the plaintiff from your decision adverse to him.

It appears that the land in question was formerly embraced in the homestead entry No. 14,350, of Sallie Rodgers, which was canceled on relinquishment by my decision of July 24, 1882. By my said decision

the case of said Hawkins *v.* Sallie Rodgers, wherein said Massingill appeared as interpleader, was also dismissed, and you were instructed to advise the parties in interest that the land would be subject to entry by the first legal applicant.

On August 16, 1882, Hawkins applied to make entry, and you allowed him to do so, as above. The day following Massingill applied to file a pre-emption declaratory statement on the land, but his application was rejected because of the appropriation of the land by Hawkins's entry. It seems that at the same time you canceled Hawkins's entry on the belief that you had erred in permitting the same before the expiration of the sixty days allowed the parties within which to appeal from my said decision in the previous case. But afterward, namely, on August 22, you appear to have rectified your error by reinstating said entry. No appeal having been filed in the former case, that case was closed by this office October 18, 1882.

On October 17, 1882, the case at bar was initiated by Massingill, and his cause of action seems to be grounded on the same claim as was his interplea in the former contest, namely, that he is entitled to the preference right of filing upon the land because of his prior settlement and improvements thereon.

But you hold that as this question was decided by my decision of July 24, 1882, in the former case alluded to, it is *res judicata*, and therefore cannot be further inquired into or discussed. Upon this view your decision is based.

I do not, however, concur in your conclusions. My decision, adverse to Massingill, in the former case was based on the ground that he gained nothing by virtue of the improvements made by him on the land while it was embraced in an uncancelle<sup>d</sup> entry.

It had reference solely to his standing at the time his claim for consideration was presented. Matters subsequent thereto were *dehors* the record, and could not be, as they were not, inquired into or brought in issue.

If Massingill can therefore establish that he has rights *that have since accrued*, there is every reason why he should be allowed to do so.

It is his right, and Hawkins's special plea in bar of *res judicata* cannot interpose to estop him from exercising it; for that plea, to my mind, is untenable under the state of facts as now presented.

With this view of the matter I have examined the record of contest. I find therefrom that Massingill was in possession of and had improvements on the land at the date (July 24, 1882) of cancellation of Rodgers's entry, and that he has ever since continued in possession thereof as claimed by him. This is conclusively proved—in fact, is admitted by Hawkins.

In the case of McCluskey *v.* Thomason (10 Copp, 4), which was analogous to this, the testimony showed that McCluskey was resident on the land November 5, 1880, the date of cancellation of Neel's entry, in-

teuding to claim it under the homestead laws. It was held by the Department that prior to that cancellation the tract was under appropriation; but upon that event McCluskey had the same rights a pre-emptor would have had under the pre-emption laws, and he was authorized to enter within three months from the time it became subject to further appropriation (see also case of *Murphy v. Taft*, 9 Copp, 213).

Your decision is therefore reversed, and Massingill will be allowed to make pre-emption filing on the land, as applied for.

Should he make such filing, which he is required to do within thirty days from notice hereof, the entry of Hawkins will stand subject to his rights thereunder. Or, if desired by Hawkins, his entry will be cancelled and he allowed to make a new one, with credit for fee and commissions already paid.

Duly advise the parties in interest of this decision, allow sixty days for appeal therefrom, and, at the proper time, report action taken.

Affirmed by Secretary Teller, January 30, 1884.

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### 31. PRIVATE ENTRY.

#### *AFFIDAVIT BEFORE COUNTY CLERK—PRIORITY.*

#### *PLAISANCE v. BRADLEY.*

Homestead entry was made subsequent to private entry. But homestead entryman's affidavit before county clerk that he had made settlement upon the land prior to date of private entry should give him preference. Private entryman is permitted to show cause why his private entry should not be canceled.

*Secretary Teller to Commissioner McFarland, January 30, 1884.*

SIR: I have considered the appeal of H. P. Plaisance from your decision of 7th of June, 1883, holding for cancellation his homestead entry No. 6,638, made July 5, 1882, for the W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  11, 7 S., 9 W., New Orleans district, Louisiana, for conflict with private cash entry No. 5,695, by N. B. Bradley, made July 1, 1882, covering this with other tracts.

The affidavit of Plaisance was made June 10, 1882, before the clerk of Calcasieu Parish (or county), and the entry papers were transmitted to the district office in compliance with section 2294 of the Revised Statutes. The affidavit alleges that he was residing on the land, and had a *bona fide* settlement and improvement thereon, commenced on the 25th of May previous, and consisting of a house, well, fencing, &c.

The law allowing a party in such case to go before the clerk of his county to make the oath was undoubtedly intended to provide a means for prompt protection of his claim from appropriation by parties having no present interest, who might anticipate him in reaching the district office while he might be attempting in good faith to make his entry.

He therefore should not be defeated by a stranger, whose application at the district office is made at a date subsequent to his application and oath filed with the county clerk, as by such a practice his home would be given to another, notwithstanding his compliance with the law which was passed especially for his benefit, and he would be no better off than one to whom its provisions had no application.

As the papers were before you, showing the priority of Plaisance by the date of his affidavit, it was error to hold his entry for cancellation; but the entry of Bradley should have been suspended, and he should have been called upon to show cause, if any he can allege, why his cash entry should not be canceled for conflict with the prior right of the settler.

I reverse your decision.

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### 32. PURCHASE.

*TWO ENTRIES—GOOD FAITH—ACT JUNE 15, 1880.*

*MCNEFF v. NEWMAN.*

A party made one homestead entry under general homestead laws, and thereafter made second homestead entry of other land under act of June 8, 1872, believing that he was entitled to both; notwithstanding irregularity of second entry, he may purchase the land covered thereby under act of June 15, 1880, if same was subject to entry and there is no adverse claim.

*Secretary Teller to Commissioner McFarland; July 17, 1883.*

SIR: I have considered the case of Chas. McNeill *v.* Chas. Newman, involving lot 2, the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , lot 3 of the SW.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 25, T. 11, R. 3 W., Marysville, Cal., on appeal by Hiram L. Parker from your decision of November 29, 1881, allowing Newman to purchase the tracts under the act of June 15, 1880.

Newman made homestead entry of the tracts August 13, 1878, and McNeill commenced contest against him for abandonment thereof in August, 1880. Pending consideration of that case, Newman applied in April, 1881, to purchase the tracts under the act of June 15, 1880, and, pending that application, Parker applied to enter them under the homestead laws, alleging that Newman's entry was void *ab initio*, because of a former entry in 1874, whereby he exhausted his homestead right. Parker appealed from the local officers' refusal to allow his application, and you ordered a hearing respecting Newman's good faith as to his second entry.

It does not appear that McNeill had any interest in or claim to the tracts, except as a contestant of Newman's entry, and under the act of May 14, 1880, he had no preference or other right until he procured cancellation of that entry, which he had not done. Notwithstanding this, he sold and conveyed to Parker whatever right he had, and Parker

thenceforth continued to prosecute in the name of McNeff the proceedings against Newman.

You find from the testimony that Newman acted in good faith, and without intent to defraud the Government in his second entry, which he made under the belief that he had the right to one entry under the general homestead laws, and another under the act of June 8, 1872 (section 2304, Rev. Stat.), by reason of his services in the Navy of the United States during the late rebellion.

It is not necessary to consider herein whether or not Newman's second entry was an appropriation of the tracts, so that while it remained of record they were not subject to further entry, nor whether Newman had exhausted his homestead right by his entry in 1874, nor whether Parker could continue the proceedings against Newman in the name of McNeff after the latter had abandoned them, and had the right of appeal from any decision in the matter, because the first and real question is, whether or not Newman had the right to purchase the tracts under the act of June 15, 1880, and this seems settled by the construction of that act as held in the case of Maughn (Copp, June, 1882) and other cases, that, notwithstanding irregularity in the entry, the entryman may purchase if the land was subject to entry, and there is no adverse claimant, both of which conditions are favorable to Newman.

Your decision is affirmed.

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*CONTEST—ABANDONMENT—INTERPLEADER.*

*THOMAS v. MCCLURE AND YEATES.*

The defendant is held not entitled to purchase under the act of June 15, 1880, as such purchase is intended solely to benefit the interpleader, and would result in defeating the superior equities of the plaintiff.

*Commissioner McFarland to register and receiver, Dardanelle, Ark., August 30, 1883.*

**GENTLEMEN:** I have considered the case of *B. T. Thomas v. David McClure*, defendant, and *John C. Yeates*, interpleader, involving McClure's homestead entry No. 13,828, made June 1, 1879, on the S.  $\frac{1}{2}$  N. W.  $\frac{1}{4}$  Sec. 1, T. 2 N., R. 23 W., on appeal by the interpleader from your decision in favor of the plaintiff.

The contest was instituted May 17, 1882, on the ground of abandonment. On June 1 following, the defendant, McClure, presented an application to purchase the land above described under the act of June 15, 1880, but no receiver having then qualified in the place of the late receiver, Thomas Boles, such application was rejected by you.

On June 28, 1882, the day set for hearing of the case, the plaintiff, Thomas, filed a supplemental or amended affidavit of contest, alleging further, and among other things, that he had purchased the land from

the defendant, and was in actual possession of the same, whereupon a continuance was granted to August 4 following. On said latter date the interpleader, Yeates, appeared and filed an interplea, and asked to be made a party defendant to the contest, on the ground that he was the legal owner, and also in possession of the land. His motion was granted; and the respective parties being present with their counsel, and waiving all irregularities of procedure, the case was taken up and heard.

The testimony shows that the defendant never made any improvements on the land, but abandoned the same in December, 1879, or January, 1880, and moved to Montgomery County, Arkansas, distant some 25 miles from the tract in controversy, where he has ever since resided. It further appears that the plaintiff has been residing upon and improving said land ever since the defendant's abandonment thereof, intending in good faith to make it his home. In February, 1880, he built a house on the land, and has since made considerable improvements thereon. There is also evidence showing that just prior to his abandonment of said land defendant sold his interest in the same to plaintiff for the sum of \$7, and transferred his duplicate receipt to the interpleader, who had paid on his behalf the sum of \$2 as part of the purchase-money, with the understanding that such receipt was to be turned over to the plaintiff on his reimbursing the interpleader for said sum. On this point, however, it may be stated that the interpleader denies that the receipt was held by him for the purpose alleged. On the contrary, his version of the matter is, that the receipt was purchased by himself from the defendant, with the view of saving that portion of his improvements which he states he believes a resurvey will show lies upon the tract in dispute.

\* The interpleader, it seems, owns and occupies under his homestead entry No. 8,957 (F. C. No. 2,608), made May 4, 1874, the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , 1, 2 N., 23 W., which adjoins the tract in controversy. He admits, however, that he offered to sell the receipt to the plaintiff, but, such offer having been declined, he concluded to get the land himself. But he denies, as submitted in evidence, though not conclusively proved by the plaintiff, that one of plaintiff's witnesses offered to pay him the alleged balance due on the receipt. The interpleader also acknowledges, as further charged by the plaintiff, that he procured the defendant to go to the land office and make application to purchase the land under the act of June 15, 1880, and that he furnished the defendant \$100 two or three days before he (said defendant) presented himself at your office for such purpose. He further admits that he expected to get a deed to the land from the defendant after the purchase had been consummated, and also paid him \$8 in addition as an inducement. It appears in evidence that such deed was actually executed by the defendant about the time the appli-

cation to purchase was made. No testimony was offered by the defendant, and he appears to have been singularly silent.

The receipt about which there is so much contention accompanies the defendant's application to purchase.

On inspection it appears never to have been relinquished or transferred by the defendant. The purchase or possession of it by the plaintiff or the interpleader would, therefore, have availed nothing to either. It is only touched upon so largely in my consideration of the case because of the exceptional character of the point involved, which renders it necessary to take in collateral issues in order to show as clearly as possible the respective equities of the contending parties.

From the foregoing, the real question at issue would seem to be, is the defendant entitled to purchase the land under the act of June 15, 1880, when it is admitted and proved that such purchase is intended solely for the benefit of the interpleader, and will, if allowed, result in the defeat of the superior equities of the plaintiff? I do not think the defendant is, under the circumstances, so entitled.

Rule 14 of office circular, issued October 9, 1880, under the act of June 15, 1880, provides that "where the duplicate receipt has been lost or destroyed, and the application to purchase is made by the original homestead party, the applicant must make oath that he has not transferred, nor attempted to transfer, his homestead right under said entry, nor assigned his right to receive the repayment of the fees, commissions, and excess payments paid thereon." It is clear that this rule was intended to prevent the purchase by the homestead claimant after he had transferred his interest in his entry, or attempted to transfer the same. Such transfer being usually made upon the duplicate receipt, the absence of the receipt would raise a strong presumption that a transfer had been made. Hence to rebut this presumption an oath as to non-alienation was deemed necessary, and accordingly the above-mentioned rule was promulgated.

The substance of the rule is that a homestead party cannot be permitted to purchase the land after he has sold his rights to another. A transfer of the duplicate receipt is not, however, the only evidence of such sale. The sale may be otherwise established, and when established is sufficient to bar a purchase by the homestead party of land to which he no longer has any equitable claim, even if he does still hold possession of the duplicate receipt.

In the present case, the duplicate receipt does not show a transfer by the defendant. But the fact that he had disposed of his entire interest in the land both by deed and otherwise is proven. To allow the purchase by a homestead party under such circumstances would be a violation of the spirit and purpose of the rule referred to, and would place this office in the position of aiding the consummation of a scheme to deprive the occupant of his improvements placed upon the land under color of right, obtained through actual transfer of possession from the

homestead party. It is reasonably clear in this case that the application to purchase is not *bona fide* on the part of the defendant, but is in reality made in the interest of the interpleader, who has no standing in the case.

The application to purchase is therefore rejected, and the aforesaid entry No. 13,828 is held for cancellation. You will so advise all the parties in interest, allow the usual time for appeal, and, at the expiration thereof, make prompt report regarding action taken.

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*CASH ENTRY—EXECUTION OF AFFIDAVIT.*

RICHARD MARTIN.

The affidavit required by the second section, act of June 15, 1880, may be made outside the land district before any qualified officer having a seal.

*Commissioner McFarland to register and receiver, Wa Keeney, Kansas,  
November 2, 1883.*

GENTLEMEN: I am in receipt of your letter of September 15, 1883, transmitting the application of Richard Martin who made original homestead entry No. 967, for the NW.  $\frac{1}{4}$  of Sec. 27 in T. 17 S., R. 20 W., March 4, 1878, to purchase said tract of land under the provisions of the second section of the act of Congress approved June 15, 1880.

The application in question was presented at your office on the 25th day of July, 1883, and rejected by you for the reason that the affidavits presented in support of said application were not sworn to before an officer authorized by law to administer oaths in this class of cases, said affidavits having been executed before a notary public who resides and keeps his office outside of the limits of the Wa Keeney land district.

Mr. Martin appeals from your action, and submits an affidavit, duly subscribed and sworn to, from which it appears that owing to sickness in his family, the great distance which he now resides from your office and the Wa Keeney land district, and his financial circumstances, he is unable to appear, either at your office or within the land district aforesaid, to make the required affidavit.

The affidavit required by the regulations issued under the act of June 15, 1880, may be made before any qualified officer having a seal, provided the party seeking to avail himself of the benefits of said act proves satisfactorily (as in this case) that he cannot make the affidavit before the local officers or before the judge, or, in his absence, before the clerk of any court of record for the county in which the land is situated, as required by the prescribed rule.

As there is no other question regarding Mr. Martin's right to purchase the land in question under the provisions of said act, his application, herewith returned, may be granted, and you will so advise him.

## 33. QUARTER-SECTION.

*QUANTITY—APPROXIMATION—INTENTION OF CONGRESS.*

BENJAMIN C. WILKINS.

A "quarter-section" of public land is, under the homestead laws, 160 acres. In fractional sections, an entry must approximate 160 acres as nearly as practicable.

*Secretary Teller to Commissioner McFarland, April 1, 1884.*

SIR: I have considered the appeal of Benjamin C. Wilkins from your decision of October 15, 1883, holding for cancellation his homestead entry of December 5, 1882, upon the NE.  $\frac{1}{4}$  of Sec. 2, T. 112, R. 67, Huron, Dak.

It appears that this quarter-section is subdivided into lot 1, containing 77.34 acres; lot 2, containing 77.14 acres, and the S.  $\frac{1}{2}$ , containing 80 acres—the whole aggregating 234.48 acres, and that Wilkins paid \$93.10 for the excess of 74.48 acres above 160 acres. You suspended his entry August 9, 1883, on account of the excess, allowing him sixty days within which to elect which contiguous tracts he would retain so as to approximate his entry to 160 acres; otherwise, to have his entry canceled. He declined to relinquish any portion of the land, and you held his entry for cancellation.

The decisions of this Department upon the question whether one may enter as a homestead a technical quarter-section of public land, although it embraces a much larger quantity than 160 acres, or whether he is restricted to (approximately) 160 acres, have not been uniform—the case of Aanrud, decided by my predecessor August 23, 1880 (Copp, October, 1880), holding that he might enter such quarter-section, and my decision of September 17, 1883, in the case of Sayles, that his entry must be made to approximate 160 acres.

What Congress *intended* in respect to the quantity of land allowable in a homestead entry may be gleaned from its legislation. February 1, 1859, a bill passed the House of Representatives "to secure homesteads to actual settlers on the public domain." It provided for the entry of "one quarter-section of vacant and unappropriated public lands or a quantity equal thereto to be located in a body in conformity with the legal subdivisions." No action was taken thereon at that session of the Senate.

March 12, 1860, a bill with the same title passed the House, authorizing one qualified under its provisions "to enter, free of cost, one hundred and sixty acres of unappropriated public lands." The Senate Public Land Committee reported a substitute for the bill granting homesteads to actual settlers at 25 cents per acre (but not including pre-emptors then occupying public lands), which passed that body. The House refusing to concur in the amendment, a protracted conference

between committees of the two houses ensued, which resulted in the acceptance by the House committee of the Senate substitute, and with slight amendments it passed both houses. It provided (section 1) for the entry of "one quarter-section of vacant and unappropriated public lands, or *any less quantity*, to be located in one body, in conformity with the legal subdivisions of the public lands, after the same shall have been surveyed" upon named conditions, one of which was that the applicant for the benefit of the act "is actually settled on the *quarter-section*, or other subdivision *not exceeding a quarter-section*, proposed to be entered." Provided, that the act should not be construed "to embrace or in any way include any *quarter-section* or *fractional quarter-section* of land upon which any pre-emption right has been acquired prior to the passage of this act." Section 2 provided "that no individual shall be permitted to enter more than *one quarter-section* or *fractional quarter-section*, and that in a compact body," and section 3, "that no claim of pre-emption shall be allowed for more than *one hundred and sixty acres*, or *one quarter-section*, of land," and that any claimant under the pre-emption laws may take less than 160 acres by legal subdivisions.

June 23, 1860, President Buchanan returned the bill with his veto, saying, "This bill gives to the persons named in the bill the privilege of appropriating to himself *one hundred and sixty acres* of Government land" upon the conditions named, and that although foreigners were welcome to our shores it is not "expedient to proclaim to all the nations of the earth that whoever shall arrive in this country from a foreign shore and declare his intention to become a citizen shall receive a farm of *one hundred and sixty acres* at a cost of 25 or 30 cents per acre, if he will only reside on it and cultivate it." The veto was sustained, and the bill did not pass the Senate.

In 1861 another bill with like title passed the House providing that any person with the required qualifications "be entitled to enter, free of cost, *one hundred and sixty acres* of unappropriated public lands." It passed the Senate with slight amendment, was approved by President Lincoln May 20, 1862, and is, substantially, the law now in force, of which section 2289 (Rev. Stat.) authorizes one to enter "*one quarter-section* or a less quantity of unappropriated public lands," "subject to pre-emption, at \$1.25 per acre; or 80 acres or less of such unappropriated lands at \$2.50 per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And any 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*." Section 2298 provides that "No person shall be permitted to acquire title to more than *one quarter-section* under the provisions of this chapter." Section 2304, that the person therein named shall upon compliance with the provisions of this chapter be entitled to a patent for "*not exceeding one hun-*

*dred and sixty acres or one quarter section.*" Section 2306, that any person entitled to enter a homestead under section 2304, who may have entered a quantity of land *less than one hundred and sixty acres*; shall be entitled to enter so much more land as, when added to the quantity previously entered, shall not exceed *one hundred and sixty acres*; section 2313, that certain Indians therein named shall be permitted to enter "*not exceeding one hundred and sixty acres, or one quarter-section,*" and section 2315, that the persons therein named may enter "*not exceeding one hundred and sixty acres.*"

It seems clear to me from this review that Congress and the President used the terms "quarter-section" and "160 acres" interchangeably and as meaning the same quantity of land, and that this resulted from the fact that a quarter-section under the Government system of public surveys embraces or is intended to embrace just 160 acres, although from inaccuracies in adjusting meridians, and other exceptional reasons, it sometimes differs from that amount; and that the purpose was to give settlers under the law 160 acres, and no more. When, therefore, by reason of the surveys, an entry for this precise amount is impracticable, it must, as nearly as possible, approximate it.

The same conclusion is reached from a consideration of the pre-emption law. The act of April 24, 1820 (3 Stat., 566), provided that the public land when offered at public sale should be offered in half-quarter sections, and when offered at private sale might be purchased in entire, half, quarter, or half-quarter sections; and that when fractional sections containing *one hundred and sixty acres* or upwards should as nearly as practicable be subdivided into half-quarter sections, but that fractional sections containing less than *one hundred and sixty acres* should be sold entire.

The act of May 29, 1830 (4 Stat., 420), authorized any settler in occupation of and who cultivated any portion of the public land in 1829, to enter "*by legal subdivisions any number of acres, not more than one hundred and sixty, or a quarter-section.*"

The act of June 1, 1840 (5 Stat., 382), authorized a settler who resided on *one quarter-section* but cultivated land on another, to elect to enter either, "*so as not to exceed one quarter-section in all.*"

The act of September 4, 1841 (5 Stat., 453), authorized any qualified person to enter, "*by legal subdivisions any number of acres not exceeding 160, or a quarter-section of land,*" and these words are carried into section 2259 of the Revised Statutes, and restrict a pre-emption entry to that quantity.

Section 2274 provides "*That in no case shall the amount patented under this section exceed one hundred and sixty acres;* section 2279, "*That no person shall have the right of pre-emption to more than one hundred and sixty acres along the line of railroads within the limits granted by any act of Congress;*" section 2283, that the Osage lands in the State of Kansas shall be subject to disposal to actual settlers "*in*

quantities not exceeding one hundred and sixty acres, or one quarter-section to each"; and section 2287, that any *bona fide* settler under the *homestead or pre-emption* laws who has filed the proper application to enter "not to exceed one quarter-section of the public lands, but who has subsequently been appointed a register or receiver, may perfect the title under the pre-emption law." And as section 2259 limits a pre-emption entry to "*one hundred and sixty acres or a quarter-section of land,*" I think the term "*one quarter-section,*" as used in section 2287, must have the same signification and mean "*one hundred and sixty acres or a quarter-section.*"

It thus appears that, substantially, the same words are used in limitation of land to be entered under both the pre-emption and the homestead laws, and I cannot doubt that the terms "*quarter-section*" and "*160 acres*" are used synonymously in each to mean 160 acres; and this is in harmony with the general policy of the Government under other laws. It is, however, claimed by the appeal in the present case that the true interpretation of the homestead law will allow a homestead entry for a technical quarter-section, no matter how much land it embraces, as held in this Department's decision of the case of Aanrud, and that my decision in the case of Sayles, which restricted such an entry to (approximately) 160 acres, was inadvertently made and is erroneous.

Aanrud entered two lots aggregating 191.91 acres, and paid for the 31.91 acres in excess of 160 acres. You suspended his entry because the area was greater than that allowed by law, allowing him to elect to have canceled by legal subdivisions the excess. But on appeal your decision was reversed, on the ground that the two lots embraced a technical quarter-section, which Aanrud was entitled to enter.

In the case of Sayles, the quarter-section was divided into two lots and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ —aggregating 230.15 acres—and he applied to enter under the homestead law all the land embraced in the quarter-section. My decision held that his "entry can be readily made to approximate 160 acres, and that it should not be allowed for the amount applied for," notwithstanding the separate tracts embraced a technical quarter-section only. This ruling was followed by my subsequent decision of February 13, 1884, in the case of Goslee, and I am satisfied, from this further consideration of the law, it was correct.

In the present case Wilkins would, by relinquishment of one of the lots embraced in his entry, have 157.34 acres left, which approximates the quantity to which he is entitled under the law. He declines to relinquish any portion of his entry, and you have accordingly adjudged that the whole shall be canceled. I affirm your decision with this modification, viz, that he be allowed still sixty days from notice in which he may yet so relinquish, in default of which his entry will be canceled.

**34. RELINQUISHMENT.**

*PURCHASER—PUBLIC-LAND ENTRY—RIGHTS AGAINST THE UNITED STATES.*

**ANDREW KORBE.**

The purchaser of the relinquishment of a public-land entry gains no rights against the United States from the mere fact of such purchase, and the question of duplicate sales or of the payment or non-payment of the purchase money is not material to the determination of the case.

*Commissioner McFarland to the register and receiver, Wa Keeney, Kansas,  
June 30, 1883.*

**GENTLEMEN:** I have considered the appeal of Andrew Korbe from your decision of May 5, 1881, rejecting his application to contest timber-culture entry No. 91, made by Samuel P. Kipple, July 14, 1876, for the NW.  $\frac{1}{4}$  Sec. 32, 14 S., 17 W.

It appears that Kipple died May 28, 1879, and that on June 28, 1880, his widow, as administratrix, executed a relinquishment to the United States of said entry before John G. Tracy, probate judge of Ellis County, Kansas.

On November 16, 1880, Edwin F. Wood presented at your office what purported to be a copy of said relinquishment, certified to by the probate judge, and he applied at the same time to enter the land under the timber-culture laws.

You rejected the relinquishment and application on the ground that the probate judge did not state that the original relinquishment was on file in his office, and because a copy of a relinquishment is not sufficient to cause a cancellation of the entry.

Wood appealed from this decision, alleging that he purchased the relinquishment from Mrs. Kipple, the relinquishment and purchase money (\$50) being deposited with the probate judge; that the relinquishment and his application to enter the land were in the first instance sent to the local land office by the probate judge, but were returned to him for correction, and that Mrs. Kipple subsequently obtained possession of the relinquishment and sold the same to another party. The probate judge made affidavit to the same effect. His receipt, dated June 23, 1880, for the \$50 paid by Wood was also transmitted. An affidavit from Mrs. Kipple dated September 18, 1880, accompanied the papers, in which she stated that the receiver's duplicate receipt for entry No. 91 had been delivered to one Charles Miller, and had been lost or destroyed.

By my letter of February 14, 1881, your action in rejecting the certified copy of the relinquishment and Wood's application to enter the land, was so far modified as to permit him to furnish further evidence "to settle the matter of heirship."

Supplemental testimony was forwarded, being the affidavits of Mrs.

Kipple and Rasmus Rasmussen, respectively, setting forth the names and ages of the minor heirs of Samuel P. Kipple, deceased. An order of sale from the probate court, dated July 9, 1880, authorizing the disposal of the interest of the estate of Samuel P. Kipple in timber culture entry No. 91, was also filed by Mr. Wood.

On May 17, 1881, the entry was canceled by this office, as relinquished on the papers submitted by Wood, and he was allowed to enter the land, which he did on May 24, 1881, per timber culture entry No. 3762.

On May 5, 1881, Andrew Korbe filed an application to contest timber culture entry No. 91, upon the ground of the failure of Kipple or his heirs to comply with the law, and the further allegation that the entry had been relinquished and sold to him (Korbe) for the sum of \$100.

You rejected the application to contest, for the reason that an application for the cancellation of the entry was then pending before this office.

From this action Korbe appealed. He transmitted the duplicate receipt in entry No. 91, with the original relinquishment by Mrs. Kipple, as administratrix, indorsed thereon. A certificate from the judge of the probate court, dated June 20, 1880, showing that Mrs. Kipple was the duly appointed administratrix of the estate of Samuel P. Kipple, deceased, and a certified copy of letters of guardianship dated August 9, 1880, accompanied the papers in the case.

Korbe alleges that he purchased the relinquishment and improvements from Mrs. Kipple "on or before the 9th day of July, 1880," paying her therefor the sum of \$100.

There is no doubt that Mrs. Kipple sold to Wood her relinquishment of timber-culture entry No. 91 for the sum of \$50, the money being left in the hands of the probate judge to be delivered to her upon the cancellation of the entry.

When the papers were returned for correction she attempted to abandon her contract with Wood, and sold the relinquishment to Korbe for \$100 through the Charles Miller previously mentioned.

The purchaser of a relinquishment of a public land entry gains no rights against the United States from the mere fact of such purchase, and the question of duplicate sales or of the payment or non-payment of price has no legal bearing in the determination of a case.

Wood presented evidence of a relinquishment and therefore of the abandonment of Kipple's entry, whereupon that entry was canceled, and his own entry of the land was allowed.

While the matter of the cancellation of Kipple's entry was pending before this office on Wood's application, Korbe applied to contest. His application was properly rejected by you on account of the pending proceedings.

Kipple's entry having been canceled, the land became subject to entry, and Wood was permitted to enter it. His entry is now intact upon

the records, but is liable to contest for any failure of his own to comply with the law.

Your action is affirmed, and Korbe's appeal is dismissed.

You will notify the parties of this decision, allowing the usual time for an appeal to the Hon. Secretary of the Interior.

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VOLUNTARY—MISREPRESENTATION—TENANT.

FICKER V. MURPHY.

A relinquishment, to have full force and effect, must have been knowingly and voluntarily made. Murphy's relinquishment was obtained through misrepresentation and deceit, and his signature is without attestation.

Where a party goes upon public land as the tenant of an absent person who has not made entry of the land, such tenant may, as in this case, make entry in his own name.

*Secretary Teller to Commissioner McFarland, January 12, 1884.*

SIR: I have considered the case of John Ficker v. Michael Murphy, on appeal from your decision of September 11 last, adverse to the first named.

The tract involved is the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 5 N., R. 13 W., Little Rock, Ark., and is claimed as a homestead by both parties to this contest. The leading facts, as they appear from the evidence in the case, are as follows:

On the 21st of October, 1879, Murphy made homestead entry for the tract described. On the 21st of December, 1879, Ficker filed his affidavit of contest, charging in substance that Murphy's entry was made in fraud of his (Ficker's) right to make homestead entry for the same tract. A hearing was had January 28, 1880, the testimony at which, though conflicting on some points, tends to show that Ficker had purchased the improvements on the tracts of one Jos. R. Janney, who at the date of said sale and purchase had a homestead entry of record covering said tract. Janney relinquished, and his entry was canceled September 27, 1879.

After the purchase from Janney and the filing of the latter's relinquishment Ficker left the State and went to Kentucky, where he was at the date of cancellation of Janney's entry, and also at the date (October 21, 1879) of Murphy's entry. During his absence Murphy went upon the land as Ficker's tenant, pursuant to negotiations with one Hempstager, acting as agent for Ficker. Afterwards, discovering that the land was not owned by Ficker; that it was public land subject to homestead entry; that there was danger of its being entered by some other person, a stranger to him and to any arrangement which he had made as tenant, and that thereby he might be ousted from his tenancy and occupancy, Murphy made his homestead entry of October 21, 1879.

It will be observed that nearly a month elapsed between the date of Janney's relinquishment and that of Murphy's entry. In other words, the tract was subject to homestead entry for that length of time previous to Murphy's entry. On Ficker's return from Kentucky, which was subsequent to Murphy's entry, the latter refused to give possession of the land.

On the foregoing facts, elicited at the hearing, the local officers were divided in opinion, the register holding that Murphy's entry should be canceled and the receiver dissenting. In view of the disagreement, the case was referred to your office for decision.

Pending action in your office, a paper purporting to be a relinquishment by Murphy of his entry was filed in the local office, which thereupon canceled said entry and permitted Ficker to make his homestead entry for the same tract. Murphy's relinquishment bore date December 20, 1879, and appears to have been filed by Ficker (who had purchased it) November 10, 1881, the same day on which he made his entry for the tract in question.

Subsequently, in January, 1882, Murphy filed an affidavit repudiating the relinquishment purporting to be his, averring that if it had been signed by him his signature was obtained through misrepresentation and fraud, practiced by his attorney, P. H. Prince, and asking a hearing. Prince, on the other hand, alleged that Murphy had executed the relinquishment voluntarily, and with full knowledge of its purport and character; that it was held by him as security for his fee, and that, failing to get the fee agreed upon, he finally, with full notice to Murphy, sold said relinquishment for \$200, one hundred of which he offered to Murphy, who after consideration declined to accept the same.

In view of these conflicting allegations relative to the relinquishment, your office ordered another hearing, which was had in March, 1883, and which resulted in another division of opinion between the register and the receiver, the former finding that Murphy signed and acknowledged the relinquishment knowing its full force and effect when filed, and the latter holding the opposite view.

On the 4th of May, 1883, the record of the hearing, together with the differing reports and opinions, were transmitted to your office for action.

You, on September 11, 1883, decided as to the question involved in the original contest of *Ficker v. Murphy*, on which the hearing of December 21, 1879, was had; that Murphy's homestead entry was valid, thus in effect dismissing the charge of Ficker that said entry had been made in fraud of his right to homestead the tract in question; and, with reference to the relinquishment, which was the subject of inquiry at the hearing of March, 1883, you find that it was obtained from Murphy through misrepresentation and deceit, and that it is of no valid force and effect.

I do not think the relinquishment can, in the light of all the facts and circumstances, properly be regarded as valid and binding on Mur-

phy. At the solicitation of Prince, his attorney, who wanted "a little security for his fee," Murphy signed what proved to be in form a relinquishment. That he was ignorant of the true import and possible effect of such instrument, and that he was purposely kept in ignorance by Prince, is, I think, quite apparent. His signature to the relinquishment is without attestation, and the acknowledgment was before Prince as notary public, circumstances in themselves suspicious. Besides, at the very date of the execution of the so-called relinquishment he was defending his entry and his home in the land office and in the court and is still so defending them. He has also continuously resided on the tract since his entry. A relinquishment to have full force and effect as such must have been knowingly and voluntarily made. That under consideration does not meet either of these requirements, and is not in fact a legal or valid relinquishment. In this view the cancellation of Murphy's entry and the allowance of that of Ficker was erroneous action on the part of the local office. Treating Murphy's entry, then, as if it were intact upon the record, the question remains, should it be canceled as in fraud of the rights of Ficker, whose tenant upon the tract entered he was at the date of his entry? I think not.

From his testimony it appears that at the date of renting and going upon the land and for some months thereafter he supposed that the land belonged to Ficker; and Hempstager, Ficker's agent, of whom he rented, so informed him. In course of time he learned from neighbors that the land belonged to the United States; that the law had not been complied with under a former entry, and that he might make complaint and have said entry canceled. These statements are not controverted, and show that although he was Ficker's tenant, it was no part of the arrangement that he was to hold, or attempt to hold, the land as a homestead for him. He had had no negotiations with Ficker in person, and did not know his intentions. Ficker had gone to Kentucky, where his family was, before Murphy became his tenant through negotiations with Hempstager, as agent, and at the date of the entry in question had been absent nearly if not quite one year. Murphy did not know that he would return, or, if he should, that it was his intention to enter the land. His entry, therefore, did not show bad faith with Ficker, nor was it in fraud of his rights. Upon a careful consideration of all the facts and circumstances as presented by the record in the case I am satisfied that the superior equities are with Murphy, and that the conclusions reached by you are correct.

Your decision holding Murphy's entry No. 11,077 for reinstatement, and Ficker's entry No. 12,868 for cancellation, is affirmed.

*PREPONDERANCE OF TESTIMONY—ACQUIESCENCE—AGENT.**ORVIS v. BANKS.*

Where a relinquishment was executed by the entryman's father as agent, and left with him for subsequent filing, but was not filed until after the entryman's death; held, that the agency terminated at death, and the law cast the homestead right on the widow, who was entitled to the land, unless she actually or constructively ratified the relinquishment.

*Secretary Teller to Commissioner McFarland, February 1, 1884.*

SIR: I have considered the case of Frances J. Orvis *v.* Heman Banks, involving the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 21, T. 2, R. 4, Concordia district, Kansas, on appeal by Banks from your decision of January 24, 1883, canceling his entry so far as it relates to the tract in question, and reinstating that of Francis M. Goodvin, the former husband of Mrs Orvis.

Goodvin made homestead entry No. 12,824, July 15, 1876, for the tract, which was canceled pursuant to your letter of March 17, 1877, a relinquishment of the same having been transmitted by the district land office per letter of March 2, 1877.

Banks filed declaratory statement No. 7,779 for the tract, and also the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of the same section March 29, 1877, alleging settlement March 28, 1877. On October 10, 1879, he changed his filing to homestead entry No. 15,520, which included the lands covered by the pre-emption filing.

Mrs. Orvis made application June 21, 1880, to have the decedent's entry reinstated, on the ground that the relinquishment was unauthorized and illegal.

Your office ordered an investigation of the charge, on which it was shown that the decedent and his family occupied the land in question as their home from the date of entry. In the early part of October, 1876, they went to Nebraska, ostensibly on a visit, and while there he died, February 5, 1877. On her return to Kansas, some months afterwards, she claims to have discovered that John Goodvin, the father of decedent, had filed in the district office a relinquishment of the entry, and disposed of the improvements connected therewith. She herself remarried, at what date is not shown, and lives with her husband at Concordia, having never since resided upon or attempted to exercise any control over the land.

The receiver's receipt contains a relinquishment, by indorsement, dated September 18, 1876, to which is subscribed the decedent's name, with those of John and Lafayette Goodvin as witnesses.

The preponderance of testimony indicates that the relinquishment was authorized by decedent, and was drawn up and signed in his presence, his name being actually written for him by his father, John Goodvin. But it appears that it was not filed in the district land office until after his decease.

It also appears that the decedent deposited the receipt so indorsed with the father, as custodian, with a request that he take care of the same, but whether he was requested to deliver it to the district land officers does not appear, and is not material. The father occupied the position of an agent in the transaction, either for the custody of the paper or for its delivery, and his authority to perform any acts as such agent ceased on the demise of the son.

I do not mean to say that a deed fully executed at the request of the grantee, and ready for delivery, if coming into the possession of the said grantee without collusion or fraud even after the death of the grantor, may not, when placed of record in good faith, become effective to pass the title. But here was no such request on the part of the United States, and no knowledge that the relinquishment was intended. At date of execution the settler was still upon the land. His widow swears that the trip to Nebraska was made only as a visit, and that their return was only prevented by his death, which occurred within less than six months after their leaving the homestead; and it is conceded that some, if not the greater portion, of their household effects were left in their abode. On the contrary, one or two witnesses swear that, on his way to Nebraska, Goodvin declared his intention never to return to the land. The testimony, in my judgment, indicates, when taken in connection, an uncertain purpose on the part of the entryman. He evidently intended to leave such formal notice of relinquishment on the back of the receipt placed in his father's hands as to permit it to be filed if he should, after reaching Nebraska, finally conclude to entirely abandon; while, by keeping possession of the papers as well as the land, through his father's agency, he might return and resume his residence. The relinquishment not having been made effective by delivery prior to his death, could be, if brought to the notice of the Government, treated merely as evidence tending to show abandonment, but not conclusive thereof, if it should be shown that he still remained upon the land and continued to comply in fact with the requirements of law.

Hence I conclude, as before stated, that the relation of father to the son was one of agency merely, and that he had no further right to control the homestead after the death of the latter.

As the law casts the estate upon the widow, any subsequent relinquishment must be shown to have been done by her authority and in her behalf, or to have been ratified by her afterwards.

But this ratification may be inferred from the facts and circumstances of the case, and from her acts in connection therewith. From the date of her receiving information of the condition of the claim and of the disposal of the homestead and property thereon, she is affected with such notice as to make it incumbent upon her to so proceed that a stranger or a third party shall not be injured or materially prejudiced by any act or laches of her own.

Mrs. Orvis alleges poverty as a reason for not instituting this proceeding at the time when she learned of the relinquishment. If such was the case, it was her duty to notify the district land officers of the fact, and set forth her grievances, which notice would have evidenced her intention to identify herself as a claimant to the land.

The Government was ignorant of the fact that the relinquishment was filed after the entryman's decease, or even of the fact of his death. Nor was Banks aware, so far as the testimony discloses, of the defect in the relinquishment. He was not informed that it had not been properly filed.

No demand was made upon him by Mrs. Goodvin (now Orvis) for the possession of the homestead, nor upon John Goodvin, her father-in-law. She made no attempt to take possession, nor has 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 her husband's death.

It is further shown by her own testimony that she simply asked John Goodvin for an account, not for restitution of the land and goods. Her present complaint was brought upon an alleged failure to account for the proceeds, as a reason why she was, as she asserts, compelled to ask that the entire action be set aside as originally unauthorized.

If she had so intended at the first to deny the sufficiency of the relinquishment, instead of ratifying the same, and resorting to John Goodvin as the agent to account for the proceeds, it devolved on her, as the party in interest, to assert her claim at the earliest possible moment, when she learned of the relinquishment. It appears that her father engaged an attorney to protect her interest; but she seems to have preferred to remain inactive, until some three years after Banks had settled on the tract, during which time she permitted him to proceed with his improvements to the extent in value of about \$1,000, without opposition; and now at this late day she suddenly concluded to assert her interest in the land, the original improvements upon which are valued by the sworn testimony at not exceeding \$50 to \$100. This she can not 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.

Your decision is reversed. The entry of Banks will be permitted to stand.

*VOLUNTARY—GRASSHOPPER RAVAGES—SECOND ENTRY—PREFERENCE RIGHT.**DAVIS v. MCNEEL.*

A homestead claimant who relinquished his homestead in Kansas on account of grasshopper ravages exhausted his right of homestead, and can not make a second entry in another State.

A preferred right was acquired under acts of March 3, 1879, and May 14, 1880, by virtue of the possessory right to the quarter-section acquired prior to its survey and prior to any superior claim to the tract, notwithstanding under the homestead law of 1862 he could claim but eighty acres.

*Secretary Teller to Commissioner McFarland, April 2, 1884.*

SIR: I have considered the case of James Davis v. Philetus W. and William J. McNeel, involving lots 10, 11, and 12 in Sec. 10, T. 22 S., R. 8 W., Roseburg, Oreg., on appeal by the McNeel's from your decision of October 18, 1883, awarding said tracts to Davis.

The official plats were filed in the local office on November 24, 1881. Philetus W. McNeel made homestead entry No. 3,727 on December 1, 1881, for lots 2, 9, 10, and 11, alleging settlement in February, 1876.

William J. McNeel made homestead entry No. 3,730 on December 5, 1881, for lots 3, 4, 7, and 12, alleging settlement, April 2, 1880.

James Davis made homestead entry No. 3,749 on December 19, 1881, for lots 8, 10, 11, and 12, alleging settlement, October 26, 1877.

At the hearing it was developed that William J. McNeel had formerly homesteaded land in Kansas, which, because of the ravages of grasshoppers, as he says, he had voluntarily relinquished. I concur in your opinion that he had exhausted his homestead right, and that his present entry should therefore be canceled.

Philetus W. McNeel was one of the earliest settlers in this section, and was entitled to enter 160 acres of land. He originally settled upon and improved the tracts now known as lots 2 and 9, whilst those now known as lots 10 and 11 were in the possession of other parties. It is unnecessary for me to enter into a detailed statement of the several transfers of the latter two lots, or to trace the adverse claims of the parties to them to their respective sources. Suffice it to say that I concur in the opinion of your own and of the local office, that when Davis first laid claim and acquired a possessory right to lots 10 and 11, McNeel was claiming tracts other than these as part of his quarter section; and that, therefore, the right of Davis to them was superior to that subsequently acquired by McNeel. Let it be true that at date of Davis's said acquisition of possessory right he was entitled to claim but 80 acres of double-minimum land under the homestead law; nevertheless his status is not changed, for he was not then holding the land under the homestead or any other statutory law. Whilst holding a bare possessory right to the quarter-section, prior to its survey, and prior to

any superior claim to it, the acts of March 3, 1879, and of May 14, 1880, were passed, vesting in him at once full power to enter all the land which he was then holding, with credit for time from date of actual settlement. Consequently Davis's claim to these two lots is to be preferred to that of McNeal, and his entry should be allowed.

Your decision is affirmed.

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**EVIDENCE—BAD FAITH—ABSENCE AND NEGLECT.**

**AMLEY v. SANDO.**

The testimony indicates bad faith, and a mere pretense of settlement. No cultivation is shown, and absence for nine months is proved. Evidence tending to prove that defendant had relinquished her claim shows the motive and purpose of her long absence from and neglect of the land.

*Acting Secretary Joslyn to Commissioner McFarland, April 7, 1884.*

SIR: I have considered the case of Peter T. Amley v. Sarah L. Sando, involving the latter's homestead entry, No. 8100 (Watertown series), for the SW.  $\frac{1}{4}$  of Sec. 5, T. 121, R. 63, Aberdeen, Dak., on appeal by Amley from your decision of October 13, 1883, dismissing his contest.

Mrs. Sando, who is a widow, made homestead entry June 19, 1882. Shortly afterwards she, with some relatives, drove to the land for the purpose of having some breaking done. Breaking to the value of \$10 was done for her by one Kelley, and they all remained on the land over night. About the same time she bargained with Kelley for a "granary" (which did not belong to him, but which was on his land), and which she expected to move upon her land and use for a dwelling-house when she established her residence there. She then went away from the land, and, without making other improvements, remained away, residing at various places, until March, 1883. Meanwhile, in December, 1882, and more than six months after her entry, this contest was initiated. In the latter part of April, 1883, the "granary" was moved upon her land by Kelley, and in the following March she began living in it.

At the hearing Mrs. Sando testified as follows:

The reason I did not come upon it before the six months was out was because I had no money, sickness, could get no team to take me out. I tried my best to come. It was cold, so it was impossible for me to live in a cold house the way my health was. More than one told me it was not necessary for me to go on the land until spring, and I thought I would not be particular.

From this statement, and from a careful examination of all the testimony, I am of opinion that Mrs. Sando has not furnished a satisfactory excuse for her failure to establish a residence on the land for more than nine months after entry. On the whole, the testimony shows her to have been in ordinary health during said period. There is not an element of good faith apparent in her proceedings but the breaking; and

that, not followed by residence, cultivation, or any other improvement, wears the look of a mere pretense. Further, there is evidence tending to prove that she had relinquished her claim to the land, and this is of value in showing the motive and purpose of her long absence from and neglect of it.

I think that the contestant sustained his allegations, and that Mrs. Sando's entry should be canceled.

Your decision is therefore reversed.

Motion for review denied by Secretary Teller, May 1, 1884.

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### 35. RESIDENCE.

#### *ATTEMPTED SALE—BAD FAITH—ADJOINING TRACT.*

##### *GUYTON v. PRINCE.*

An attempted sale of the land embraced in a homestead entry is not sufficient ground for cancellation, but raises a presumption of bad faith.

Residence on an adjoining tract and cultivation of the land embraced in a homestead entry is not compliance with the homestead law.

*Commissioner McFarland to register and receiver, Little Rock, Ark., February 20, 1883.*

**GENTLEMEN:** I have considered the case of Columbus G. Guyton *v.* Simeon Prince, involving homestead entry No. 10,025, for the SW. $\frac{1}{4}$  of Sec. 28, T. 8 N., R. 16 W., on appeal by the plaintiff from your decision dismissing the contest.

This entry was made August 8, 1879, contest initiated October 2, and hearing held November 3, 1882—the charge being abandonment. Both parties were present at the trial with their respective witnesses, and adduced testimony *pro* and *con*.

The evidence shows that at date of entry the defendant was residing upon a tract of land adjoining that embraced in his entry, which he had purchased from the Little Rock and Fort Smith Railroad Company; that there are two cabins on the homestead land, both of which were built prior to date of entry, one by a Mrs. Reid and the other by the defendant, also a stable, smoke-house, and other out-buildings; that since date of entry the defendant has been cultivating and improving the homestead land in connection with the railroad land, both of which are inclosed as one piece or parcel; and that, with the exception of a few sojourns of one or two weeks' duration in the cabins on the homestead tract, when he "only carried with him onto the homestead tract such articles as he needed for the time being," the defendant has continuously resided since date of entry upon his railroad land. And according to his own testimony, he did not return to the homestead tract prior to date of initiation of contest, but had returned to it thereafter, however.

Several of the witnesses for plaintiff testify that the defendant has attempted to sell the land embraced in his entry. One of them, J. T. Young, gives evidence that the defendant told him that he had bargained to sell it to a Mr. K. May; another, Martin Nord, that "the defendant told witness that he would give him \$20 if he would sell the tract to some one of the German immigrants, and that at another time he told witness that he had as much as sold it to Joe Kelley." The plaintiff also testifies that the defendant offered to sell the land to him, "about two months and a half ago, for \$300." On the other hand, the defendant denies flatly that he has ever offered the land in controversy for sale.

The preponderance of testimony on this point, however, would seem to be on the side of the plaintiff. But the attempted sale—and I must hold the same as proved—would not *per se*, in itself, warrant the cancellation of the defendant's entry, although raising as it does a strong presumption of bad faith on the part of the defendant. It can only have weight as tending, in connection with the other facts, to impeach his *bona fides* in the premises.

There is no question in my mind but that the defendant has satisfactorily complied with the provisions of the law in the matter of cultivation. The evidence which discloses that there are between 7 and 11 acres cleared and in cultivation is conclusive of this; nor is such compliance denied by the plaintiff.

The point remaining to be considered, therefore, and the only one, in fact, that would appear to be in issue, is the alleged failure of defendant to establish residence upon the land embraced in his entry within six months after date thereof, and to thereafter continue such residence without interruption.

That the evidence adduced at the trial of the case clearly proves the defendant's failure in this respect I think there can be no doubt, and the question therefore arises, Is such failure one that may be remedied or overlooked where it is in evidence that during the whole period since date of entry, nearly three years, the homestead claimant has continued to cultivate and improve the land included in his entry in a substantial manner, but lived in a house situated on adjoining land, which is owned by himself, and which he had inclosed, cultivated, and improved as one body of land in connection with his homestead tract?

I must decide in the negative. The provisions of the homestead law are stated in plain and unequivocal terms. They make *residence* on the homestead tract a vital prerequisite or condition-precedent to entitle the homestead claimant to a patent.

The homestead law *insists* on settlement or residence and cultivation for a period of five years. (John Wineland, Copp, vol. 4, p. 103.)

A homestead claimant who remains on the land over night once or twice in six months fails to establish the residence contemplated by the homestead law; and where it is shown that such failure to comply with

the provisions of the law was not the result of ignorance or of uncontrollable circumstances the entry should be canceled. (*Byrne v. Catlin, Copp*, vol. 5, p. 146.)

That the defendant in the case at bar was not ignorant of the law, but, on the contrary, fully alive as to its plain requirement in the matter of inhabitancy, is manifest from his efforts to keep up a show of residence on the land embraced in his entry by going upon the same now and then and remaining over night for a short time.

I therefore reverse your decision and hold the entry for cancellation. You will advise the parties in interest of this decision. Allow sixty days for appeal therefrom, and at the proper time report action taken.

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*FAILURE OF—GOOD FAITH—ACT MARCH 3, 1881.*

**MCLEOUD v. WEADE.**

Notwithstanding the homestead entryman failed to make personal residence within the required six months, his entry is allowed to stand, in view of his good faith and the law of March 3, 1881.

*Secretary Teller to Commissioner McFarland, April 30, 1883.*

SIR: I have considered the case of Milo H. McLeoud *v. Calvin A. Weade*, involving the latter's homestead entry, made July 14, 1880, upon lots 1, 2, and 3 of Sec. 2, T. 124, R. 48, Benson, Minn., on appeal by Weade from your decision of April 10, 1882, holding his entry for cancellation.

This contest was initiated March 24, 1881, about eight months from the date of entry, upon allegations that Weade failed to reside upon the land, as required by law, and had abandoned the tract.

The testimony shows that in November following his entry Weade purchased lumber for his house, which was transported by a railroad to the station nearest to the land in December, and that he employed a carpenter to build and complete the house prior to January 1, 1881, that he might then occupy it. The house was framed, but by reason of cold weather and deep snow it became practically impossible to do any outdoor work for many weeks thereafter, it being the most severe winter in that vicinity for many years. As soon as the weather reasonably permitted the house was completed, and Weade moved into it April 28, and, with his family, has since continuously occupied it. He dug a well and plowed ground for a garden prior to the contest.

The Revised Statutes require a homestead entryman to commence residence upon his land within six months from the date of entry. This Weade did not do—his six months expiring January 14, 1881—and, under a strict enforcement of that law, his entry became forfeited. But the act of March 3, 1881, amends the former law, “by adding thereto” the proviso that where climatic reasons prevent residence within six

months the Commissioner of the General Land Office may allow the settler twelve months for that purpose.

There appears no reason to doubt the good faith of Weade, or of his purpose to retain, and not abandon, the tract; and his residence, commenced within about eight months from the date of his entry, under the facts, should be allowed as a compliance with the requirements of the law.

I reverse your decision, and allow the entry of Weade to stand.

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*TWO ENTRIES—NO RESIDENCE BY PROXY.*

**BARBEE v. GILMORE.**

Residence on a homestead must be in person, and cannot be by proxy, even by a member of the entryman's family.

Two entries of the same tract may be allowed, subject to an adjustment of the legal and equitable rights of the two parties.

*Acting Commissioner Harrison to register and receiver, Huntsville, Ala., May 22, 1882.*

GENTLEMEN: I have carefully considered the contest of Robert Barbee *v.* John S. Gilmore, involving their legal and equitable rights, respectively, to the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  of Sec. 20, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of Sec. 29, 2 S., 4 W.

The records show that Barbee entered said land as a homestead September 24, 1881, and executed the preliminary affidavit before the register. October 18, 1881, said Gilmore filed an affidavit, duly corroborated, setting forth that he had improvements on said land, and was residing thereon with his family, and intended to enter the same as soon as the abandoned entry of one Hussey became canceled (August 27, 1881), but was prevented from so doing by reason of the extreme illness of his wife, which resulted in her death September 17, 1881. Upon the above showing this office directed you to allow Gilmore to make an entry for the same land under act of May 14, 1880, and their legal and equitable rights to be adjusted thereafter (*vide* office letter January 18, 1882).

At the solicitation of the parties a hearing was held September 27 and 28, 1882, Gilmore alleging that he resided upon and had valuable improvements on the land in controversy at the date of Barbee's entry; Barbee denying the allegation, thus producing an issue. The evidence shows that Gilmore commenced to build a house on said land in May or June, 1881, which was completed the following August, into which he moved one Lucy Honeycut (not a member of his family), with instructions to look after the place and prepare the house for his wife on her return from Tennessee. It further appears that Gilmore's daughter lived in said house with said Lucy Honeycut about three weeks, during which time Gilmore supplied them both with necessities. In the mean

time Gilmore himself resided at the parsonage of the Colored Baptist Church, some 2 miles distant, over which he seems to have been the presiding spirit. In the early part of September, 1881, his wife returned from Tennessee, and was taken to the parsonage, where she died on the 17th of the same month.

It is shown conclusively that up to September 27, 1882, Gilmore had failed to establish a residence *in person* on the land; that he labored on the land through the day, but continued his residence at the aforesaid parsonage, which had been his home for several years. Section 2291 Rev. Stat. requires personal residence upon the land; residence by proxy is not sufficient to satisfy its terms; and as Gilmore had sufficient time to establish his residence, after his wife's death, upon the land, I am of the opinion that he has forfeited his rights under the act of May 14, 1880. Therefore, in view of the premises, I have decided to hold Gilmore's entry No. 12,581 for cancellation, subject to appeal within sixty days from notice.

You will notify all parties in interest of the contents of this letter, and at the proper time advise this office of any action that may be taken.

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*OFFICIAL RESIDENCE—ACTUAL SETTLEMENT.*

*HARRIS v. RADCLIFFE.*

An actual residence and settlement must first be established, before an official compelled to live at a distance from the land embraced in his homestead entry can be allowed to make final proof.

*Secretary Teller to Commissioner McFarland, September 18, 1883.*

SIR: I have considered the case of John Harris *v.* W. H. Radcliffe, involving 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. 32, T. 39 N., R. 24 W., Marquette, Mich., on appeal by Harris from your decision of August 18, 1882.

It appears that Radcliffe, who had served in the late war for more than four years, made homestead entry No. 341, for said tracts, on June 5, 1872; that in the fall of 1872 he went upon the land, selected a site for a house, and afterwards sent out men who built a shanty on it; that he was elected sheriff of Delta County in November, 1872, and accepted the office, sending out some one in the spring of 1873 to clear a small patch and plant it with potatoes, and that he held the office of sheriff and lived in the town of Escanaba until his death, December 26, 1873; that neither he nor his family ever established a residence on the land, and that it has not been further cultivated by or for them; that the entry was reported for cancellation after due notice to Radcliffe's widow, who remarried, and is now Mrs. Mary A. DeMarsh, but that she failed to furnish her final proofs within the time named; that John Harris, advised of the notice of cancellation, went upon the land in August,

1879, and has resided there and improved it since ; that on September 8, 1880, Mrs. DeMarsh filed notice of her intention to make final proof, and that on January 22, 1881, said Harris made application to contest the entry. The local officers found that the entry should be canceled, and their ruling was reversed by your decision aforesaid.

It is proper to state that, in her final proofs, Mrs. DeMarsh swore to a residence on the land by herself for several years, beginning in 1873 ; but she failed to appear in person at the trial, her witnesses failed to corroborate her in this particular, and the testimony to the contrary is abundant and convincing.

Your decision holds that—

At the time the said W. H. Radcliffe entered the land he had six months to make settlement ; as he was elected sheriff and entered upon the duties of said office before the six months expired, and was obliged to reside at the county seat, he was exonerated from residing on his entry by the ruling of this office, even though it should appear that his widow did not reside thereon the full length of time, as testified to by her.

I cannot approve this rule, for the reason that it nullifies the statute. Under it, any officer of a town, county, State, or of the United States, might enter land, build an uninhabitable shanty, procure an agent to perform some trifling cultivation for the required period, and obtain patent without residing on it for a day, and without any intention of obtaining the "home" which it is the object of the homestead law to provide. In *Benson v. W. P. Railroad Company* (1 Land Owner, 37) it was held that where a *bona fide* settler had established a residence on the land, and was afterwards called away by official duty which required his presence at the county seat, such absence would not work forfeiture of his rights ; but I would regard it as highly impolitic, as well as illegal, to extend the rule beyond cases where an actual residence has been established before the intervention of an adverse right. A rule which sanctions the constructive performance of a duty upon which rights are dependent by force of positive law may be properly employed to save rights acquired by a partial performance of such duty, but not to confer rights upon one who has made no effort to perform it.

In my opinion, on the evidence before me, Radcliffe did not establish a legal residence on the land, and as such residence for one year succeeding the commencement of improvement is expressly required by the statute (section 2305, Rev. Stat.), and since adverse rights have intervened, his entry should be canceled. There appear to be no equities warranting any other disposition of the case.

Your decision is accordingly reversed.

*GOOD FAITH—DROUGHT—FAILURE—POVERTY.***CLARK v. LAWSON.**

Poverty excuses non-continuous residence. Drought excuses non-cultivation, provided good faith is manifested by the homestead claimant.

*Secretary Teller to Commissioner McFarland.*

SIR: I have considered the case of *Joel Clark v. James Lawson*, involving soldier's homestead entry No. 3,683, on the SW.  $\frac{1}{4}$  of Sec. 34, T. 8 N., R. 68 W., Denver, Colo., on appeal by Clark from your decision of April 25, 1882, dismissing the contest.

It appears that Lawson went upon the tract in March, 1878, built a house and made other improvements the same year, and broke and planted an acre or two in the spring of 1879; that the crop failed to come to maturity for want of rain and for want of facilities for irrigation; that, pending the construction of an irrigating ditch in the vicinity of the tract, which was to be completed in 1882, no other crop was planted; and that he, being a poor man, with a family, was compelled to earn a living elsewhere by daily labor, residing most of the time with a sister, but returning from time to time to continue the improvement; that his house was burned in the fall of 1880, and that he purchased another and was on the land in the spring of 1881, rebuilding and otherwise improving, when the notice of contest was issued and served on him. Said notice alleged abandonment for the six preceding months, and failure to settle and cultivate as required by law.

The above recital of evidence elicited at the trial shows that the allegation of abandonment was not proved.

As to failure to reside on the land continuously, it has been held that continuous residence is not required where the entry is in good faith and the circumstances justify the absences (*Edwards v. Saxon*, 9 Land Owner, 72). Lawson's poverty and large family point him out as the very man for whose benefit the homestead laws were devised; there does not appear to be want of good faith, and it is a settled rule that poverty justifies temporary absences for the purpose of obtaining the means wherewith to improve a homestead.

In regard to the alleged failure to cultivate, it is clear that the beneficent homestead law should not be so construed as to work forfeiture because of a failure to cultivate, resulting from causes beyond the claimant's control. The persisting drought is the act of God, and excuses the failure. Drought is as much the enemy of a settler as a hostile adverse claimant or a band of marauding Indians; and as these have been held to excuse an enforced absence, so should that be held to excuse it when there is no evidence of an intention to abandon. Much of the land in the far West is susceptible of a high degree of cultivation when proper irrigating facilities are furnished; and when these are wanting, when a faithful effort to cultivate has been made and failed of success only

because of a lack of water, when it is clear that no other settler could do more with the land until water is supplied, it is eminently just that the first *bona fide* claimant, maintaining his improvements, should be allowed to retain the land until irrigation is possible. By the enforcement of such a rule the adverse claimant loses nothing, the United States are not damaged, and the homestead law becomes what it was intended to be, the protector, and not the oppressor, of the honest settler.

Your decision is accordingly affirmed.

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**SETTLEMENT BEFORE SURVEY—JOINT CASH ENTRY—R. S., 2274.**

**MILLER v. STOVER.**

Where homestead claimants settled before survey on the same forty-acre tract, Sec. 2274, Rev. Stat., applies, and joint cash entry may be made of such tract.

*Secretary Teller to Commissioner McFarland, October 1, 1883.*

SIR: I have considered the case of S. B. Miller *v.* Cyrus Stover, involving the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, T. 3 N., R. 7 E., Deadwood, Dak., on appeal by Stover from your decision of July 31, 1882, awarding the tract to Miller.

It appears that Miller settled on unsurveyed land in 1877 and Stover in 1879. At the time of the latter's settlement it was understood between the two that their possessions were mutually bounded by a certain line, sufficiently marked, running in a northerly and southerly direction, and that Stover's land lay to the west and Miller's to the east of said line. There was much testimony given at the hearing in relation to the location of the boundary line and to subsequent changes in it made by the parties; but said testimony is of no moment in this adjudication. The only fact to be considered is that when the official survey was made, in the fall of 1880, it was found that the boundary line agreed upon divided irregularly the tract in controversy, and that both had settled upon and improved different parts of the same 40-acre subdivision. Miller was in no sense a trespasser on Stover's land, for he acquired his original right by purchase through Stover, and with the latter's full knowledge and consent.

September 27, 1881, the plat of survey was filed in the local office; on the next day Stover made homestead entry No. 319, and six days afterwards Miller made homestead entry No. 326. Both claim under the act of May 14, 1880, but it is to be observed that the inceptive rights to their respective tracts were acquired prior to the passage of said act.

In the case of Burton *v.* Stover, this day decided, I held, in relation to section 2274, Rev. Stat., that the equity of the statute extends to all *bona fide* settlement claims initiated prior to survey, where a boundary line has been made by them. Said decision is applicable to the case at bar, and you are therefore directed to notify the parties that they may

make joint cash entry of the tract in controversy; and if either fails to agree to such entry within a reasonable time, say ninety days, the land will be awarded to the other as part of his homestead.

Your decision is modified accordingly.

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*ABANDONMENT—SIX MONTHS—COMPUTATION OF.*

**BENNETT v. BAXLEY.**

The homestead entryman has six months, exclusive of the day of entry, within which to begin residence.

*Acting Secretary Joslyn to Commissioner McFarland, January, 22, 1884.*

SIR: I have considered the case of L. O. E. Bennett *v.* William A. Baxley, involving the NE.  $\frac{1}{4}$  of Sec. 32, T. 10, R. 11, Natchitoches, La., on appeal by Bennett from your decision of April 18, 1883, dismissing the contest.

It appears that Baxley filed an affidavit, as required by section 2290 of the Revised Statutes, for homestead entry of the tract in question, November 20, 1880, and that May 21, 1881, Bennett initiated a contest against him for abandonment under section 2297 of the Revised Statutes, which provides that if at any time *after* the filing of the affidavit, and before expiration of the five years mentioned in section 2291, it is proved to the satisfaction of the register of the land office that the person who filed such affidavit "has actually changed his residence or abandoned the land for more than six months at any time \* \* \* the land so entered shall revert to the Government."

Under the express provisions of this section, as well as under the ordinary construction of statutes in respect to the computation of the time within which an act is to be performed, the day of the filing of Baxley's affidavit must be excluded, as if he were required to commence residence on the tract within six months *from and after* such filing. The six months within which he was required to commence residence on the tract would therefore commence November 21, 1880, and expire May 21, 1881, and he had the whole of the latter day for that purpose. But the land does not revert to the Government, and there are no laches on the part of the entryman in this respect until after his abandonment "*for more than six months.*" Clearly, then, this contest, brought on May 21, was premature, and was initiated at a date when Baxley could—if he had not previously done so—commence residence on the tract and be within the statutory requirement.

I affirm your decision.

*INTENTION—POVERTY—COMPULSORY ABSENCE.**PLUGERT v. EMPEY.*

The evidence shows that Empey did not go upon the land with the intention of making it his home.

His plea of poverty is disregarded in view of purchases and building a hotel elsewhere.

Unless facts are presented that amount to compulsory absence, actual residence is required under the homestead laws.

*Secretary Teller to Commissioner McFarland, March 18, 1884.*

SIR: I have considered the case of Ernest Plugert *v.* William J. Empey, involving the NW. $\frac{1}{4}$  of Sec. 28, T. 30 N., R. 11 E., Wausau, Wis., on appeal by Plugert from your decision of June 30, 1883, dismissing his contest for failure to prove its allegations.

The allegations are that Empey changed his residence and abandoned said land, covered by his soldier's homestead entry No. 3,369, for more than six months next preceding the initiation of contest, February 1, 1883. The evidence in the case, including the testimony of the defendant himself, shows that, after entering the land in October, 1880, he had a house built in April, 1881, a cellar and well dug, several acres of timber cleared, and some vegetables planted, and that in the same month he established a residence there with his family; that in the following June he followed the line of a railroad then building in the vicinity, and kept a boarding house for the railroad employés until September, during which time his family remained on the homestead; that he then went some 20 miles away to Summit Lake, removing his family with him, where they have since remained, keeping a hotel, of which his wife is the efficient manager; that by his permission one Penning lived on his homestead from October, 1881, to March, 1882, and that he was succeeded by one Friedrich, who was succeeded by one Butler, who was succeeded by one Noble, who was in possession at date of the hearing, March, 1883; and that, with the exception of planting the first crop of vegetables, he has at no time cultivated the land. These facts unquestionably sustain the allegations of the contestant.

But the entryman shows that once or twice, during each six months after removing his family, he returned to the land and remained for a night in the house; as he puts it himself, he "went down and staid over night in order to keep my (his) claim good." It was settled in *Byrne v. Catlin* (5 L. O., 146), that one cannot maintain a residence on a homestead "by going thereto and remaining over night once or twice in six months," and that ruling has not since been rescinded.

The entryman also shows that in the fall of 1882 his wife and boy returned to the land and lived in the house with Noble, with the exception of several brief returns to the hotel, for some six weeks. He swears that she went down in order to place her boy at school. It is

very clear that she did not go there in order to re-establish a home, for she left at the end of the six weeks, and has not returned. I am of opinion that, as the entryman expected to prove up his claim in February, 1883, he sent his wife to the homestead, as he had himself gone there before, in order to make a pretense of living on it, and that there was no *bona fides* in his attempted residence from September, 1881, to March, 1883. In this opinion I am supported by the opinion of the local officers, who, after hearing all the testimony, say, "In this case there can be no reasonable claim that the homestead settler has complied with the law as to residence."

Is there any ground upon which this entry can be sustained? Empey alleges that he is a disabled soldier, pensioned at \$6 for an injured right arm; that he could not work the land himself, and knew that he could not when he went on it; that he exhausted his money in putting up his house, and was compelled to leave temporarily for the purpose of earning a living for his family, but he furnishes no evidence in support of these allegations. While the homestead act favors the soldier in various ways, it nevertheless requires him to comply with the law as to residence and cultivation; the rulings to that effect are uniform, and I am constrained to regard the law in this respect as settled. As an executive officer I have no discretion in such cases, unless a valid excuse for the absence is furnished—such an excuse as will supply facts that amount to a compulsory absence. The excuse is poverty—a good excuse, as it has frequently been held, where it is an honest one; but I regret to say that I cannot allow it here, for Empey admits that at the time he removed his family to Summit Lake he built a hotel at a cost of a thousand dollars. He was also able to pay one of his tenants for doing work for him, and to pay for the boarding of his son whilst going to school. These facts prove that it was not poverty that induced him and his family to abandon the land.

On the whole, I am convinced that Empey never settled on the land with a view to acquiring a home there. He went there expecting to keep a hotel for the railroad employés, and to follow the road as it progressed in the prosecution of this business, which has evidently been fairly lucrative in his case. He doubtless intended to acquire title to this tract under a pretense of a homestead settlement; but there is no evidence of *bona fides* in the claim, and his entry should therefore be canceled.

Your decision is reversed.

*GOOD FAITH—OFFICIAL DECISIONS—NOTICE.*

GEORGE W. SHEPPARD.

Notwithstanding good faith may be shown, establishment of residence is required on homesteaded land. If a party was guided by an erroneous Land Office decision, still in force, in not establishing residence, he is protected.

That he had knowledge of such decision is a matter of fact, to be proved and not to be presumed.

*Acting Secretary Joslyn to Commissioner McFarland, March 19, 1884.*

SIR: I have considered the appeal of George W. Sheppard from your decisions of December 1, 1882, and April 12, 1883, rejecting the proofs tendered on his homestead entry No. 3,101, covering the SE.  $\frac{1}{4}$  of Sec. 23, T. 2, R. 16 W., Bloomington, Nebr., on the ground that they showed his failure to establish a residence on the land.

It appears that the entry was made September 14, 1875, and that the reason Sheppard has never resided on the land (which he swears he fully intended to do when he made his entry), was that in March, 1876, he was appointed deputy clerk, and in January, 1877, clerk of Franklin County, holding the latter office until January, 1880, and that he was obliged by the duties of the office to remain continuously at the county-seat. It is shown that he built a house on the land in 1875, and has cultivated some 75 acres of it regularly. In everything, except the matter of residence, his proofs show good faith. Nevertheless, I concur in your judgment that, on those proofs, he is not entitled to a patent for the land; his case in respect of his failure to establish a residence, differs in no wise from that of *Harris v. Radcliffe*, recently decided. (10 Copp, 209.)

But he sets up that, in not establishing a residence, he was guided by the decision of your office of July 10, 1876, in the case of Solomon Males, in the same land district, wherein you held that a postmaster, who had cultivated and improved his homestead, but never resided on it because of his official duties, had complied with the law. One extract from that decision, which he quotes, is as follows:

His claim is considered a good one, therefore, and as the proof is satisfactory in all other respects, save that of settlement, you are hereby authorized to issue final papers upon payment of the legal commissions.

The same ruling appears to have obtained in your office until August 18, 1882, for it was a similar decision of that date which was overruled in *Harris v. Radcliffe*; wherefore I infer that your aforesaid decision had not been modified or rescinded, in the Bloomington district, prior to your action in the case now before me.

There is no doubt in my mind that said decision was a solemn exposition of the law, in respect of the residence of public officials on their homesteads, for settlers in that land district, on which they had a right to rely, and by which they might properly guide their conduct.

If a decision has been made upon mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration and exposition of the law, and regulate their actions and contracts by it. (1 Kent Com., 476.)

If Sheppard had notice of said decision, he is protected by it; for, though erroneous, it is a settled rule that the rights of claimants are not to be prejudiced by the errors or misconduct of officers of the Land Department. Since he had a right to rely on its decision, and did so, that Department is bound to save him harmless, and, therefore, to issue its certificate without proof of the residence which he was thereby induced not to make or maintain.

In so ruling, however, I do not go to the extent to which courts of law are accustomed to go, namely, of assuming that a claimant had notice of such a decision. The decisions of the superior branches of the Land Department are not so public or so widely disseminated as those of the courts, and I think that no presumption of notice attaches to them.

Whether they served as a guide in any particular case should be, therefore, a question of fact, to be proved in the ordinary manner to the satisfaction of your office or of this Department. In this case, where the decision relied on was not rendered for ten months after the date of the entry, it is proper that Sheppard should prove when, or about when, he had notice of it, that his failure to reside on the land after such notice should be overlooked, but that he should now make up the legal term of residence required of him prior to such notice, before making final proof.

Your decision is modified accordingly.

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*ABSENCE EXCUSED—CONTEST DISMISSED.*

*FOLEY v. BRASCH.*

When the entryman's absences were caused by sickness and poverty, and in no instance exceeded four months, and where there was good faith shown in the matter of cultivation and improvement, the entry is allowed to stand.

*Secretary Teller to Commissioner McFarland, March 26, 1884.*

SIR: I have considered the case of Morris Foley *v.* John Brasch as presented by the appeal of Foley from your decision of September 5, 1883, dismissing his contest against the homestead entry of Brasch for lots 1, 2, and 3 of Sec. 31, and lot 4 of Sec. 20, T. 6, R. 4, Deadwood, Dak.

March 20, 1879, Brasch made his entry for the land above described, and March 8, 1882, Foley filed an affidavit for contest, alleging that "Brasch has wholly abandoned said tract, and changed his residence

therefrom for more than six months since making said entry, and next prior to the date herein."

The evidence shows that Brasch has spent a considerable portion of his time in pursuits not connected with the business of cultivating or improving his claim, and at such times was absent therefrom—the longest period of absence shown being that of about four months just prior to the bringing of the contest. It appears, however, that in the summer following his entry Brasch established a residence on the land, and remained there until November; that he has shown good faith in the matters of cultivation and improvements through each successive season, and at the time the contest was brought had improvements of the value of \$1,200 on the land. He accounts for his last absence, on which the contest was grounded, by showing that he was called away by the sickness of a sister, and that during such time he left a man in possession of his claim. He also states that owing to his want of means he has found it necessary to engage in work away from his claim during the winter months in order to obtain money for the proper improvement of the land.

Your decision is affirmed, and the contest is dismissed.

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*ABANDONMENT—INTENTION—CULTIVATION.*

*EGBERT v. PAINÉ.*

Notwithstanding non-residence, the homestead entry is allowed to stand, owing to good faith and cultivation shown by the claimant.

*Secretary Teller to Commissioner McFarland, April 1, 1884.*

SIR: I have considered the case of Curtis Egbert *v.* Samuel S. Paine on appeal by Egbert from your decision of September 12, 1883, dismissing the contest.

The record before me shows that Paine made a homestead declaratory statement for the NW.  $\frac{1}{4}$  of Sec. 26, T. 143, R. 50, Fargo, Dak., on February 18, 1880, and on August 12, 1880, made soldier's homestead entry No. 6,784 for the tract.

On March 24, 1881, Egbert filed an affidavit of contest alleging that Paine had changed his residence from and abandoned the land for more than six months since the date of entry.

The testimony adduced at the hearing shows that during the summer of 1879 Paine erected a cabin on the land and broke about 20 acres of the soil; in 1880 15 acres additional were broken, and put in crop. During August, 1880, the family, with their furniture, moved from their home in Fargo, Dak., to the claim and occupied the cabin; but by reason of the ill-health of his wife and his inability to procure medical treatment in the vicinity, he was obliged to send her with their children to Fargo, distant about 20 miles. Paine appears to have occupied the cabin

subsequently to that event, and attended to the various duties pertaining to the care of a homestead claim. During January, 1881, it is shown that he repaired and improved the cabin, and that it then contained furniture and housekeeping utensils, supplied by him, necessary for the comfortable occupancy of a settler.

While the testimony shows that Paine has not made a strictly continuous residence, still, in view of the good faith displayed by him in a constant improvement of the tract prior to and since the date of his entry, and of his evident intent to maintain his residence thereon, notwithstanding the illness of his wife, which necessitated his absence at intervals, I am inclined to the belief that he has substantially complied with the law.

Your decision is affirmed for the reasons herein stated.

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**TEMPORARY ABSENCE—INTENTION—GOOD FAITH—CONSTRUCTIVE RESIDENCE.**

**SANDELL v. DAVENPORT.**

Where a claimant temporarily leaves his land for the purpose of earning an honest livelihood, coupled with a *bona fide* intention of complying with the law, such absence is accounted a constructive residence and compliance with legal requirements.

*Secretary Teller to Commissioner McFarland, April 10, 1884.*

SIR: I have considered the case of Neils Peter Sandell *v.* William H. Davenport, involving the SE.  $\frac{1}{4}$  of Sec. 17, T. 126, R. 62, Aberdeen (formerly Watertown) district, Dakota, on appeal by Davenport from your decision of September 14, 1883, holding his homestead entry of the tract for cancellation.

It appears that Davenport made homestead entry No. 6,961 (Watertown series) of the tract March 31, 1882. October 2, 1882, Davenport having filed notice of his intention to commute his entry November 10 ensuing, the usual publication was had and the requisite proof made accordingly. But meanwhile, to wit, October 28, Sandell had initiated contest against said entry, alleging in his affidavit that "the said William H. Davenport has wholly abandoned said tract \* \* \* for more than six months."

February 21, 1883, citation issued summoning the parties "to appear before John H. Perry, notary public in and for D. T., at this office on the 24th day of March, 1883." Both parties accordingly appeared with their attorneys and witnesses, and upon the testimony thus adduced the register and receiver recommended that the contest be dismissed and the entry permitted to remain intact. From such action contestant appealed, and you sustained the same by your aforesaid decision hold-

ing Davenport's entry for cancellation. Wherefore he appeals therefrom.

By your decision you held that from a preponderance of the testimony "the residence of the claimant seems to be quite poor, being at the most a mere visit to the land, remaining but a day in each visit."

You seem to have discovered a discrepancy between his proof made November 10, 1882, when he commuted his entry, and the material allegations of his testimony given at the hearing; he having sworn upon the former occasion that his residence had become continuous, while upon the latter he swore that "he had visited the tract at least once a week, except two or three times."

I have not so read the record. His commutation proof establishes the fact that he initiated settlement and residence upon the land March 14, 1882, by erecting a shanty thereon, subsequently digging a well and breaking about 32 acres, of which he cultivated about an acre and a half during the first season following his entry.

It is true Davenport himself admits that he was obliged to leave his claim frequently in quest of work, both by the job and by the day, as a means of livelihood; but I fail to discover from the record that he has in any wise evidenced his bad faith in the premises; but, contrariwise, good faith, for during such temporary absences he had one George Lawrence upon the land in his employ, whom he had hired to break and cultivate the tract so long as he could afford to pay him therefor.

I think contestant has failed to verify his allegations, and that his charge that neither Davenport nor any member of his family had "resided on or in any way improved said tract of land" is offset by claimant's own uncontested testimony, to wit: "At the time I slept there I used hay for a bed and took my bedding with me. \* \* \* I am a single man. I was married when I took the claim. My wife's health was poor at the time. I have no children. My wife intended to come as soon as she got better. She died the 20th of July, at Luther, Mich. I have about 32 acres of breaking, a well between 18 and 20 feet deep. I hired the breaking done. Geo. Lawrence did it for me."

The testimony both of contestant and his witnesses tends to show mainly how much they did not know about the material facts in the case. It is chiefly valuable to claimant Davenport, and this by reason of its purely negative character, which if it were transposed and taken positively would redound rather to his credit or good faith than to his discredit. For instance, contestant's brother, Charles Sandell (one of his witnesses), when subjected to the crucial test of cross-examination, answered the only question asked him in this wise: "I did not think that Mr. Davenport had gone away and left his claim." The record discovers the fact, although contained in a parenthesis—to wit, "(objected to by contestant)"—that contestant objected to such an ingenuous disclosure by one of his material witnesses, notwithstanding his allegations of abandonment.

The question of *bona fide* residence is equally one of intention as of fact. There is no question touching his commencing his residence within the prescribed period, and I take it that if the temporary absences in question are—as I think they have been—satisfactorily accounted for, then his residence has been constructively if not actually sufficient. The Department has repeatedly held—and it invariably holds—that where a claimant leaves his claim for the purpose of earning an honest livelihood, coupled with the *bona fide* intent to maintain his residence upon and cultivate and improve his claim, such absence is accounted a constructive residence upon the same, and compliance with legal requirements. Having found from the record that Davenport has evidenced his good faith in the premises, and has shown such compliance with said requirements, I therefore approve the register and receiver's recommendations, and accordingly reverse your decision.

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BUSINESS MEN—OCCASIONAL VISITS—SUBTERFUGE.

CAMPBELL v. MOORE.

Persons living and doing business in cities and towns cannot secure title to public lands by occasional visits to their claims. The visits in this case aggregate little more than one month of actual residence in seven months from date of homestead entry—the entry having been made in October and the proving up in May following, with settlement a short time prior to entry.

Commissioner McFarland to register and receiver, Huron, Dak., April 16, 1884.

GENTLEMEN: I have considered the case of Robert S. Campbell v. Richard T. Moore, on appeal by Campbell, involving homestead entry No. 339, NE.  $\frac{1}{4}$ , 25, 112, 61, made October 14, 1882.

It appears that on May 12, 1883, Campbell filed an affidavit of contest against this entry, alleging abandonment, though the affidavit does not appear with the case, as it should. On the same day, having learned of Moore's intention to make proof on May 14, 1883, he filed a protest against said proof being received. On June 2, 1883, a hearing was had upon said protest, and on July 12, 1883, you dismissed the protest. Moore claims to have made settlement on the land a short time prior to entry. At the time of making this entry he was carrying on the business of sewing-machine agent, and had a warehouse for that purpose in Huron, and his wife conducted a millinery establishment, both living in the store. He never removed from that home in Huron to the land in controversy, but occupied the same as a *home* until the day of hearing.

The improvements he put upon the land are very meager. He built a board shanty upon the land in September, 1882, and afterwards had a few acres of breaking done, using the sod to erect a small house. This

land, thus broken, was never cultivated, except some potatoes and seed were sown about the time or after the contest was instituted.

It was the custom of Moore to go to the claim on Sundays and return to Huron on Monday morning to attend to business; sometimes he would remain from Saturday evening till Monday morning.

This is clearly a case in which the claimant has undertaken to procure a title to Government land under the homestead law with the least possible residence. Moore cannot put forward the plea of poverty. Both he and his wife were carrying on business in Huron. He had a team and wagon, and also kept some kind of a lodging-house, the same in which he carried on his business, at an annual rental of more than \$400. His circumstances were far better than the majority of men who make homestead entries. His mere occasional visits to the land to remain overnight during eight months is not such a residence as is required by the law, and his reasons for not making a continuous residence is but a subterfuge to avoid the law.

This office recognizes the fact that an uninterrupted residence by Mr. Moore during the fall and winter of 1882 could have been of no advantage to himself, and perhaps but little to the claim. He was as well aware of this when he made the entry as I am. His want of good faith is evidenced by his attempting to prove up in the early spring on visits to the land which, in the aggregate, would amount to but little more than a month. The most charitable construction to be put upon the matter is that he attempted to follow the example set by others, who have a very loose idea of the nature of an oath or the requirements of the law.

This office will not permit any one to thus withhold land from actual settlement by *bona fide* seekers of homes. There is no question that if the proof of others who have proved up in your district, especially those living and doing business in cities and towns, had been submitted to the same test as Moore's, their entries would have been in danger of being canceled.

Considering all the facts, the appeal is sustained and the entry held for cancellation.

So advise the parties.

*LEGAL—OFFICIAL—PERSONAL—SETTLEMENT—CULTIVATION.***HUMBLE v. McMURTRIE.**

Personal residence may be in a different place from legal residence. An official is not supposed to spend every minute, day, or week at the place of his official business, and may properly leave it for a time and establish a good residence on the public domain. A settler establishes a residence the instant he goes on the land for the purpose of establishing it, though circumstances may prevent his maintaining the residence.

*Secretary Teller to Commissioner McFarland, April 21, 1884.*

SIR: I have considered the case of John W. Humble *v.* Ephraim McMURTRIE, involving the latter's homestead entry, No. 3791, made November 29, 1881, on the SE.  $\frac{1}{4}$  of Sec. 8, T. 163, R. 55, Grand Forks, Dak., on appeal by McMURTRIE from your decision of September 29, 1883, holding said entry for cancellation.

The affidavit of contest filed October 13, 1882, alleges that "the said McMURTRIE has failed to ever establish a residence on said land as required by law, and that the said tract is not settled upon and cultivated by said party as required by law." There were no witnesses on the part of the contestee. For the contestant David Best testified that McMURTRIE was on the land when he built his house, but that he thought he was afterwards away from it more than he was on it, and that he could not swear positively that he or some member of his family did not reside there continuously. Charles Dalzell testified that when McMURTRIE built his house he slept there one night, when he was summoned away on business; that he frequently saw smoke coming from the house for a night or two, and thinks McMURTRIE or some member of his family was in the habit of coming down from Pembina and staying from Saturday to Monday; that at one time McMURTRIE was there with his wife and family for three days. Both witnesses testify that prior to contest McMURTRIE built a good house on the land and broke and planted five acres, and that others hired from him the right to cultivate some 50 acres of it.

This testimony wholly fails to show that McMURTRIE did not lawfully settle, establish a residence on, or cultivate the land. It, therefore, does not sustain the allegations in the affidavit of contest. As to the settlement and cultivation, there can be no question. As to residence, a settler legally establishes a residence the instant he goes on the land for the purpose of establishing it; that he is killed the next instant, or shortly afterwards forcibly dispossessed, or called away by urgent business, does not affect the question. Wherefore a contestant must show something more than Humble has shown against a man who went on the land to build his house, remained there until required by an unexpected cause to depart, built a good house, and had 50 acres cultivated to crop, in order to convict him of failure to establish his residence. All

this is evidence that when he went on the land he intended to make it his home and to establish his residence there.

Your decision, however, holds that as "it is shown that McMurtrie was collector of customs of the district of Minnesota at the time he made his entry, and as Sec. 2596, Rev. Stat. of the United States, provides that such officer 'shall reside at Pembina,' it is presumed that his residence could not be on the land embraced in his entry." While this is true as to the personal residence to which the statute refers, it is erroneous as to a legal residence, which most officials of the United States maintain apart from their personal residence. The statute is not to be construed as requiring a person to spend every minute, day, or week of his official life at Pembina; hence he may in good faith leave his official business for the purpose of establishing his home, his legal residence, on a tract of land, whereon he proposes to place his family and to remain with them from time to time. Therefore it does not necessarily follow from the statute cited that McMurtrie did not establish a legal residence on his homestead, and, as that was the contest charge, the entry should not be canceled.

Your decision is reversed.

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*NECESSARY ABSENCE—BONA FIDES CONSIDERED.*

*HOLZ v. FOX.*

The entry should be allowed to stand in the case of a homestead claimant, who, having established a residence on a tract, went into service, the absence being necessary to obtain a livelihood.

*Secretary Teller to Commissioner McFarland, April 22, 1884.*

SIR: I have considered the case of Fred. Holz *v.* Jennie Fox, involving the latter's homestead entry No. 2732 for the NE.  $\frac{1}{4}$  of Sec. 27, T. 159, R. 54, Grand Forks, Dak., on appeal by Fox from your decision of August 20, 1883, holding the entry for cancellation.

Said entry was made June 15, 1881, and affidavit of contest filed March 23, 1882, alleging failure to establish a residence, change of residence for six months prior to date of affidavit, and abandonment. At the hearing it was shown that Miss Fox, who is an orphan, built her house about November 1, 1881, broke an acre and a half, dug a well, began to reside in the house November 27, 1881, and remained for two days and a night, when she went out to service (obliged to do so, it appears, in order to earn money with which to improve her homestead), returning on April 16, 1882, remaining six weeks on the land, planting a small crop, and then going out again into service.

I am of opinion that, in view of all the circumstances, Miss Fox established a *bona fide* residence on the land. This being so decided the plaintiff has failed to prove his case; for it is clear that he showed nei-

ther abandonment nor change of residence for six months. I concur with the local officers in their opinion that the contest should have been dismissed, and therefore reverse your decision.

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*COMMENCEMENT—TECHNICALITIES—SPECULATIVE ENTRY.*

LUNDE v. EDWARDS.

Homestead entry allowed to stand, notwithstanding the claimant failed to commence residence on the land prior to the initiation of contest, for the reason that the severe winter prevented his completing his house.

The Land Department will not lend its power to the accomplishment of an effort to defeat an honest settler's rights, on mere speculative and technical grounds.

*Secretary Teller to Commissioner McFarland, June 4, 1884.*

SIR : I have considered the case of Tollef H. Lunde v. Andrew W. Edwards, on appeal by Edwards from your decision of September 14, 1883, holding for cancellation, on the ground of abandonment, his homestead entry, No. 4408, made October 11, 1881, for SE. $\frac{1}{4}$  of 8, 158, 56, Grand Forks, Dak.

Contest was instituted September 25, 1882, and hearing had January 24, 1883. The register and receiver decided against the contestant. You reversed their decision on the ground of technical failure on the part of Edwards to actually commence residence on the land prior to initiation of contest, although he had in April and May, 1882, broken several acres of ground which he cultivated to crop during the season, and had partially erected a house on a good foundation laid early in May, but which he had not completed prior to the filing of the affidavit of Lunde.

He explains this by showing that the winter was too severe to allow him to build or improve ; that in April he visited the land, and found it overflowed and too cold and wet to cultivate ; that in May it was still unfit ; that the nearest lumber was 30 miles away ; that he failed to obtain teams for hauling until after harvest ; that he put in the crops by hiring, and had his foundation laid, corner posts and other posts erected and partially covered with tarred paper, which, however, proved insufficient to withstand the winds, and render the structure habitable ; that he took his family to the neighborhood, but could not occupy the house ; that he was engaged as a stationed minister of the gospel during the summer, but finally reached his place and completed a habitable abode.

It is clear to my mind that here was no abandonment in fact. The law recognizes climatic reasons for failure to begin residence within six months ; and it is notorious that such reasons exist in the northwest during winter. Early in spring Edwards was on the ground asserting his claim, and had until October 11, 1882, to establish his residence. He was proceeding to that end long prior to contest, and contestant was

aware of his efforts and improvements. Nevertheless Lunde did not await the twelve months, but proceeded to attack the entry for abandonment in advance of the statutory period, well knowing that no intention to desert the premises existed, and relying purely on the technical failure for the success of his contest.

This Department will not lend its power to the accomplishment of an effort to defeat an honest settler and deprive him of his labor and improvements on mere speculative and technical grounds. It is not asserted nor pretended that Lunde had a particle of interest in the land, or even desires it for his own settlement. He is a saloon-keeper, residing in a town, without a family, and not likely to have such urgent need of a home as to entitle him to the privilege of appropriating that of a settler whose good faith has been sufficiently manifested by his efforts, although not fully complying with all the demands of the law.

I reverse your decision, and affirm that of the register and receiver.

### 36. RIGHT OF PURCHASE.

*FINAL JUDGMENT—ACT OF JUNE 15, 1880—WHEN BARRED—NEGLECT OF PUBLIC OFFICER.*

*POMEROY v. WRIGHT.*

When the contestant has obtained judgment in his favor by the local officers, or on appeal, which becomes final, his right of entry attaches at the date said judgment became final, and, if duly exercised, bars a purchase upon application filed afterward. If the contest is finally decided adversely to the contestant his right of entry never did attach.

The contestant obtained judgment against the entryman on July 16, 1881, and under Rule of Practice 47 judgment became final August 16, 1881, while the cancellation was not made until February 7, 1882. Here, by reason of the delay of the Government, six months were allowed to elapse, after the rights of the respective parties were finally determined, before the judgment was carried into execution; during all of which period, and until the last day thereof, no offer to purchase was made by the entryman. There is no rule of law that can be invoked which justifies the Government in thus depriving a person of a legal right by such delay; on the contrary, the law, as enunciated by the Supreme Court, expressly forbids it.

*Secretary Teller to Commissioner McFarland, December 17, 1883.*

SIR: I have considered the appeal of Charles W. Wright from your decision of May 5, 1882, rejecting his application to purchase, under the act of June 15, 1880, the land embraced in his homestead entry, No. 3829, namely, the NE.  $\frac{1}{4}$  of Sec 12, T. 116, R. 56, Watertown, Dak.

It appears from the record that Wright made said entry October 25, 1879, and that it was suspended by your letter of July 24, 1880, for the reason that the affidavit did not conform to section 2294, Revised Statutes. The entry was also contested for abandonment by one P. A.

Pomeroy, decided adversely to Wright by the local officers on July 16, 1881, and said decision sustained by your letter of January 27, 1882. From this decision he did not take an appeal, but thereafter applied for a rehearing, and, it being granted, he failed to appear at the trial. Pomeroy made due application as a successful contestant, namely, within thirty days after cancellation, to enter the land for homestead purposes under the act of May 14, 1880.

It appears further that your said letter directing cancellation of Wright's entry was received at the local office on February 7, 1882, at 9 o'clock a. m., and that the cancellation was made on the local records at 9.45 a. m. of that day. On the same day at 9 o'clock a. m. Wright was at the local office, and at or about 9.15 a. m. made his application to purchase. Said application was rejected by the local officers for the reason that the entry had been canceled prior to its receipt, and on appeal the rejection was sustained by your decision aforesaid.

Counsel in their appeal assign for error in said decision, first, that Wright was not deprived of his right of purchase by the cancellation of his homestead entry, as ruled in the case of J. W. Miller (9 Land Owner, 57). Said case was one where the question was between the Government and settler only, and in the subsequent case of G. S. Bishop (9 Land Owner, 95), it was held that when adverse rights attached prior to application, under the act June 15, 1880, the right of purchase was barred.

Counsel assign for error, second, that the record shows an application by Wright to purchase prior to the cancellation at 9.45 a. m. on February 7, 1882, and this raises the important question in the case. Your decision holds that "cancellation takes effect on the receipt of the letter of cancellation at the district office," and that in the case at bar it took effect at 9 a. m. on said day, and before the application to purchase was made. I do not think a decision founded on either of the above propositions would satisfactorily dispose of this class of cases. The first makes the rights of the parties dependent on a mere form, namely, the clerical act of cancellation, while both ignore the rights of the contestant in the premises. The act of June 15, 1880, gives the entryman a right of purchase, and the act of May 14, 1880, gives the successful contestant a right of entry. These statutes are independent of and do not conflict with each other, for it is clear that by the later act Congress did not intend to interfere with any rights acquired under the earlier. The proviso to the act of June 15, 1880, reserving the rights or claims of subsequent homestead entrymen, was, in my judgment, not necessary to effect this result; like the proviso in the act of March 3, 1863, the intention of Congress is sufficiently clear without it. (L. L. & G. R. R. Co. v. U. S., 92 U. S., 733.) In adjusting adverse claims under these two laws, therefore, the fundamental rule is that the homestead entryman, or his transferee, has the right of purchase only until the time when the contestant's right of entry attaches.

Now, the act of May 14, 1880, gives the contestant a right of entry for thirty days from date of the notice of the cancellation which he has procured. It thus fixes the time after which his right of entry ceases, but it does not fix the time at which his right of entry attaches. Hence this latter right must be determined by a consideration of other statutes and of the general principles of law applicable to the case. Section 2297 invests the local officers with power to hear and determine charges of abandonment and change of residence, and if they find adversely to the claimant it declares that "then and in that event the land shall revert to the Government." But other statutes give the contestee the right to continue his defense until judgment by the court of highest resort, while the rules of practice make the judgment final when no appeal has been taken within a fixed period. As the act of June 15, 1880, is remedial, a liberal construction of it will extend the time of purchase to the limit of the time of defense. Indeed, the contestant has not "procured the cancellation" until the contestee has exhausted his right of defense. On the contrary, he has procured the cancellation when there is no longer a right of appeal. Upon adverse judgment, therefore, it follows that the original claimant loses his right to the land when such judgment is final; the judgment itself determines his right, while the cancellation is a mere formal method of executing it, and takes effect by relation as of the date of the judgment, so far as the entryman's rights are concerned.

From the foregoing it follows that if the rights are lost and acquired by a contest they are equally lost or acquired by the judgment of the local officers, or on appeal. Now, the successful contestant does acquire a right of entry by his contest, under the act of May 14, 1880, and consequently he acquires it by the judgment, whose result is published to the world at some subsequent date by the formal cancellation. The law does not limit his right to the date of the cancellation; it makes it dependent upon the success of the contest. Hence he does all the law requires him to do, in order to acquire the right of entry, when he has successfully maintained the charges, and his right would date from the final judgment were the cancellation never formally made; for "it is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." (*Lytle v. Arkansas*, 9 Howard, 314.) Consistently with this it is held, under the act of May 14, 1880, in the case of John Powers (8 Land Owner, 178), where "the contestant had done what he could to procure the cancellation," that "if it was cancelled in pursuance of his action he was within the descriptive terms of the statute and entitled to its benefits." It would be a perversion of legal principles to construe the act referred to as giving a contestant right of entry only when he had "procured the cancellation" in fact, for that might never be made, and the law would thus become a nullity.

Its manifest intention is to accord the right when the contestant procures the judgment, which makes it the duty of the officers of the Land Department to cancel the entry, for he is not empowered to make the cancellation himself. For similar reasons it was held in *Railroad Company v. Smith* (9 Wallace, 95), where it was said to be the duty of the Secretary of the Interior to ascertain and make out lists of certain swamp lands, that "the right of the State did not depend on his action, but on the act of Congress;" and the same rule is applied to the rights of a railroad company in *VanWyck v. Knevals*. (106 U. S., 367.)

The rule thus deduced by a construction of the statute, namely, that the successful contestant's right of entry attaches at the date of and by force of the adverse judgment, subject to defeat only by reversal on appeal, is in harmony with another settled rule relating to the disposal of the public lands. Where persons must acquire right to land by the performance of some act, the maxim *qui prior est tempore, potior est jure*, applies; or, as stated in *Shepley v. Cowan* (91 U. S., 330), "the party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterward issued relates back to the initiatory act, and cuts off all intervening claimants." Now, the two acts of Congress relied on by the parties to this cause provide two different things as initiatory acts to the acquirement of a right of entry: one is an application to purchase, the other is a successful prosecution of a contest. Whichever person completes his initiatory act first acquires the superior right; and consequently if the contestant procures judgment before the entryman offers to purchase, the right to purchase is barred. If a right to patent is acquired by doing all that the law requires the contestant to do, *a fortiori* his right to have the cancellation made is acquired by the same act, and the cancellation, like the patent, relates back to its date and cuts off intervening claims. So, where a pre-emptor has complied with the prerequisites of the statute he is not only "entitled to patent," but "he is entitled to certificate of entry." (*Frisbie v. Whitney*, 9 Wallace, 194.) As remarked in *Shepley v. Cowan*, in relation to two acts of Congress under which adverse rights were claimed, "the two modes of acquiring title to land from the United States were not in conflict with each other. Both were to have full operation, that one controlling in a particular case under which the first initiatory step was had."

Again, in *Houston v. Coyle* (10 Land Owner, 224), the analogy between the right of a contestant and a common informer was pointed out. Such analogy may be further illustrated by the fact that the right to a moiety of the penalty, which the informer at common law acquired by his suit, could not be divested even by a pardon of the offender:

The right so attaches in the first informer that the King, who before action brought may grant a pardon, which shall be a bar to all the world, cannot after suit commenced remit anything but his own part of

the penalty. For, by commencing the suit, the informer has made the popular action his own private action, and it is not in the power of the Crown, or of anything but Parliament, to release the informer's interest. (2 Black. Com., 437.)

The same principle must apply in the case of a contestant, under the act of May 14, 1880, whose right, however, by force of the statute attaches at date of the judgment, and not at initiation of the contest.

Nor is there any conflict between the rule laid down here and the established rule of the Land Department, referred to by counsel for Wright and in your decision aforesaid, that cancellation takes effect by a formal act at the local office. That rule is made for a different purpose, and is founded on another law, or construction of law, which reserves all land covered by an entry, and declares it not to be "public land;" when the entry is canceled in fact, the reservation is removed and the land is restored to the public domain. The two rules, being founded on different statutes and designed to accomplish different ends, do not and cannot conflict. The former fixes the time when the right of entry by a successful contestant attaches in law, and the latter the time when entry may actually be made. It is well settled that a person may have a right of entry prior to the actual cancellation of an existing entry, as where land occupied by a settler is afterward entered by another person. Such a settler has also a right to the cancellation of the entry of record, because he has a right to enter the land for himself by performance of the initial act required by the law. And here again the rule laid down in this decision is in harmony with pre-existing rulings of the Land Department.

The decision in the case of *Gohrman v. Ford* (8 Land Owner, 6), which has become a leading case on this subject, was based on a different state of facts from those in the case at bar. There the offer to purchase was made before the hearing, and the only question was whether the contestant had completed the initial act required by the law at date of the offer to purchase. It was held that he had not, but the reason was based on the rule that he could not actually make entry until after cancellation, without consideration of the question whether he could acquire a legal right to enter by a judgment; consequently that decision and this do not properly conflict. In the case of *Whitney v. Maxwell* (10 Land Owner, 104), the facts were substantially the same, and it was decided on the authority of *Gohrman v. Ford*. In *Bykerk v. Oldenwyer* (10 Land Owner, 122), it was held that the right of purchase is not barred by an adverse decision of your office overruling the local office, though application is filed after said decision. But it is to be observed that none of these cases are overruled by the present case, for in none of them had judgment actually become final. In the first-named case it is expressly said that whenever the entryman "tenders to the Government its price for the land, and the rights of no other person are affected thereby, he should be permitted to purchase." This is sound

doctrine, and the only remaining point to be determined is when such rights are affected by a purchase, which has not heretofore been fully considered. This case decides that when the contestant has obtained judgment in his favor, by the local officers, or on appeal, which becomes final, his right of entry attaches at date said judgment became final, and, if duly exercised, bars a purchase upon application filed afterward. If the contest is finally decided adversely to the contestant his right of entry never did attach.

This case also very clearly illustrates the injustice of a rule making the contestant's right of entry dependent on formal cancellation, and emphasizes the necessity of the rule herein laid down. The contestant obtained judgment against the entryman July 16, 1881, and under Rule of Practice 47 judgment became final on August 16, 1881, while the cancellation was not made until February 7, 1882. Here, by reason of the delay of the Government, six months were allowed to elapse after the rights of the respective parties were finally determined before the judgment was carried into execution, during all of which period, and until the last day thereof, no offer to purchase was made by the entryman. There is no rule of law that can be invoked which justifies the Government in thus depriving a person of a legal right by such delay; on the contrary, as above shown, the law as enunciated by the Supreme Court expressly forbids it.

Upon these grounds your decision is affirmed.

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### 37. SECOND ENTRY.

#### *ENTRIES—WIDOW AS LEGAL REPRESENTATIVE.*

A widow as the legal representative of her deceased husband may continue to cultivate his homestead, and at the same time make an entry in her own name.

*Commissioner McFarland to F. M. Heaton, Huron, Dak., May 24, 1883.*

SIR: In reply to your inquiry of the 27th of March last, you are advised that the widow of a "homesteader" who died before completing his title to the land, but who up to the date of his death complied fully with the homestead law, would not, while continuing the cultivation of said homestead claim as the representative of her deceased husband, be debarred from exercising her own rights under the homestead acts (see Copp's Land Laws, Vol. I, page 442, case Adelphine Hedensky, decision honorable Secretary of the Interior, dated August 25, 1875), although it may appear somewhat extraordinary that one party can carry two homesteads at the same time, there is no escape from this conclusion, in the light of the decision above quoted; for no residence being required in completing the husband's entry there is nothing to prevent the widow from fulfilling the legal requirements in both entries.

*FAILURE OF RESIDENCE AND SETTLEMENT EXPLAINED.*

## FRANCIS M. FOSTER.

A settler who made homestead entry of the wrong tract by mistake, and who failed to reside on and cultivate either tract by reason of the sickness of his wife, is allowed to amend his entry so as to embrace the tract originally selected, provided that no adverse right has meanwhile attached to it.

*Secretary Teller to Commissioner McFarland, September 18, 1883.*

SIR: I have considered the appeal of Francis M. Foster from your decision of November 23, 1882, rejecting his application to make another entry in lieu of his homestead entry, No. 16364, made May 5, 1881, of the NW.  $\frac{1}{4}$  of Sec. 29, T. 4 S., R. 2 W., Concordia district, Kansas.

It appears that the entry was canceled October 17, 1882, for relinquishment, pending a contest initiated against the same by one Edgar McKie, September 13 preceding, upon the ground of abandonment.

Foster bases his application upon the ground that the aforesaid tract is not the one he intended to enter, and which he supposed until September 1, 1881, had been described in his original application. He fails, however, to describe the tract he intended to enter.

It transpires through his own affidavit, and those of two other affiants corroborating the same, that he was precluded from complying with legal requirements in point of residence and cultivation of the tract described in his entry by reason of the sickness of his wife on or about September 5, 1881, in Concordia, Kans.; that "on the 13th day of September, 1881, one Edgar McKie commenced a contest against me on said land for such failure to reside on the same, &c., \* \* \* and that by reason of said contest I am about to lose the benefit of my homestead right, all of which is from no fault on my part," &c.

You held that under the rulings of the Department the only relief that could have been granted Foster would have been to allow him to amend his entry so as to embrace the tract he intended to enter; "but as a condition precedent it would have been incumbent upon him to show compliance with the law as to residence and cultivation of the tract originally selected."

As I said under date of April 2, 1883, in the case of *Neubert v. Middendorf* (10 Copp, 34), "such amendment is recognized by the practice of the Department to obtain the correction of a misdescription in the original papers growing out of accident or mistake, clerical or otherwise, when the settlement of the party is bona fide upon a particular tract, and he is in danger of losing his actual home and improvements."

Under date of July 27 last, in the *ex parte* case of Thomas Hammill, I said that "if the privilege of such amendment be recognized in the presence of an adverse right or interest, I think its recognition in *ex parte* cases—where no such right exists—the more reasonable and just."

Although Foster is in no danger of losing his actual home and improvements, he has wholly failed to comply with legal requirements; he has nevertheless satisfactorily explained the cause of such failure. And as this is matter to be considered solely between the Government and him, I deem it to be but reasonable and just, and resting clearly within the scope of my discretion, to recognize a right expressly conferred by law, but of which he would otherwise be deprived by purely fortuitous circumstances. I am aware that 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;" but it should be observed that as he has not so acquired title, his case does not come within the intendment of such prohibition.

I am, therefore, of the opinion that in the event of his designating exactly the tract he intended to enter he should be permitted to make entry of the same upon payment of the usual fees, provided, of course, no adverse right or interest has accrued meantime to preclude such entry; in which event it would be competent for him to enter another tract instead.

Your decision is accordingly reversed.

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*CHARACTER OF LAND—RELINQUISHMENT.*

*SILAS HALSEY.*

By reason of the altitude and lack of moisture the land in this homestead entry will not produce crops. A relinquishment and second entry are permitted.

*Secretary Teller to Commissioner McFarland, November 6, 1883.*

SIR: I have considered the appeal of Silas Halsey from your decision of September 28, 1882, refusing to allow him to amend his homestead entry, No. 4364, covering 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. 13, T. 21 S., R. 28 W., Larned, Kans.

It appears from the record that he made said entry on January 28, 1879; that he broke 10 acres in the spring of 1880 and planted it to corn, which crop proved a failure; that he sowed 10 acres to wheat in the fall of 1880, which also entirely failed; that he replanted 10 acres to corn and millet in the spring of 1881, which, as in the former cases, entirely withered away and perished for want of moisture; that he liberally planted with potatoes and various other vegetables, all of which failed to grow; and that he took the land in good faith, and in good faith continuously resided on and tried to cultivate it; but that he found by experience, what he could not ascertain without it, that by reason of the great altitude and the limited rainfall it is impossible to cultivate it successfully. Wherefore he asks permission to amend his entry so as to embrace land which is susceptible of cultivation.

I observe that your office allowed new entries in the cases of L. P. Skarstad, A. O. Rolstad, and Benedict Levin (9 Land Owner, 58), where the soil was unfit or the water too scarce for cultivation. In those cases there appears to have been no negligence or lack of good faith, and in the case now before me the facts warrant a similar conclusion.

Wherefore I am of opinion that Halsey should be allowed to relinquish his present entry, without prejudice to his right to make another.

Your decision is accordingly reversed.

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### 38. SETTLEMENT.

#### *CHARACTER OF LANDS—PRIOR SETTLEMENT—RIGHT OF ENTRY.*

##### *MARTIN v. HENDERSON.*

Where a settler goes upon land afterwards sought to be entered under the act of June 3, 1879, such settlement followed by a homestead entry precludes a timber entry, and questions as to the relative value of the land for agricultural purposes or for timber are not to be considered.

*Acting Commissioner Harrison to register and receiver, Stockton, Cal., July 16, 1883.*

GENTLEMEN: It appears from our records that Eli Henderson made homestead entry No. 3695, September 15, 1882, SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, 10 S., 24 E., alleging settlement July 29, 1882.

I am in receipt of your letter of March 1, 1883, transmitting testimony in the case of John A. Martin *v.* Eli Henderson, involving the land above described.

It appears that Martin filed a sworn statement, August 14, 1882, covering the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  Sec. 2, and E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  Sec. 11, 10 S., 24 E., and on the 23d of November, 1882, a hearing was had to determine the character of the land embraced in Henderson's entry.

You decided that the land in contest was more valuable for agricultural purposes than for timber, and awarded it to Henderson.

An appeal is filed from your decision.

In reply I have to state that the fact that Henderson settled upon the land in July, 1882, as alleged by him, is not disputed, and under the act of May 14, 1880, his right under the homestead law relates back to date of settlement. Hence at the date Martin presented his proof and applied to make cash entry of the land under the act of June 3, 1878, the land in contest was embraced in a homestead entry, the right of the claimant antedating the sworn statement filed by Martin. It was not, therefore, subject to entry under said act, and, without considering the testimony as to the character of the land, the application of Martin is rejected so far as it relates to the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 2, 10 S., 24 E.

You will advise the parties in interest of this decision, allow the usual time for appeal, and in due time make the proper report to this office.

Affirmed by Secretary Teller, February 13, 1884.

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*CONTESTS—FAILURE OF SETTLEMENT.*

*COOK v. SLATTERY.*

Work done on the land in question by a party who is hired by a corporation to dig a ditch thereon cannot be claimed as an act of settlement.

*Acting Secretary Joslyn to Commissioner McFarland, August 20, 1883.*

SIR: I have considered the case of Samuel R. Cook *v.* William Slattery, involving the SE.  $\frac{1}{4}$  of Sec. 2, T. 24 S., R. 34 W., Larned, Kans., on appeal from your decision of August 7, 1882, adverse to Cook. The record in the case presents the following facts:

Slattery made homestead entry for the tract described, on the 16th of April, 1881, alleging settlement April 9, 1881. Said entry was made after the passage of the act of May 14, 1880 (21 Stat., 140), and the right relates back to the date of settlement. On the 16th of April (the same day on which Slattery made entry), Cook applied to enter the same tract, and alleged settlement April 10, 1881. His application was rejected by the local office, for the reason that, when presented, the application of Slattery showing a prior right had been received and made a matter of record. It was not only first presented, but it alleged the earlier settlement. From this decision appeal was taken to your office, and in connection therewith appellant, Cook, filed his affidavit, corroborated by two witnesses, setting forth that he had, under a misconception of the law, erred in fixing the date of his settlement as of April 10, 1881, and that as a matter of fact he made settlement April 7, 1881.

Your office on the 26th of July, 1881, ordered a hearing to determine the facts, and on the 19th of April, 1882, the register and receiver transmitted to you the testimony taken at the hearing had, pursuant to your order.

Upon an examination of the testimony you speak of the case as a doubtful one, but say that you find no good reason for disturbing the decision of the local office dismissing the contest, and you affirm the same.

The evidence adduced at the hearing furnishes the following facts, which are made the basis by Cook for the change of his allegation as to date of settlement.

On the 7th, 8th, and 9th of April, 1881, and for a few days following, an irrigating ditch was in progress of construction near the land in question, a branch of it crossing said land. This ditch was built by a stock company.

Cook was employed by and worked for said company, with his team, on the branch ditch traversing the tract in dispute. He began work April 7, and worked until and including the 12th, excepting the 10th, which was Sunday. On that day he moved his house on to the tract claimed, and in his application to enter he, therefore, gave the 10th as date of settlement. He now claims that his first act of settlement was on the 7th, because, though employed by the irrigation-ditch company, he worked on that portion of the ditch which traversed the land in question, and in so doing had in view the improvement of said tract, intending to claim the same as a homestead.

The evidence shows that he was employed by the company, and that in settling for his services three ways were open to him: 1st, to receive all his pay in cash; 2d, to receive half cash and half in water; or, 3d, to take company stock. It appears there has not yet been a settlement between him and the company.

Upon a careful consideration of all the facts, I am of the opinion that Cook's first act of settlement within the meaning of the law was on the 10th of April, 1881.

The work done on the ditch, while it may have been beneficial to the tract in dispute, in common with other tracts in the vicinity, was work done by the company; and whatever Cook did was labor for which he was to receive from the company a stipulated price.

While he saw in the building of the ditch an accruing benefit to the land, and may by such fact have been influenced in selecting as a homestead the particular tract in question, and so may, while at work for the company, have intended to enter the tract, yet such work can in no proper sense be regarded as settlement, whether viewed from the standpoint of the act itself or of the intention at the time of the act.

He did not so regard it at the time, nor when he afterwards, on April 16, he applied to enter; but, finding his application rejected by reason of an adverse claim presented by another, who alleged settlement one day earlier than the date named in his application, he afterwards changed his allegation so as to antedate the other party in the matter of settlement.

His work on the ditch in the employ of the company was no more an act of settlement than would work on a railroad passing through a given tract be an act of settlement on such tract. The value of the land in either case might be enhanced, but if so it is by the act of the company, and whatever the employé does is done for the company. I find nothing in the showing which would justify the conclusion that Cook performed any act of settlement on the tract in question prior to April 10, 1881.

Your decision dismissing the contest is affirmed.

*ACTS OF AGENTS.—RIGHTS ACQUIRED BY.**MCLEAN v. FOSTER.*

No one can acquire a settlement right to public land by virtue of plowing or other acts performed by an agent.

*Acting Secretary Joslyn to Commissioner McFarland, April 7, 1884.*

SIR: I have considered the case of James McLean *v.* Margaret J. Foster, involving the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 3, T. 156, R. 54, Grand Forks, Dak., on appeal by McLean from your decision of August 25, 1883, awarding the tract to Foster.

It appears from the record that this land was surveyed in the spring or summer of 1880, but that the plats were not filed until May 12, 1881. About the time of the survey the Foster family, father, mother, brother, and sister, made arrangements to apply for this whole section and part of another. On several parts of it they made individual settlement and residence, but not on the NE.  $\frac{1}{4}$ . On that tract in May, 1880, Foster's brother, at her request he testifies, plowed a few acres of ground and hauled some logs for a future house. She was not on the land at the time, but was then and continually afterward living in the town of Grand Forks. In the early part of April, 1881, McLean went upon the section and began to build a house on the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ . While so building, Miss Foster's brother began to build her house on the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , and was notified by McLean of his claim to the entire quarter; nevertheless he continued to build, and Miss Foster took personal possession of the house on May 5, 1881. Both parties appear to have complied with the law since.

Whatever right McLean has to this land he acquired on the day he settled; and there is no doubt that he is entitled to the entire quarter, unless Miss Foster then had a superior right to it. At said date she had no right to it whatever against the United States or against him, for she had not made a legal settlement, nor even taken possession of the land. No one can acquire a settlement right to public land by virtue of another's acts, and the plowing or other work done for her by her brother was ineffectual for any purpose. This is the settled rule. And, indeed, if she had actually settled in person in May, 1880, her failure to follow it up by establishing a residence would have divested her of all right acquired by the settlement. In my judgment Miss Foster has neither a legal nor an equitable claim to the tract in question, and her entry should be canceled.

Your decision is reversed.

## 39. TRANSFeree.

*PURCHASE—ACT OF JUNE 15, 1880—BOUNDS GOVERN QUANTITY.*

**GUNNING v. HERON.**

Where a homestead entryman attempted to transfer part of his land prior to June 15, 1880, the transferee may be allowed to purchase his part when the entryman applies to purchase under the act June 15, 1880. Where there is a discrepancy in a deed the metes and bounds must govern rather than the quantity named.

*Secretary Teller to Commissioner McFarland, May 9, 1884.*

SIR: I have considered the case of W. D. Gunning *v.* William Heron, involving the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 11, T. 21 S., R. 29 E., Gainesville Fla., on appeal by the last named from your decision of October 26, 1883 (10 Copp, 273).

The contest and the appeal grew out of the following facts: Heron, on the 8th of February, 1876, made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 11, above mentioned, having previously made settlement and established his residence thereon. On the 8th of August, 1879, he signed, at Waltham, Mass., an agreement in language as follows: "I hereby agree to transfer for value received a tract of land of 10 acres (ten acres) in the town of Altamont, Fla., to W. D. and Mary Gunning."

On the 13th of February, 1880, he executed at Altamont, Orange County, Florida, a formal instrument (called on its back a bond for a deed), giving and agreeing to convey by warranty deed to William D. Gunning for valuable consideration, as soon as he shall get title from the United States, the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 11, T. 21 S., R. 29 E., containing ten acres more or less, the same being a part of said Heron's homestead entry. In June, 1882, Heron, notwithstanding the above-mentioned bond and agreement, attempted to sell and transfer by warranty deed the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 21 to one George McSween, and in connection with this transaction the attempt was made to dispossess Gunning by force.

Gunning subsequently instituted contest against Heron's entire entry alleging that it was void on the ground that at the date of its initiation he (Heron) was not a citizen of the United States, and had not declared his intention to become such.

A hearing was had in July, 1883, which quite clearly established the following facts: (1) That Heron at the date of his entry was not a citizen of the United States, and had not declared his intention to become such, though he had for years voted in this country, under the impression that because a minor at the date of his immigration no formal act or declaration of his was necessary to secure citizenship; and (2) that said Heron intended to sell, and did agree to convey to Gunning, a certain amount of land from the southwest corner of his homestead, in consideration for which attempted transfer Gunning paid \$280,

and entered into possession in November, 1879. What that certain amount was has become one of the subjects for consideration, in connection with the pending controversy. Before a decision on the contest was reached by the local office, Heron applied to purchase, under the act of June 15, 1880, the tract covered by his homestead entry.

Thereupon the contest was dismissed; the application to purchase was allowed, and final certificate issued to Heron for the entire quarter section. To this contestant objected, and the case came before you for consideration and action. You held that while it was established that Heron had not declared his intention to become a citizen, the entry being regular and in due form in other respects, he was entitled to the benefits of the act of June, 1880, and could purchase thereunder. At the date of his purchase he had been admitted to full citizenship.

You further held, however, that having attempted to transfer a portion of the tract covered by his entry he could be allowed to purchase only so much thereof as he had not attempted to sell and transfer, the law giving the attempted transferee the right to purchase from the Government the portion covered by his purchase from the entryman.

In this conclusion I think you are correct. Section 2 of the act of 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, &c.

Clearly this gives to the entryman the right to purchase, provided he has not attempted to sell; but if he has by written instrument attempted to transfer the land, the transferee and not the entryman is entitled to purchase, unless there be mutual arrangement to the contrary. In this case there was an attempted transfer, and the bona fides thereunder is shown not only by written instrument but by payment and *livery of seisin*, the transferee having soon after the transaction entered into possession and made improvements to the value of several thousand dollars.

Reference has been made to an attempted sale on the part of Heron by warranty deed to one McSween of the same land previously sold by him to Gunning. This cannot affect Gunning's rights, because, (1) at the date of sale Gunning was in possession, which fact was notice to McSween of an existing right in some one other than Heron; and (2) said sale to McSween was not until June, 1882, and therefore could not be made effective by the act of June 15, 1880, that act having relation only to past transactions.

The only remaining question is that relative to the amount of land which Gunning is entitled to purchase of the Government.

You have decided that he is entitled to purchase the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 21—about 40 acres—holding that the words "containing

ten acres more or less," which appear in the bond, do not constitute a limitation on his right to purchase the entire quarter-quarter-section, in accordance with the description "SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ."

This view is in accordance with the well-established rule of law applicable to instruments of conveyance, to wit, that where there is a discrepancy or apparent inconsistency between the description by metes and bounds, and the amount named as included therein, the former must govern.

Though there are facts in the case which give rise to some doubt as to whether the intention of the parties was the conveyance of one-quarter of one-quarter of a section (40 acres more or less), or of one-quarter of one-quarter of one-quarter of a section (10 acres more or less), I think the Department in deciding the question must be governed by the description in the bond—"SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ."

It must therefore be held that Gunning has the right under the act of June 15, 1880, to purchase the tract so described. Should it turn out that the intention of the parties was different, and that it does not accord with the conclusion reached, the matter may be arranged by mutual agreement or by resort to a court of equity, after the issue of patent.

Your decision holding Heron's entry for cancellation to the extent of the conflict with the rights of Gunning, and allowing the latter to purchase the SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , already described, is affirmed.

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#### 40. UNLAWFUL INCLOSURE.

##### FENCING PUBLIC LAND—EJECTMENT—SETTLER.

###### NICKALS v. BIRD.

It is illegal to fence a large tract of public land and attempt to exclude settlers therefrom.

An entry will not be suspended because of the judgment granted by a local State court ejecting a party who has settled upon unlawfully inclosed public land.

*Commissioner McFarland to register and receiver, Eureka, Nev., April 26, 1884.*

GENTLEMEN: I am in receipt of your letter of the 13th of last February, with the final proof of Thompson J. Bird, in support of his homestead entry, made March 23, 1880, for SW.  $\frac{1}{4}$ , Sec. 17, 20 N., 52 E., with protest of William W. Nickals against the same.

After Bird had given his testimony on final proof, attorney for Nickals attempted to cross-examine him, but Bird refused to answer; Bird's witnesses were cross-examined. Nickals placed no witnesses on the stand. Bad faith on the part of Bird was not shown.

Nickals filed record evidence, showing that, upon his complaint, the sixth judicial district court in and for the county of Eureka, Nevada,

ordered and adjudged June 29, 1883, that he be placed in possession of the said tract; and it appears that Bird was ousted from the premises under said judgment. This fact and the fact that the land was within the inclosure of Nickals when entry was made are made the grounds of the protest.

It was decided by letter from this office dated March 31, 1881, that the land was subject to entry notwithstanding the inclosure of Nickals, and the latter having subsequently attacked the entry, on the ground of abandonment, I decided, on January 13, 1882 (Copp, v. 8, p. 176), that the charge had not been sustained, and my decision was affirmed on appeal.

Nickals had no status as a pre-emption or homestead claimant for the land in question. His inclosure embraced about 1,000 acres of the public domain when the entry of Bird was made. The attempt to exclude settlers therefrom was unlawful. This Department is clothed by Congress with power to enforce and carry into execution the laws under which the public domain may be appropriated. It has, as above stated, decided that Bird was entitled to take up the land under the homestead law, and the said judgment throws no new light upon the status thereof, and hence the entry will not be suspended because of the protest.

The period of time since entry and period of claimant's service in the U. S. Army during the war of the rebellion aggregate more than five years.

You are authorized to issue the final papers in the case upon payment of the legal commissions, and you will so inform claimant and protestant.

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#### 41. WIDOW OF DECEASED SOLDIER.

*TERM OF ENLISTMENT—COMPUTATION—ENTRY—MARRIAGE OF WIDOW.*

ELIZABETH PORTER.

The entire term of enlistment, without reference to when the war of the rebellion closed, governs in computing the time in soldiers' homestead entries. After a soldier's widow makes a homestead entry, as such, she may marry without losing the credit of her first husband's term of enlistment.

*Secretary Schurz to Commissioner Williamson, April 30, 1880.*

SIR: I have received your letter of January 31, 1880, in relation to the case of Elizabeth Porter, widow of Henry Porter, who made homestead entry No. 80, October 14, 1873, at Los Angeles, Cal., under the act of June 8, 1872, for the NE.  $\frac{1}{4}$  of Sec. 24, T. 1 S., R. 14 W., S. B. M., and final proof January 11, 1876, claiming credit for her husband's military service during the war of the rebellion.

When the case was before me in June last, the record of service of Henry Porter showed that he enlisted for the term of five years, and was killed in action at Pumpkin Vine Creek, Georgia, May 30, 1864. In the view I then took of the last clause of section 2307, Revised Statutes, I held that Mrs. Porter was entitled to the full term of his service, except that she should be required to live one year upon the tract.

The information furnished you by the Adjutant-General shows that Mr. Porter's term of service was three instead of five years.

You state in your letter :

This office in computing the time of service is governed by the dates of the President's proclamations of April 15, 1861, calling out the militia, and August 20, 1866, declaring the war at an end.

From this I understand that, no matter what the term of service for which the soldier enlisted, if killed, the time of credit was fixed by the President's proclamation of August 20, 1866. In other words, he could not have credit for any time since that date.

I do not think that this is the correct interpretation of the statute. After reciting what persons are entitled, it reads as follows:

But if such person die during the term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

The words "*whole term*," as used in said section, in my opinion, show that Congress intended that credit should be given for whatever time the soldier had enlisted, if he was killed, and that this time is not to be abridged by the fact that the war closed before the expiration of his enlistment.

You further indicate that no credit can be given to Mrs. Porter after she married Brown. In this I think you also erred. If she was still residing upon the land, her marriage did not affect her right as a homestead claimant.

You reported this case for such action as I might deem proper. In returning it, you are instructed to allow to Mrs. Porter credit for the full term of three years for which her husband enlisted, and, also, for the time she actually resided upon the land before or after her marriage, as is shown by the proof.

## III.—INDIAN LANDS.

## 1. KANSAS TRUST AND DIMINISHED RESERVE LANDS.

## SETTLEMENT—RESIDENCE—IMPROVEMENT.

GEORGE MCFALL.

The fourth section of the act of March 16, 1880, allowing entries on these lands without actual residence, has reference only to tracts on the boundaries, contiguous to other lands on which the parties were then actually residing, under title, who had cultivated and made improvements on their adjoining claims *prior thereto*.

None of these conditions existing in McFall's case, the decision disallowing his entry is not modified.

*Commissioner McFarland to register and receiver, Topeka, Kans., June 30, 1883.*

GENTLEMEN: I am in receipt of your letter of June 4th instant, in reply to letter C from this office of May 26th ultimo, holding for cancellation entry No. 1175—Kansas trust and diminished reserve lands series, under section 2, act of July 5, 1876, made April 22, 1882, by George McFall for the W.  $\frac{1}{2}$  of lot 2 of the NW.  $\frac{1}{4}$  of Sec. 6, T. 16 S., R. 11 E., the E.  $\frac{1}{2}$  of lots 1 and 2, of the NE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 1, T. 16 S., R. 10 E., receipt No. 2664 for first installment of purchase money.

Under date of May 14th ultimo, you called attention to the fact that the E.  $\frac{1}{2}$  of Lot 2 of the NE.  $\frac{1}{4}$  of Sec. 1, T. 16 S., R. 10 E., was sold April 15, 1882, to Martin L. Stinson per entry No. 1173, same series, for lot 2 of the NE.  $\frac{1}{4}$ , and lot 2 of the NW.  $\frac{1}{4}$  of Sec. 1, T. 16 S., R. 10 E., and stated that you had inadvertently allowed McFall's entry, and you therefore asked that the same be canceled as to the tract in conflict with Stinson's entry.

As stated in the letter from this office of May 26th ultimo, it was found upon examination of McFall's proof of settlement right that he had never resided upon the land, but claimed to own and reside upon the four center 40-acre tracts of Sec. 1, T. 16 S., R. 10 E., and to have used the land embraced in his entry for pasture and grazing purposes, the only improvements thereon being a fence around 40 or 50 acres of grass land, which he purchased in February, 1882, and upon which he placed a value of about \$100. The four 40-acre tracts referred to, to-wit, the W.  $\frac{1}{2}$  of lot 1 of the NE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of lot 1 of the NW.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the NE.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 1, &c., were entered December 13, 1880, by Francis M. Brown under the first section of the act of March 16, 1880, per entry No. 83, Kansas trust land series, receipts Nos. 106, 370, and 404, certificate No. 112, dated February 20, 1882. It was also stated in the said letter that—

The act of July 5, 1876, under which McFall made his entry, provides that these lands shall be disposed of to *actual settlers only*, and as he

does not appear to be a settler in any sense of the word as contemplated by the said act, his entire entry is therefore held for cancellation, with sixty days for appeal, &c.

In your letter of June 4 instant you write as follows: "We would respectfully call your attention to section 4 of act of March 16, 1880. We may have erred in not noting on the face of the receipt the fact that this entry as well as all the adjoining entries that have heretofore been made on these lands were made under the section authorizing such entries, but as the blanks were printed as under act of July 5, 1876, and as act of March 16, 1880, seems to be amendatory or supplemental to said act of July 5, 1876, we did not deem it necessary to so note on the papers," and you make the following quotation from my decision of March 29, 1883, in the contested case of *Weare v. Streit*:

There is no positive provision of law against second entries of these lands, nor do the instructions of June 9, 1879, expressly forbid them, even where the tracts desired are not contiguous.

You also state that prior to the receipt of the said decision you rejected all applications for second entries, but that since that time you have allowed parties who have paid the full amount of purchase money due on their original entries to make second entries of adjoining lands, and you request that if your theory is correct with reference to McFall's entry, the decision of this office in his case be so far modified as to admit of his holding the claim except as to the tract in conflict with Stinson's entry. You further state that the lands remaining unsold in the reservation are rough and unsuitable for cultivation, and you feel that as liberal a construction as possible should be given to the two acts, so that they may be taken up for grazing purposes, in tracts not exceeding 160 acres, by the owners of land contiguous thereto.

The act of March 16, 1880, was passed especially with a view of affording relief to certain actual settlers on the trust-lands, or their heirs, legal representatives, or assigns, being in possession thereof at the date of the act, to whom certain described tracts had been awarded under the act of May 8, 1872, and provisions for the entry of which were made by the first section of the act of June 23, 1874, and again by the first section of the act of July 5, 1876, but who had failed to enter and pay—either in full or in part—for their lands so awarded as above provided. The relief thus afforded was of a pecuniary character, mainly giving these parties the benefit of the reduction in the price of their lands as made by the re-appraisal thereof in 1877 under the act of July 5, 1877. The second section of the act extended the same relief to actual settlers on both the trust and diminished reserve lands who had initiated entries under the second section of the act of June 23, 1874, but who had failed to complete the payment therefor. There was but a very limited number, however, of this class of settlers.

The fourth section of the act, to which you invite particular attention, provides as follows:

Actual settlement on any of said lands shall be regarded as sufficient

in all cases where the claimant actually resides on contiguous land to which he holds the legal title, and has heretofore cultivated and made valuable improvements on his adjoining claim, in good faith, for the purpose of a home for himself; provided said claimant shall in all other respects comply with the law and the regulations issued thereunder by the General Land Office.

It is held by this office that this provision of law, allowing entries of these lands without actual residence thereon, has reference only to tracts on the boundaries of the Kansas Indian lands, contiguous to *other lands* on which parties were actually residing, and to which they held the legal title *at the date of the passage of the act*, and who had cultivated and made valuable improvements on their adjoining claims in good faith *prior thereto*.

None of these conditions appear to have existed in McFall's case. The tracts of land covered by his entry are not on the boundary of the said Indian lands, and those which he claims to own are not other lands, but are a part of the Kansas trust lands, and even if he had purchased Brown's interest therein, and was residing thereon at the date of his own entry, he did not at that time hold the legal title thereto, as no patent had issued in the case, and it is clearly evident that he neither resided upon nor held legal title thereto on the 16th of March, 1880; also, that he had not cultivated and made valuable improvements on his adjoining claim prior to that date, as required by the section quoted.

I therefore decline to modify my decision in case of McFall's entry, of which you will immediately advise him as heretofore instructed, and you will be governed accordingly in case of all applications for "adjoining entries," as you term them, of these lands under the said section.

With regard to "second entries," I have to state that my decision of March 29, 1883, in the contested case to which you allude—*Weare v. Streit*—was made to meet the peculiarities of that particular case, and although the brief extract which you have culled therefrom, taken apart from the context, might appear to be somewhat general in its application, it was not so intended, and, of course, has no relevancy whatever to the case of McFall; neither is your statement—that you rejected all applications for second entries prior to the receipt of the said decision—applicable to his entry, which was made nearly a year before you received the decision, and it is not a second entry. Streit had made an entry of 40 acres in the northeast corner of a certain section, under the second section of the act of June 23, 1874, and paid one installment (one-fourth) of the purchase money, amounting to \$73.25. By reason, however, of various complications which had arisen from the suspension of his entry under a ruling of this office, but which was afterwards reconsidered, he desired to relinquish his claim and forfeit the money paid thereon, and then take another 40-acre tract in the southeast corner of the same section, which, with the two intervening 40-acre tracts, he had originally intended to enter in conjunction with that already entered, as soon as he had paid for the same, but which he was subsequently pre-

vented from doing by reason of the existing complications referred to; and this office held that no injustice would be done either to the Government or to the Indians or to any individual settler in allowing him to do so, notwithstanding the fact that the tract he desired to enter was not contiguous to the one originally entered. He was entitled under the law to enter 160 acres. The tract originally entered and the one he desired to enter would make but 80 acres, while he would actually hold and acquire title to only 40 acres. The other 40 acres, upon the cancellation of his entry, would revert to the Government, to be disposed of for the benefit of the Indians, and the money which he had paid would remain to their credit. I do not see, however, that anything either in the law or my decision (taken as a whole) can possibly be construed as intending to allow a party who has already entered and holds 160 acres of these lands to make another entry thereof. On the contrary, parties in entering are restricted to 160 acres in each case.

With respect to your statement that the lands remaining undisposed of in the reservation are rough and unsuitable for cultivation, and your opinion that the acts providing for their sale should be given a construction of sufficient liberality to admit of their being taken for grazing purposes without actual residence thereon, I have to state that it is not within the jurisdiction of the Department to either extend or limit the actual provisions of law. Our province is simply to execute the law as enacted by the legislative power. If the condition of these lands is as represented, and parties interested in their disposal feel that the law therefor is unjust in any of its requirements, their proper recourse lies in an appeal to Congress, which alone has the power to afford relief.

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*ACTUAL SETTLEMENT—INTENTION TO REMAIN.*

**SEACORD v. TALBERT.**

The act of July 5, 1876, under which the parties claim, holds these lands subject to entry only by actual settlers.

Driving stakes for the purpose of indicating a site for a house, at a time when Seacord believed that the right to the land was in one Adams, with whom he was negotiating for its purchase, did not effect a legal settlement, which he could only do by again going on the land *animo manendi*.

Talbert found the land unoccupied, unsettled, and had no notice of anything which could affect his rights, which he is therefore allowed to perfect.

*Secretary Teller to Commissioner McFarland, September 24, 1883.*

SIR: I have considered the case of James M. Seacord *v.* Thomas Talbert, involving the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and lots 1 and 4 of the NE.  $\frac{1}{4}$  of Sec. 22, T. 16 S., R. 9 E., Kansas trust and diminished-reserve lands, Topeka district, on appeal by Talbert from your decision of September 11, 1882, awarding the land to Seacord.

It appears that one Adams had made claim to the land in controversy, and had done some breaking, and partially dug a cellar on it in 1878; but he had discontinued the improvements, never lived on the land, and informed Seacord that he would give up his claim if Seacord would buy the improvements. Seacord at this time was living in another county, where he made a contract to remove a preacher's family to the northern part of the State, and, while engaged in fulfilling the contract, he passed in the vicinity of the land on March 18, 1879, and on that day went upon it in company with Adams, and drove four stakes at the place where he proposed to put a house. He then went away from the land, and made arrangements with Adams to purchase the said improvements, and also a house which Adams owned, and which was on another tract of land. It does not appear that these improvements and this house were then and there purchased. Next day Seacord, with his own family, went north in continuation of his business of removing the preacher's family, and was absent until April 28, 1879.

It also appears that while Adams was still claiming this land, namely, about November 1, 1878, he contracted with one Hollenbeck to place the aforesaid house on it, and that in pursuance of the contract then made, and without further instructions from Adams, he placed the house on the land on March 22, 1879.

It appears further that on March 28, 1879, Thomas Talbert, who was traveling with his family in search of vacant land on which to settle, heard of this tract, went there and saw it, and on the next day settled on it with his family. He had notice of the old breaking, of the partially dug cellar, of a house in two parts, empty and not set on a foundation, and of the fact that no one had ever lived on the land; and he also heard that Adams laid claim to the tract and was going to sell his improvements. It is not clear whether it was then or two days afterward that he was informed of Seacord's claim. He built a house, and has made various improvements since, and has continuously resided on the land; and there is no doubt that he went there in good faith, believing there was no bona fide prior settlement on it.

On April 28, 1879, Seacord returned to the land, repaired and set up the house within a few rods of Talbert's house on the same subdivision, and soon moved into it. He has made some improvements, and has had his residence there since. He filed his affidavit of contest on November 4, 1879.

These parties claim under the act of July 5, 1876 (19 Stat., 74), section 2 of which provides that these lands "shall be subject to entry \* \* \* only by actual settlers," and their applications to enter have been filed since the initiation of the contest. In considering their respective rights, it is clear, in the first place, that Adams did not make a bona fide settlement on this tract, such as would have avoided either party's subsequent settlement. He made a pretense of settling there, for the purpose of holding it if he ever concluded to settle actually, but had long

before abandoned his improvements, and was endeavoring to negotiate their sale. Nevertheless when Seacord made what he is pleased to call a settlement, namely, by driving four stakes into the ground, he believed that the right to the land was in Adams, and he did not drive those stakes as an act of ownership, or as an assertion of a claim, but by Adams's license, and for the purpose of denoting the spot where he intended to place a house if he effected the proposed purchase of the improvements. Consequently his temporary presence there on March 18, 1879, and the act of driving the stakes did not amount to a legal settlement, and such a settlement he could only effect by again going on the land *animo manendi*.

He claims that the subsequent purchase of the improvements, and the removal of the house to the land, were in continuation of his settlement. But this position is untenable. His purchase, even if it was made afterward on the same day, which is not shown, could have given him but the same right to the land which his vendor had, and that has been shown to have been unsubstantial and invalid. And since the house was not placed on the land by him or for him, he could not acquire a settlement by virtue of it.

When Talbert came upon the land six days afterward he had no notice of anything which could affect his rights; he found it unoccupied, unsettled, and without an adverse claim to it; and his actual settlement there the next day gave him a valid and good right to the land, which he should now be allowed to perfect.

Your decision is accordingly reversed.

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*ACTS OF JULY 5, 1876, AND MARCH 16, 1880—RESIDENCE AND CULTIVATION.*

**BUCHANAN v. MINTON.**

Section 4 of the act of March 16, 1880, points out bona fide residents, making homes on the public lands, as the persons whom Congress desired to benefit by the act; and by clear implication it requires actual residence on and improvement of all lands, except those contiguous to a claim on which the settler has made his home. Where a settler has properly initiated a claim to a tract, of which he has retained possession, though he has failed to do the things requisite to give him title to it, another settler, on adjacent land, cannot by a mere verbal claim, or without attempting to reduce the tract to possession, acquire any right to it.

*Secretary Teller to Commissioner McFarland, September 25, 1883.*

SIR: I have considered the case of Wallace C. Buchanan *v.* James Minton, involving the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 28, T. 16 S., R. 9 W., Kansas trust and diminished-reserve lands, Topeka district, on appeal by Buchanan from your decision of September 12, 1882, awarding the land to Minton.

It appears that Buchanan also claims the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of

Sec. 27, and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 28, in said township; and that Minton also claims the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said Sec. 28. In May, 1878, there being no adverse claimant, Buchanan went on the land and broke a few furrows in the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 28, and dug a well in the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 27, and thus properly initiated a claim to these tracts and to the tract in contest, which lies between them. In 1878 and 1879 he cut hay on the land in contest, and in the latter year built a shanty on the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 28, but he has never resided on any part of the land. In March, 1879, Minton bought of one McMillan the latter's claim to the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 28, and established his residence thereon, and he has since resided there and cultivated it. In April, 1879, having noticed that Buchanan claimed it, he went up and examined the land in contest, and, finding no improvements there, told several of his neighbors that he (Minton) laid claim to it; but he has not resided on, improved, or otherwise settled on it. The hearing was had in February, 1880. On March 11, 1881, Buchanan applied to purchase the tracts covered by his claim, and on April 30, 1881, Minton did the same, the applications conflicting as aforesaid.

Your decision holds that residence is essential to a bona fide settlement on these lands, and I concur in that part of it. It is the proof of the settlement which the statute contemplates, when it provides for entry "only by actual settlers" (act of July 5, 1876; 19 Stat., 74), and no entry should be allowed without it. Instructions of August 15, 1874 (Copp's Land Laws, 713), providing regulations under the act of June 23, 1874 (18 Stat., 272), which authorized entry "by actual settlers," required testimony to residence and improvements as proof of actual settlement, and such has been the practice since. Similar regulations obtain in respect to settlement on the Osage Indian lands (*Morgan v. Craig*, 3 Reporter, 234), the language of the statute relating to them being substantially the same. Were there any doubts about the matter, the Kansas diminished-reserve act of March 16, 1880 (21 Stat., 68), amending the act of July 5, 1876, would set them at rest. Section 4 provides that "actual settlement on any of said lands shall be regarded as sufficient in all cases where the claimant actually resides on contiguous land to which he holds the legal title, and has heretofore cultivated and made valuable improvements on his adjoining claim, in good faith, for the purpose of a home for himself." This provision points out bona fide residents, making a home on the public lands, as the persons whom Congress desired to benefit by the act, and by clear implication it requires actual residence on and improvement of all lands except those contiguous to a claim on which the settler has made his home.

I am therefore of the opinion, on the evidence before me, that Buchanan is not entitled to entry until he shows such bona fide residence and cultivation.

I cannot concur in that part of your decision which holds that Minton is entitled to purchase the land in controversy. The evidence shows that his settlement was on the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  only, and the initial act of settlement had relation to that tract, and to that alone. A month afterward he conceived the idea of claiming the land in controversy, and did so by notice to his neighbors; but he never performed an act of settlement on it, or included it within any marks of boundary, or exercised ownership over any part of it, and his "claim" to it was as unsubstantial as the breath that gave it utterance. Buchanan had properly initiated a claim to the tract, and the evidence shows that, though not entitled to entry, he had continued to exercise dominion over it, and to retain actual *peditis possessio*; and from this he could not be ousted by any mere verbal declaration of a claim by a person who chanced to covet the tract.

Your decision is accordingly reversed.

Motion for a re-hearing denied June 3, 1884.

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*SETTLEMENT A PERSONAL ACT.*

*KNIGHT v. HAUCKE.*

Settlement is a personal act, and can date only from the time the party went upon the land. The purchase of a prior settler's improvement does not transfer the vendor's date of settlement.

*Secretary Teller to Commissioner McFarland, November 17, 1883.*

SIR: I have considered the case of Artemus Knight *v.* August Haucke, involving the right to purchase under the act of July 5, 1876 (19 Stat., 74), the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 32, T. 16, R. 9 E., Kansas trust and diminished-reserve lands, Topeka, Kans., on appeal by Knight from your decision of January 29, 1883, awarding the right to Haucke.

The act authorizes purchase of these lands by bona fide settlers thereon.

It appears that the Indian title having been extinguished in September, 1873, and the Indians being in the act of removal from these lands the agent of the Government placed one Martin in possession of the agency buildings and lands for the purpose of protection, until they could be legally disposed of. The tract in question is part thereof. Martin immediately asserted a claim to it, and it is alleged, through an arrangement with the agent (which could have no legal effect), was to have a preference right thereto, in consideration of his care of the property, whenever it was offered for sale or disposal. He at once occupied the agency buildings and land, and asserted his claim upon the books of a local association established to show the claims of its members, and continued in possession of the buildings and annually cultivated a portion of the land—but residing on a tract not here in dispute—until

December 22, 1876, when he sold whatever right he had to the land and improvements thereon to Knight. Knight immediately placed his son in possession of his purchase, and subsequently, in April, 1877, with the remaining members of his family, personally entered thereon, and has since cultivated portions of the land in dispute, but has resided at the agency building (on land not in dispute) and has made valuable improvements.

It is claimed in behalf of Knight that Martin was a bona fide settler whose rights were assignable, and hence that his (Knight's) rights commence from the date of Martin's alleged settlement in 1873. I do not concur in this view. Under this, as under the pre-emption law, settlement is a personal act, and one cannot acquire rights granted a settler until he is personally connected with the land by performing those acts which constitute actual settlement; and to this end neither his ownership of the improvements nor his possession by means of the residence, cultivation, or improvement of the land by an agent, nor any claim he may assert to the land, can have any legal effect. His right must rest upon his personal and actual settlement only. The term "bona fide settler" has acquired this meaning through a long series of legislative enactments and judicial and Department decisions, and it must therefore be held that Congress so intended it in the act of 1873.

It is not here necessary to consider whether or not Martin was a bona fide settler from 1873 to the date of his sale in 1876, because even if he were his rights absolutely terminated at the latter date, and he could not transfer his claim so that Knight could appropriate to his own benefit anything other than the transferred property. Rights are conferred by statute, and I am not aware of any which grants them to a settler before his settlement. Those of Knight cannot, therefore, commence prior to December 22, 1876; and the case must, in harmony with the general legislation and decisions upon like questions, rest upon the priority of settlement as between the parties.

I have examined the testimony, and concur in your statement that at the date of Knight's purchase Haucke had been actually resident on the NE.  $\frac{1}{4}$  of the section as claimed by him, with valuable improvements and cultivation for more than a year. He must, accordingly, be held the prior settler, and entitled to purchase the tract in dispute.

I affirm your decision.

**2. OTTAWA AND CHIPPEWA, IN MICHIGAN.**

*NOT SUBJECT TO ENTRY WITH VALENTINE SCRIP—SALE AT PUBLIC OFFERING.*

**WHITE AND MALLETT.**

The lands described can only be disposed of at public offering at minimum price of \$2.50 per acre.

*Secretary Teller to Commissioner McFarland, October 8, 1883.*

SIR: I have examined the case of the application of White and Mallett to enter with Valentine scrip E. No. 139, and E. No. 140, the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 25, T. 17 N., R. 16 W., Reed City, Mich., on appeal from your decision of July 17, 1882, rejecting the application.

The lands in question lie within the limits of certain tracts of land withdrawn from sale, for the benefit of the Ottawa and Chippewa Indians, under the treaty of July 31, 1855 (11 Stat., 621), and are lands mainly valuable for the pine timber thereon.

The treaty provided that within five years the persons (Indians) named in lists to be prepared might make selections of tracts of the lands so reserved, and patents under certain restrictions were to be issued for the lands so selected, and further provided that the lands which shall not have been appropriated or selected within five years should remain the property of the United States, and thereafter, for the further term of five years, be subject to entry by Indians only in the usual manner and at the same rate per acre as other adjacent public lands, and the lands so purchased by the Indians might be sold without restriction, and certificates and patents were to issue therefor as in ordinary cases. "And all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands."

Further legislation affecting these lands is as follows:

Act of June 10, 1872 (17 Stat., 381), provided that the unoccupied lands should be open to homestead entry by Indians only for the period of six months from the passage of the act, and immediately after the expiration of said six months the Secretary of the Interior was directed to restore the remaining lands to market, and after such restoration they were to be subject to the general laws relating to the disposition of the public lands, provided that none of the lands were to be taken under any grant of lands for public works or improvements, or by any railroad company.

Act of March 3, 1875 (18 Stat., 516), amended the act of 1872, and provided that, after the allowance of further selections and entries, the lands not disposed of and not valuable mainly for pine timber should be subject to homestead entry for one year; and thereafter the lands

remaining undisposed of should be offered for sale at a price not less than \$2.50 per acre.

May 23, 1876 (19 Stat., 55), the act of 1872 was further amended, and such amendment provided that, "the remainder of said lands not disposed of, and not valuable mainly for pine timber, shall be subjected to entry under the homestead laws."

I am not prepared to agree with the opinion expressed by you that further legislation is necessary in order to dispose of such lands as are valuable mainly for pine timber. I do not see how the amendment of 1876 can be construed to repeal that part of the act of 1875 providing for offering the lands. The amendment of 1876 extended the homestead privilege to all lands not disposed of and not valuable mainly for pine timber. The act of 1875 had limited the entry of homesteads to one year, and had provided that all lands thereafter undisposed of, whether valuable mainly for pine timber or not, should be offered for sale at the minimum price of \$2.50 per acre. The effect of the act of 1876 was to remove these restrictions, and allow homestead entries without limit as to time, to be made upon all lands undisposed of and not valuable mainly for pine timber. In other respects it left in force the amendment of 1875.

The record does not show whether, under the act of 1872, the remaining lands were restored to market in the manner therein provided. However that fact may be, under the act of 1875 the lands then remaining could no longer be disposed of under the general laws relating to the disposition of the public lands. Their disposition under that act and under the act of 1876 was limited to homestead entry and to sale as therein provided. Under existing legislation these lands can be disposed of in no other way. They are not therefore subject to entry with Valentine scrip.

I affirm your decision.

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### 3. WINNEBAGO HOMESTEADS.

*ACTS OF MARCH 3, 1875, AND JANUARY 18, 1881.*

NA-WA-JO-JOP-QUA-KAH AND JO-JE-GAH.

Entries and selections by the Winnebago Indians are not the subject of contest, in their present status at least. Contests dismissed and entries permitted.

*Secretary Teller to Commissioner McFarland, November 21, 1883.*

SIR: I have before me for examination the case of the homestead entry, No. 2103, of Jo-je-gah, a Winnebago Indian, for lot 2, the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 18, T. 27 N., R. 10 E., Wausau, Wis., made August 7, 1875, and other entries similarly situated.

Jo-je-gah's said entry, and also that of Na-wa-jo-jop-qua-kah, No. 2105,

made same date for lot 1 on same section, were contested by Gustave Baranowsky for abandonment.

By your letter of September 29, 1883, addressed to the register and receiver, you affirmed the decision of those officers, and held the entries so contested for cancellation.

By your letter of July 6, 1882, also addressed to the register and receiver, you held for cancellation a large number of other entries made by Winnebago Indians; but it being made to appear to you that the Indians claiming the entries had not been duly notified of the contests, by your letter of December 12, following, you directed the canceled entries to be reinstated and the contests dismissed, reserving, however, to the contestants the right "to initiate contests *de novo* against said entries." Such contests being renewed, cancellation was again ordered by your letter of September 29 last, as already recited, proper notice in the last contests having been given to the Commissioner of Indian Affairs and the agent appointed by him to look after the interests of the Indian claimants.

Said Commissioner of Indian Affairs having intervened in behalf of said claimants, November 6, instant, I directed you to suspend all proceedings in the matter, and to transmit to me all papers relating to the subject, which I have now attentively examined.

Said entries were made under the provisions of section 15 of the act of March 3, 1875 (18 Stat., 420), extending to Indians properly qualified the benefits of the homestead laws, upon due proof of the abandonment of tribal relations.

January 18, 1881, Congress passed an act (21 Stat., 315), entitled "An act for the *relief* of the Winnebago Indians in Wisconsin, and to aid them to obtain *subsistence by agricultural pursuits*, and to promote their civilization." It recited that a large number of said Winnebago Indians had selected and settled in good faith upon homestead claims under section 15 aforesaid, and that all of said Indians had "signified their desire and purpose to abandon their tribal relations and adopt the habits and customs of civilized people, and avail themselves of the benefits of the aforesaid act, but in many instances are unable to do so on account of their extreme poverty."

This Department was directed to cause a census of said Winnebago Indians to be taken in two lists, one to include all of the tribe residing upon or drawing annuities at the tribal reservation in Nebraska, and the other to embrace all of said tribe residing in the State of Wisconsin. Upon completion of the census of the Winnebago Indians in Wisconsin the Secretary of the Interior was authorized and directed to expend for their benefit the proportion of the tribal annuities due to and set apart for said Indians under the act of June 25, 1864, of the appropriations for said tribe for the fiscal year 1874 to 1880 inclusive, amounting to \$90,689.93, and also a certain proportion of a further sum of \$41,012.74

then in the Treasury to the credit of said tribe. Said act contained the further provision following, viz:

And all of the said sums shall be paid pro rata to those persons whose names appear upon the census roll of the Winnebagoes of Wisconsin, heads of families being permitted to receive the full amount to which all the members of the family are entitled: *Provided*, That before any person shall be entitled to the benefits accruing under this act, it shall be made to appear that the person claiming its benefits, or the head of the family to which such person belongs, has taken up a homestead in accordance with the said act of March third, eighteen hundred and seventy-five, or that, being unable to fully comply with the said act by reason of poverty, he or she has made a selection of land as a homestead, with a bona fide intention to comply with said act, and that the money applied for will be used to enter the land so selected, and for the improvement of the same.

The last section of the act provided that the titles acquired by said Winnebagoes of Wisconsin to the lands theretofore or thereafter entered by them under the said act of March 3, 1875, should not be subject to alienation or incumbrance, either voluntarily or by judgment or decree of any court, nor subject to taxation of any character for the period of twenty years from date of patents, and that said section should be inserted in every patent issued under that act or the act of 1875.

The act of 1881, therefore, as we have seen, recognized the fact that a large number of said Winnebago Indians in Wisconsin had selected and settled in good faith upon lands under the act of 1875, with the desire and purpose to abandon their tribal relations and adopt the habits and customs of civilized people and avail themselves of the benefit of said act, but that they were unable to carry out such desire "*on account of their extreme poverty.*" To enable them to overcome this obstacle, a reasonable appropriation of money was made and a census ordered that the money might be properly distributed; but such distribution was strictly limited to those persons who had taken up a homestead under said act of 1875, or such as had made a selection of land as a homestead intending to comply with the act, and the money applied for was to be used to enter the land so selected, and for the improvement of the same.

The plain object and purpose of the act of 1881 was to place sufficient funds in the hands of such members of said tribe in Wisconsin as in good faith desired to comply with the terms of the homestead laws, the benefits of which were tendered to them by the act of 1875. This act for the relief of such persons was passed nearly six years after the act of 1875, to enable such persons to complete homestead entries, many of which had existed for nearly that number of years, and which the act itself declares they could not obtain the benefit of "*on account of their extreme poverty.*"

If these entries are now to be canceled for the reasons assigned the beneficial object of the act, as expressed in the title of the bill and carried into the provisions of the statute, would be defeated.

I am advised that the necessary census, the taking of which was delayed for the want of funds, was not completed until October of the present year. The Indians, therefore, without any fault on their part, have not had any of the means recognized by the act to be absolutely necessary for them to secure those homes which in good faith they attempted to procure under the act of 1875, but were not able because of their poverty.

I am entirely satisfied that the relief act of 1881 had the effect to extend the time within which the homesteads could be entered and completed, for a period long enough, at least, to enable such Indians to use to advantage the money appropriated in making entries, in erecting dwellings, in cultivating and improving the lands so entered and selected.

The selections and entries that come within the terms of the act of 1881 are not, therefore, at least in their present status, the subject of contest.

In the case of Jo-je-gah's entry it appears, from evidence submitted to me, that he selected it in good faith, but because of old age and poverty was unable to improve it, and surrendered his claim to his son-in-law, David Big-Hawk, who has lived upon the land for upwards of two years, and improved the same as far as his means would permit. Baronowsky's contest should be dismissed, and if Jo-je-gah desires to relinquish, Big-Hawk, who has tendered the fees and made application to enter the land, should be permitted to do so.

The facts in the several cases in which cancellation was ordered by you are not given in the papers submitted, but contests should be dismissed and entries permitted to be made and completed in accordance with the construction of said acts and the principles herein set forth.

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#### IV.—INSTRUCTIONS.

##### 1. ALIENS—REQUISITES FOR ENTRY BY.

###### *HOMESTEAD AND TIMBER CULTURE.*

Applicants, alien born, required to furnish record proof of declarations of intention to become citizens of the United States.

*Commissioner McFarland to register and receiver, Huron, Dak., June 12, 1883.*

**GENTLEMEN:** You are advised that hereafter parties desiring to enter Government lands under the homestead or timber-culture laws, who are alien born, and state in their affidavits that they have declared their intention to become citizens of the United States, will be required to furnish record proof of the same, to accompany their application and affidavit, as this office is caused a great deal of delay and correspond-

ence in cases where parties in their original affidavits swear that they have declared their intentions, and when making final proof fail to furnish evidence of same.

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#### CONDITIONS TO BE OBSERVED.

*Commissioner McFarland to register and receiver, Watertown, Dak., January 31, 1884.*

GENTLEMEN: Referring to your letter of the 10th instant, requesting instructions with regard to what conditions are requisite to qualify aliens to make entry of lands under the homestead laws, you state that your office has adopted four rules, viz:

1. When an alien has declared his intentions, &c.
2. As the equivalent of the above when his father had done so, and died during his minority.
3. When he came to this country before he was eighteen, and remained until two years after his majority.
4. When he served in the Union Army or Navy, &c.

In answer, I have to state that aliens are qualified to make entry under the homestead laws upon the following conditions:

1. Where they have declared their intentions to become citizens of the United States, under section 2165, Rev. Stat.
2. That it is equivalent to a declaration by the widow or minor children where the father makes his declaration of intention, and dies before having taken out his full papers. The case cited by you in 10 Copp, p. 19 (the Jackson case), is recognized in this office.
3. When an alien comes to this country during his minority, and remains until after he reaches his majority, he must file his declaration under section 2165, or comply with the requirements of section 2167 before being qualified to make entry. (See Secretary's decision in case of Hutchinson *v.* Donaldson, Copp, vol. 9, p. 150.)
4. An honorable discharge from the United States armies, either the regular or volunteer forces, is equivalent to a declaration of intention.

If the above rules are enforced they can work no injustice to any alien applicant, and will at the same time conform strictly to the letter and spirit of the naturalization and homestead laws, in the simplest way, and all complications which have heretofore arisen from a misconstruction of these laws will be avoided.

Except where plain and unequivocal statutory exception is made, you should require of all foreign-born applicants duly certified copies of their declarations of intention to become citizens, as a condition precedent to making an entry.

**2. DEPOSITS AS SECURITY FOR COSTS.***REASONABLE SUM—EXTRAORDINARY EXPENSES.***BELL AND BARRETT.**

Contestants should only be obliged to deposit a reasonable sum as security for the costs of transcribing testimony. Extraordinary expenses, not called for by the nature of the case, must be paid by the party in whose interest they are incurred.

*Commissioner McFarland to register and receiver, Las Cruces, N. Mex., March 26, 1884.*

GENTLEMEN: I am in receipt of a letter from Messrs. Bell and Barrett, of Silver City, N. Mex., inclosing a copy of their letter to you of the 25th ultimo, and your reply, dated the 29th ultimo, in reference to the matter of the discretion of local officers to exclude irrelevant or frivolous testimony in contest cases.

They refer to instances in which respondents, "in order to crush out contestants," subpœna a very large number of witnesses (some forty or fifty in a case specially mentioned), "not for the purpose of shedding light on the controversy," but to so augment the costs that contestants cannot proceed.

Your attention is called to the decision of the honorable Secretary of the Interior of September 21, 1883 (Copp's L. O., v. 10, p. 223; Brainard's Precedents, for October, 1883, p. 321; The Reporter, for October, 1883, p. 243).

The rule laid down in the case cited is deemed sufficient for your guidance and the guidance of officers authorized to take testimony in contest cases:

When it is clear that the line of cross-examination, or the testimony offered, is intended to vex or delay, or cause unnecessary expense to the contestant, the local officers may, and they should, peremptorily end it.

On the other hand, the ruling is designed to protect the contestant, but not to shut out testimony; and, therefore, when the local officers have exercised their discretion by barring testimony on the ground above stated, the contestee should be allowed to proceed upon paying the additional expense himself.

Officers taking testimony in contest cases should be governed by the foregoing rules, and contestants should only be required to deposit a reasonable sum as security for the costs of transcribing testimony. They should not be required to deposit for an extraordinary number of witnesses, nor for taking irrelevant testimony, or testimony that is merely cumulative. The customary costs in ordinary cases may be taken as a general guide in determining the amount of deposit to be required. Extraordinary expenses, not called for by the nature of the case, must be paid by the party in whose interest the same are incurred.

### 3. DESCRIPTION OF LANDS.

How lands embraced in certificates and receipts should be described.

*Acting Commissioner Harrison to register and receiver, Duluth, Minn., August 6, 1883.*

GENTLEMEN: Your attention is called to circular letter C, dated March 16, 1880, and letter C of June 29, 1881,\* respecting description of lands embraced in certificates and receipts issued by you. It is observed that you fail to comply with the instructions therein contained, and I have to request a compliance in future.

You will please write the descriptions in full, and restrict entries to such number of subdivisions as can be easily written in the blank spaces left in the forms for that purpose, without interlining or doubling the lines. Where tracts in several sections are embraced in one entry the descriptions should appear in the numerical order of the sections; but entries should not cover more than 640 acres each, and should, when practicable, be confined to one township and range.

A failure to adhere to the practice above indicated in the past has led to many errors and great inconvenience to entrymen, as well as to your office and this.

*Commissioner Williamson to registers and receivers U. S. land offices, March 16, 1880.*

It is found in examining the returns from some of the district offices that descriptions of tracts are often imperfectly written, as, for instance, "W., NE., NW., Sec."

You are instructed to exercise great care in the preparation of certificates and receipts, to write the descriptions in full with clearness and accuracy, so that they will read as follows: The West half of the Northwest quarter, and the Northeast quarter of the Northwest quarter of Section 12, Township 4 South, Range 3 West, Sixth Principal Meridian, Kansas.

### 4. EXAMINATION OF RECORDS.

**ADOLPH MUNTER.**

The proper examination and use of the plats and public records in the local land offices by the public are not prohibited by law, and should not be denied upon grounds of public policy, except where such examination or use will interfere unnecessarily with the dispatch of the public business.

*Secretary Teller to Commissioner McFarland, May 29, 1884.*

SIR: Referring to your report of October 8, 1883, I inclose the papers connected with the application of A. Munter for a modification of your

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\* You are instructed to mention in all classes of entry papers issued by you the meridian governing the survey of land described; state whether the township is north or south from base line, and whether the range is east or west from meridian.

Example: Northeast quarter of Section 10; Township 101 North, Range 11 West, 5th Principal Meridian.

instructions of August 20 and September 3, 1883, to the Montgomery, Ala., office, forbidding the privilege of examining the plats and records and of taking such copies as may be desired, subject to the rule that the public business shall not be interrupted nor unreasonably impeded.

I am of the opinion that a proper examination and use of the public records in the district office are not prohibited by law, and should not be denied upon grounds of public policy, except in cases coming clearly within the well-recognized rules requiring for certain purposes the exclusion of the public or of individuals in specific cases and for specific reasons.

Section 2395 of the Revised Statutes prescribes that a copy of each township plat "shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale and to the General Land Office." It would be invidious, and in the nature of legislation for this department to attempt to define, limit, or specify the particular mode of examination to be followed by the public in obtaining the information here granted as a matter of well-recognized right. And if the township plats are to be thus kept open there can be no propriety in closing the other records relating to the survey and disposal, those records being the source from which the best and most specific as well as the greater part of the general information must necessarily be sought.

I do not regard the provisions of law requiring the land officers to give information and copies of records when requested, and allowing a fee for such service, as intended in any manner to exclude the public, or individuals interested in any tract of land, or public record relating to the same, from free access to the information sought, subject only to the needs of the public service, which require that such access shall not interfere unnecessarily with the dispatch of the public business.

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## 5. FEES OF LOCAL OFFICERS.

### HITCHCOCK BROTHERS.

The local officers cannot demand a fee for answering a verbal or written inquiry as to the status of a certain tract.

*Commissioner McFarland to register and receiver, Mitchell, Dak., April 25, 1884.*

GENTLEMEN: Inclosed I hand you copy of letter dated November 23, 1883, addressed to this office by Hitchcock Brothers, of Mitchell, Dak. It is alleged that a member of said firm, with telegram in hand, applied at your office verbally, as to the status of a certain tract of land. The desired information was refused, as appears from indorsement on telegram, "because applicant refused to pay 25 cents."

You are informed that you have no authority to demand or receive pay for such information. It is your duty under the law to answer all verbal or written inquiries touching the status of any tract of land.

The act of March 3, 1883, only authorizes a charge to be made for plats or diagrams *when applied* for and furnished. You are not authorized, in response to a verbal or written request as to the condition or status of a tract of land or entry, to respond by furnishing a diagram and demanding pay.

The plat must be specifically applied for before you are authorized to demand pay therefor. You are directed to acknowledge the receipt hereof, and promptly report the practice prevailing in your office touching the matters herein referred to.

The telegram referred to with indorsement thereon is herewith enclosed for your inspection. Return same with your letter acknowledging receipt hereof.

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## 6. FINAL PROOF.

### DUTY OF LOCAL OFFICERS.

*Commissioner McFarland to district land officers, September 17, 1883.*

GENTLEMEN: By circular letter of October 21, 1878 (Copp's L. O., vol. 5, p. 118, and Copp's Land laws, vol. 2, p. 1450); you were instructed—

To carefully examine homestead proof in each case, and if you find it correct in all respects as required by law and instructions you will write "approved" on the same and subscribe your names underneath. If anything be wanting to perfect the proof, call for supplemental affidavits and have the want supplied before transmitting the same to this office.

In view of the fact that many cases of imperfect and incomplete proof are sent to this office "for instructions," I deem it proper to ask your strict observance of the following additional instructions, which will govern all cases of final proof in homestead, timber-culture, desert-land, and timber-land, entries:

You will be careful to give the testimony and affidavit in each case critical examination, and if you find defects, omissions, or want of fullness of detail, call on the claimant to supply the deficiency, informing him that if he fails to do this within thirty days from receipt of notice his proof will be rejected, subject to the right of appeal to this office.

Hereafter you will send to this office no final proof without your "approval" of the same, except on appeal.

You must assume the initial responsibility of deciding whether the requirements of law and official instructions have been fully met. You will record your approval on the back of the testimony and not on the

final certificate. In each final certificate at least one of the christian names of the claimant should be written *in full*.

You will take care that no more land shall be included in a private cash entry than can be described by subdivisions in the ordinary form of cash certificate and patent, and the subdivisions should be confined to one section whenever practicable—this to lessen the chances for confusion and error in posting.

You are instructed to be careful to promptly post all entries and locations in the appropriate places in your tract-books; without such posting the tract-books have no value and confusion follows.

Complaints are made that it is often difficult to procure the publisher's affidavit of publication of intention to make final proof. To cure this difficulty registers should refuse to pay the cost of publication until the required affidavit is furnished.

*X* In the matter of excess payments you will in no case require payment where the amount is less than one dollar.

In briefing your letters and returns to this office you will leave a blank space of one and one half inches at the upper end of the fold in order that there may be room for the number and date-stamp of this office. Your briefing should briefly state the character of the contents, as to whether they relate to a homestead, pre-emption, timber-culture, or other class of entry by number and name. The lower third of the fold should be left blank.

Approved by Secretary Teller, September 19, 1883.

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*IN DAKOTA—OFFICERS AUTHORIZED TO TAKE.*

The clerks of district courts in Dakota are authorized to take final affidavits in homestead and pre-emption cases.

*Secretary Teller to Commissioner McFarland, March 31, 1884.*

SIR: I have examined your letter of January 15, 1884, to the register and receiver at Sioux Falls, Dak., relative to the authority of certain clerks of district courts to take final affidavits in homestead and pre-emption cases, you having, by your letter to me of the 18th ultimo called my attention to the matter and asked my consideration and views on the question involved.

The Territory is divided into three judicial districts. Each district must, therefore, embrace several counties. The judges of the districts are authorized by the laws of the Territory (section 1 of chapter 14 of the Code) to appoint a clerk of the district court in each of the counties of their respective districts.

You have decided that such clerks are not authorized, except in those counties in which courts are held, to take final affidavits in homestead cases under the act of Congress of March 3, 1877 (19 Stat., 403), nor in

pre-emption and commuted homestead cases under the act of June 9, 1880 (21 Stat., 169). It appears that the practice of making proofs before the class of officers mentioned has been very extensive, and that until your decision the local land officers universally accepted such proofs, and your office issued patents thereon. Your decision, therefore, very naturally created alarm among settlers in the Territory, and called out correspondence and inquiry which resulted in your letter of the 9th ultimo to the register and receiver at Huron, Dak., modifying and explaining your former decision, so that it shall not be understood or regarded as retroactive in its effect and operation.

Upon a full consideration of the question presented I am led to a different conclusion from that reached by you. In my opinion the clerks authorized by section 1 of chapter 14 of the codified laws of Dakota are officers before whom proofs may properly be made as provided by the act of Congress of March 3, 1877 (19 Stat., 403), and the act of June 9, 1880 (21 Stat., 169).

The Territorial law above cited provides that any clerk whose appointment is authorized thereby "shall procure and keep a seal of the court for that county, and when courts are appointed therein shall perform all duties pertaining to that office, and shall keep his office at the county seat of his county."

As already indicated, your decision holds that, within the meaning of the language quoted, the clerks appointed in the several counties of a judicial district have no authority to take affidavits in pre-emption and commuted homestead cases, nor to take final proofs in homestead cases unless clothed with full powers as clerks of district courts by the appointment of such courts in their respective counties.

I do not so interpret the statute. As soon as a clerk is appointed he becomes, by the terms of the law, "a clerk of the district court," and as such I take it he is clothed with some authority and has some duties to perform. He is required to "procure and keep a seal of the court" for the county in which he has his office.

Wherefore a seal if it cannot be used? I do not think it is the intent of the law to intrust a seal to one who has no authority to use it. But the law not only intrusts the keeping of the seal to the clerk in each county, it *requires* him to procure and keep it at the county seat. Obviously this is because some official duties are imposed upon a clerk immediately upon appointment and qualification, and the seal is to authenticate those official acts, some of which may be the taking of proofs of the character herein alluded to.

The appointment of a clerk in any county makes the appointee an officer of the court from which he receives his appointment, and he is required to procure and keep a seal *because he is an officer of the court*. This is equally true whether the appointment be in and for a county in which a court holds its sessions or otherwise. It is not to be presumed that the law contemplates or requires a vain thing.

The Territorial statute (cited *supra*) does not say what the clerk shall not do, as your decision seems to argue.

The language of the law—"and when courts are appointed therein shall perform all duties pertaining to that office"—is not exclusive nor prohibitory, but is just the contrary. It clearly implies that a clerk of a district court has, as soon as appointed, certain duties to perform by virtue of his office, and then specifically says, that when a court is appointed in his county he shall perform *all* the duties of such office.

That is, it simply adds to the duties already imposed the additional duty of doing whatever may be necessary for a clerk to do as custodian of the records necessary to be kept in connection with the trial of cases in court.

If there were any doubt as to the general authority of clerks of district courts to administer oaths within their respective counties, that doubt is removed by chapter 20 of the code of the Territory, which authorizes such clerks to administer oaths within their respective counties. This authority is not postponed to the sitting of the court in the county, but vests immediately upon appointment and qualification.

Again, in support of your view that final proof in homestead cases cannot be made before the clerk of a district court in any county in which the court does not hold its sessions, you cite the provision of the act of Congress of March 3, 1877 (19 Stat., 403), that final proof "may be made before the judge, or in his absence, before the clerk of any court," &c.

You argue that a judge cannot be deemed to be absent from a place where he holds no court. I do not regard this view as justified by either the language or the reason of the law. The clerks in the several counties in which no district court is holden are as much clerks of the court under which they hold their appointments as if that court held its sittings in their respective counties, for the law (section 1 of chapter 14, Dakota Code) denominates each of them "a clerk of the district court," and, as I have said, requires them to procure and keep a seal, and authorizes them to act in their official capacity.

Being officers of the court, every official act is an act under and by the authority of the court, whether the judge be present or not. The judge may at any time appoint courts to be holden in any county in his district.

Until such appointment in any particular county, the judge is officially and in fact absent, and is represented by the clerk of the district court in that county. Every official act performed by said clerk is an act done in absence of the judge. Final proof made before such clerk is, therefore, in my opinion, clearly legal within the meaning of the act of Congress of March 3, 1877.

In addition to what has been said, I may add that I am unofficially informed that the question as to the authority of clerks of the class herein discussed has been before the district courts in Dakota, having

been raised by a motion to quash indictments based upon affidavits made before such clerks, and that the motion to quash was overruled by the district judge, whose decision was sustained by the supreme court of the Territory.

In accordance with the views herein expressed, your decision of January 15, 1884, is reversed, and you will recognize as legal and valid proofs of the character referred to.

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#### 7. NOTICE OF CONTEST.

##### *CONTESTED CASES—CONTINUANCE.*

The Rules of Practice imperatively require personal service when that can be obtained, and authorize notice to be given by publication alone only when personal service cannot be had.

Where there has been default in the matter of service or notice, but both parties appear at day of trial, the defendant may waive the informality, and does so if he proceeds to trial. But he is entitled to his full period of notice, and may demand a continuance if he has not had it.

*Commissioner McFarland to register and receiver, Niobrara, Nebr., July 2, 1883.*

GENTLEMEN: I am in receipt of register's letter of the 20th ultimo, inquiring whether continuances can be granted in contest cases where notice by publication failed to be given through inadvertence, and also what would be the effect of a failure to give notice by publication in cases where both parties appear at the appointed time.

You are advised that the Rules of Practice imperatively require personal service when that can be obtained, and authorize notice to be given by publication alone only when personal service cannot be had.

Where personal service has been made notice by publication is not required, and a postponement in order to make publication is unnecessary. But when service has not been obtained, or notice has not been published, as the case may be, the hearing may be continued, upon proper application and affidavit setting forth the facts, for the purpose of making service or giving notice by publication, as circumstances may require. Where there has been default in the matter of service or notice, but both parties appear at day of trial, the defendant may waive the informality, and does so if he proceeds to trial. But he is entitled to his full period of notice, and may demand a continuance if he has not had it.

**S. PLACE FOR TAKING TESTIMONY.***LOCAL OFFICERS.*

Without specific instructions from the Land Department, neither the register nor the receiver can legally take testimony or preside at the taking thereof in any place other than where the office of such register or receiver is located.

*Acting Commissioner Harrison to register and receiver, Valentine, Nebr., March 4, 1884.*

**GENTLEMEN:** This office is in receipt of a communication, dated the 25th ultimo, from Frank D. Hobbs, esq., inspector, &c., in which he incloses copy of a letter of February 5, 1884, addressed by him to the receiver of your office, and the reply of the receiver thereto dated on the 8th of the same month. From the tenor of the letter above referred to of the 5th ultimo, it appears that the inspector had been informed that the receiver had heard contest cases at places other than at the local office and that his expenses, as well as those of a clerk or clerks, were paid to and from Valentine by parties interested in the contests. The inspector stated in said letter that if such was the fact he concluded that the receiver had acted in ignorance of the regulations requiring hearings before local officers to be held at the *local office*, and closed his letter by asking the receiver for the facts in the premises.

The receiver, in his reply of the 8th ultimo, states that such reports are base fabrications and without foundation in truth; that the nearest approximation to such a thing was in the case of the final proof of one Amos Harris, wherein, after taking testimony one day, the parties and their attorneys insisted that some of their witnesses would not come to Valentine, and that hence the testimony of such witnesses should be taken at Ainsworth; that an agreement or stipulation was then drawn up by said parties that said testimony might be so taken, whereupon he—the receiver—consented and took the same for the accommodation of the parties, and in order to ascertain all the facts possible for the Government; that in such proceedings he had no thought of doing wrong; that his expenses were paid by himself and not by the parties in interest; that the clerk's hotel bill at Ainsworth was paid (but by whom paid he does not state). The receiver states that such are all the facts, and that in the future he will "read up the rules" and follow them strictly; that every attempt made for the accommodation of parties has been made the basis for fabrications and giving trouble, and that had he thought for a moment that he was in error in going to Ainsworth, he never should have done so.

The inspector, in submitting the matter, speaks very highly of the receiver, and is of the opinion that his action in taking testimony as aforesaid was occasioned more by unfamiliarity with the rules and regulations of this office, laid down for guidance of the local officers, than otherwise, and that hence he was led into error inadvertently.

From the foregoing, I am of the same opinion, and in disposing of the matter I have to state, that, without specific instructions from this office or the Department, neither the register nor the receiver can legally take testimony, or preside at the taking thereof, in any place other than the place wherein the office to which such register or receiver is attached is located, which, in the present instance, is Valentine, Nebr.

If the practice were permitted allowing local officers, or either of them, to take testimony elsewhere, it would doubtless give ground for ill-feeling on the part of those who the law provides may take testimony, in numerous cases, and be looked upon as an intrusion into their jurisdiction and perhaps give cause for numerous and serious complaints.

Your attention is called to circular letter M, dated March 23, 1883, copy herewith, in relation to fees, and also called to instructions issued by this office January 29, 1884, to the register and receiver at Huron, Dak. (Copp's L. O., vol. 10, p. 355), wherein the subject of illegal fees is fully discussed.

You will, therefore, be governed in accordance with the foregoing, and it is hoped that the act of taking testimony elsewhere than at Valentine will not be repeated.

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#### 9. RATES OF ADVERTISING.

*Commissioner McFarland to registers United States land offices, January, 1884.*

It having come to the knowledge of this office that excessive charges are made by the proprietors of newspapers in certain States and Territories, for the publication of notices of intention to make final proof under act of March 3, 1879, you are directed hereafter, in designating papers in which such notices shall be published, to designate only such reputable papers of general circulation nearest the land applied for, the rates of which do not exceed the rates established by State or Territorial laws for the publication of legal notices.

Approved by Secretary Teller, January 30, 1884.

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#### 10. FAILURE TO APPEAL IN TIME.

*Commissioner McFarland to registers and receivers United States land offices, July 23, 1883.*

GENTLEMEN: Great delay in adjudicating cases frequently arises from the neglect of local officers in not promptly reporting, at the expiration of the time allowed, whether or not appeals have been filed from decisions of this office. The same is true in cases of amendments.

Hereafter, at the expiration of the time allowed for appeal you will at once report whether or not an appeal has been filed; and in cases where amendments are authorized by this office, not more than sixty days should be allowed for that purpose, and if the amendment is not perfected by that time you will report the fact, returning the application.

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## V.—MILITARY RESERVATION.

### *ABANDONED—ENTRY—NON-RESIDENCE.*

#### *MCCAULEY v. NORDICK.*

Homestead entry allowed within an abandoned military reservation, notwithstanding the party never actually resided on his claim.

*Secretary Teller to Commissioner McFarland, April 17, 1884.*

SIR: I have considered the case of David McCauley *v.* Barney Nordick, as presented by Mr. McCauley's appeal from your decision of November 21, 1883, holding intact Mr. Nordick's homestead entry for the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 2, T. 134 N., R. 48 W., Fergus Falls, Minn.

It appears that Mr. Nordick made his entry October 24, 1882, alleging settlement June 15, 1881, and that Mr. McCauley applied October 27, 1882, to enter the SW.  $\frac{1}{4}$  of Sec. 2, alleging settlement April 15, 1871. The local office refused the application of Mr. McCauley because it embraced the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 2, which was covered by the prior entry made by Mr. Nordick, and a hearing was had to determine the rights of the parties.

The land covered by the above entry and application lies within the old Fort Abercrombie military reservation, which was opened for settlement by the act of Congress approved July 15, 1882 (22 Stat., 168). This act abolished the reservation and authorized the Secretary of the Interior—

To have the lands embraced therein made subject to town site, homestead entry, and sale, the same as other public lands: *Provided*, That the rights of all actual settlers entitled to the benefits of the homestead laws of the United States, who now occupy in good faith any portion of the land embraced within said reservation, shall date from the day of their actual settlement thereon; and in perfecting their titles thereto, under the homestead laws, the time such settlers have occupied and improved their said lands shall be allowed.

The testimony shows that McCauley in 1871 broke a few acres of land on his present claim, and that from such time forward he each year continued to break and cultivate said claim, so that in 1882 he "cropped" 42 acres and broke 25 acres more. In 1879 he built a house

on said land, at a cost of about \$200. But from the evidence it appears that he has never actually resided upon his claim.

Mr. Nordick settled on his claim February 23, 1881, and has since resided there, his improvements being worth about \$600.

It should be observed that Mr. McCauley's claim comprises a technical quarter-section lying in compact form, and that from the evidence it would appear he had cultivated a portion of the forty in dispute since 1879, his claim thereto being notorious at the time of Nordick's settlement.

On this state of facts, should Mr. McCauley's entry be admitted?

The special privileges conferred by the act opening this land for disposition do not in terms rest upon any requirement of residence, but are extended to "actual settlers" who "now occupy in good faith" any part of such lands. The long-continued period of uninterrupted occupancy and possession on the part of Mr. McCauley, accompanied with cultivation and permanent improvements, would preclude any imputation of a want of good faith in his occupancy. Mr. Nordick made his settlement with full notice of the claim and occupancy of Mr. McCauley, and, under the law that must govern this case, his attempted appropriation cannot be permitted to defeat the prior occupancy of Mr. McCauley.

Your decision is therefore reversed. The entry of Mr. McCauley is allowed, and Mr. Nordick's entry, in so far as it conflicts with the entry of Mr. McCauley, will be canceled.

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## VI.—PRACTICE.

### 1. AFFIDAVITS.

*JURISDICTION.—REV. STAT., 2294.*

ASHLEY D. STEPHENSON.

Where there is more than one court of original jurisdiction in a county, the clerk of each court is authorized to take preliminary homestead affidavits under Section 2294, Revised Statutes.

*Secretary Teller to Commissioner McFarland, March 6, 1884.*

SIR: I have considered the appeal of Ashley D. Stephenson from your decision of October 11, 1883, rejecting his application to enter under the homestead law the NE.  $\frac{1}{4}$  of Sec. 30, T. 2 N., R. 11 E., Montgomery, Ala.

You assign as a reason for the rejection the fact that the preliminary affidavit was made before the clerk of the county court, and hold that in order to meet the requirement of section 2294 of the Revised Stat-

utes said affidavits should have been made before the clerk of the circuit court.

Section 2294 provides that under certain circumstances it may be lawful for a homestead applicant "to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident."

This language would at first glance seem to point to a particular court; but, if so, how is it to be determined what particular court is meant?

I think the statute is broader in its application.

In almost all, if not all, the States there are in and for each county more than one court, each having its own peculiar duties and jurisdiction, and all having authority to administer oaths.

In Alabama, from which this case comes, there are in each county several courts.

The circuit court is one. Its jurisdiction extends over several counties, and it is required to sit in each county within its circuit at least twice in each year. It has a clerk in each county, whose office is at the courthouse, or within one mile thereof, in his county.

The court of probate is another, and the county court a third, in each county.

Of the two last named the judge of probate is by the law of the State *ex officio* clerk.

Each of these courts is, within its sphere and jurisdiction, "the court for the county," and a court having original jurisdiction.

It therefore follows that the clerk of each is "the clerk of the court for the county."

Section 2294 of the Revised Statutes (containing the language quoted) not specifying what or whether any particular court, to the exclusion of every other court, is contemplated, the clerk of which may take affidavits of the class named herein, it must, I think, be concluded that its requirements on this point are met when a preliminary affidavit has been made before the clerk of either of the courts mentioned. The law (section 2294) is permissive and beneficial, its purpose being to facilitate the *bona fide* settlement of the public lands. It should, therefore, be construed liberally, and so as not to hamper or embarrass applicants whom it is intended to benefit.

In this case the affidavit was made before the clerk of the county court, the judge of probate being *ex officio* such officer.

In my opinion it is valid under the law, and the application should be allowed.

Your decision is reversed.

*IN DAKOTA—PROBATE JUDGES.***GEORGE BRYANT.**

The affidavit required of applicants under section 2294, Rev. Stat., may be made before probate judges in Dakota when acting in a clerical capacity.

*Secretary Teller to Commissioner McFarland, April 10, 1884.*

SIR: I have considered the appeal of George Bryant, probate judge for Day County, Dakota, from your letter to him dated September 4, 1883, wherein you expressed the opinion that the affidavit required of applicants under the provisions of section 2294, Rev. Stat., cannot be made before a probate judge.

Although the Department does not ordinarily recognize the right of appeal, or consider a case wherein no appeal lay—as in this case, from a mere expression of opinion contained in a letter addressed to the appellant—I nevertheless deem it expedient to take cognizance of the appeal in question, in view of the exigency for a decision construing the statute cited, involving, as you advise me, a question of considerable public interest.

You base your opinion upon the very letter of the statute itself, which you construe literally, stating as reason therefor that ordinarily the affidavit required of the homestead applicant under section 2290 can only be made before the register or receiver, but that, under certain specified circumstances, section 2294 provides that “it may be lawful for him to make the affidavit required by law before the *clerk of the court for the county* in which the applicant is an actual resident.”

The language cited would at first seem to be restrictive in its scope, from the fact that the clerk of a particular court is designated before whom alone said affidavit can be made.

I think, however, its intendment is broader and susceptible of a more liberal construction. Section 1907, Rev. Stat. of the United States, provides that “the judicial power in \* \* \* Dakota \* \* \* shall be vested in a supreme court, district courts, probate courts, and in justices of the peace.”

Section 32, chapter 4, of the Code of Civil Procedure declares that “the probate courts and courts of justices of the peace possess only such jurisdiction as is conferred on them by the organic laws and the statutes of this Territory.”

Section 89, chapter 21, of the Revised Code of Dakota besides prescribing the mode of procedure, and conferring generally upon the probate courts in each organized county the ordinary limited jurisdiction of such tribunals, also provides that “they shall be courts of record, and shall have a seal, and the judge thereof shall also be clerk of the said court.” (See also section 2, chapter 1, of the Probate Code, touching the jurisdiction of probate courts.)

Section 6 of same chapter provides that “a judge of the probate

court, as contradistinguished from the probate court, may exercise out of court all the powers conferred upon him as judge." And by chapter 20, touching the "administration of oaths," probate judges are designated (*inter alia*) among the officers who are authorized to administer oaths.

Thus it appears that each of the probate judges in Dakota is, by virtue of the Territorial law, *ex officio* clerk of his own court; and as it is competent for him to exercise out of court all the functions conferred upon him by law as a judge, independently of those powers of limited jurisdiction specially conferred upon him as a judge of probate, I am of the opinion that he comes within the intendment of or answers the calls of the statute when he takes such aforesaid affidavits in his clerical capacity, as being to all intents and for all the purposes of the statute "the clerk of the court for the county in which the applicant actually resides."

Section 2294 of the Revised Statutes [containing the language just quoted] not specifying what or whether any particular court, to the exclusion of every other court, is contemplated, the clerk of which may take affidavits of the class named herein, it must, I think, be concluded that its requirements on this point are met when a preliminary affidavit has been made before the clerk of either of the courts mentioned. The law (section 2294) is permissive and beneficial, its purpose being to facilitate the *bona fide* settlement of the public lands. It should, therefore, be construed liberally, and so as not to hamper or embarrass applicants whom it is intended to benefit." (Ashley D. Stephenson, *ex parte*, wherein I rendered decision the 6th ultimo.)

Following these precedents, you will instruct the several registers and receivers to accept all such affidavits in question as may have been or which may hereafter be taken before judges of probate when acting in their clerical capacity (but not otherwise), as I think the same is permissible under and in furtherance of the intendment of the statute, to wit, to obviate the necessity of such applicants making long and often tedious journeys to the proper local office.

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## 2. AMENDMENT.

### RULE 4—CONTEST—AFFIDAVIT.

#### COOK *v.* NILSON.

Where a party seeking to contest an entry files his uncorroborated affidavit he should be allowed time to amend by filing corroborative affidavits, subject to any intervening adverse claim.

*Secretary Teller to Commissioner McFarland, November 13, 1883.*

SIR: I have considered the appeal of Milton B. Cook from your decision of October 25, 1882, in which you refuse to entertain his affidavit of contest, on the ground that he failed to file corroborative affidavits in support of his allegations, as required by rule 4 of the Rules of Practice.

It appears that Carl Nilson made homestead entry No. 3553, November 29, 1879, covering lots 2, 3, and 4 of Sec. 19, T. 35, R. 3, Olympia district, Washington Territory.

William Smith filed an affidavit of contest September 5, 1882, alleging abandonment of the tract by Nilson, which was returned to Smith as "being informal" by the district land officers, who allowed him thirty days to amend.

On September 22, 1882, Cook also presented an affidavit of contest, alleging abandonment of the land by Nilson, which was held by the district officers subject to the presentation of a formal application by Smith within the prescribed time.

On September 23, 1882, the amended affidavit of Smith was received at the district office, and Cook was notified that his contest affidavit was rejected.

Cook appealed from the ruling of the district officers, and you dismissed both cases, on the ground that neither Smith nor Cook had complied with the requirements of rule No. 4.

In the case of *Houston v. Coyle* (10 Copp's L. O., 224) it was held that, in consideration of being placed in possession of certain information and the payment of certain expenses, the Government holds the land in reserve, for the purpose of allowing the person that furnished the information and paid the expenses an opportunity to enter the land.

To secure an assurance of good faith on the part of the contestant a rule requiring his allegations to be corroborated by the affidavits of other persons has been prescribed by the Department.

Smith furnished sufficient information to give him a *prima facie* standing, and had deposited with the district officers the amount required as a deposit to initiate proceedings; to deprive him of an opportunity to complete his case, on the ground of a mere technicality, would prove an act of injustice.

Smith should be allowed to amend by filing corroborative affidavits, subject to any intervening adverse claimant.

Your decision is modified.

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### 3. APPEAL.

#### *IMPROPER DISMISSAL—CERTIORARI.*

JAMES MAHOOD.

Failure to appeal because of temporary closing of the local office should not injure the rights of a claimant who appeals after the time therefor expired. Certiorari not necessary.

*Secretary Teller to Commissioner McFarland, May 19, 1884.*

SIR: In the matter of the motion for certiorari by James Mahood, on the ground that you improperly dismissed his contest against Water-

town (now Aberdeen) homestead entry, No. 5,995, for the SW.  $\frac{1}{4}$  of Sec. 34, T. 122, R. 63, Dakota, and refused to allow an appeal, for the reason that it was not filed within sixty days, it appears from the papers before me that your records now show that the receiver of the local office informed Mahood that he could not file his appeal whilst the office was temporarily closed, and that this was the cause of the delay. If this be so, certiorari is not necessary, and you are directed to allow the appeal. If it be not so, neither appeal nor certiorari should be allowed, and you will please inform Mr. Mahood that his motion is dismissed. \* \* \*

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#### 4. ATTORNEY.

##### *NOTARY PUBLIC—DAKOTA TERRITORY—WHEN DISQUALIFIED.*

###### *TRAUGH v. ERNST.*

A notary public disqualified for administering oaths in certain cases is thereby disqualified under the United States law. Attorneys of record in cases cannot as notaries public administer oaths in those cases. They cannot act officially and professionally at the same time.

*Commissioner McFarland to register and receiver, Huron, Dak., September 7, 1883.*

GENTLEMEN: I have received your letter of the 23d ultimo, transmitting the appeal of A. M. Traugh from your action rejecting his application to contest the timber-culture entry of Jacob L. Ernst, No. 9,831, made August 17, 1882, for the SE.  $\frac{1}{4}$ , 1, 109, 67.

Traugh presented contest affidavit, accompanied with an application to enter the land, on August 18, 1883. Another contest against the same entry was filed at the same time by Hugh McLeod. The register decided the applications simultaneous, whereupon attorneys for McLeod moved to dismiss Traugh's contest on the ground that the affidavit of contest was insufficient, "it being sworn to before the attorney of contestant, he not being an official authorized to take oaths where the land is located."

The register held in his decision—

That the office could not recognize the authority of a notary public to administer oaths to a timber-culture affidavit when such notary is an attorney for the contestant. The code of Dakota regulates the administering of oaths when the notary is likewise an attorney, and especially cuts off the authority of such notary when the circumstances are as indicated, to wit, when he is an attorney of the claimant.

You accordingly rejected Traugh's contest, and from that rejection Traugh, by his attorneys, Messrs. Huntington Brothers and A. G. Harris, takes an appeal, filing specification of errors and argument.

The notary before whom Traugh's affidavit of contest was made was

Mr. Charles H. Huntington, a member of the firm of Huntington Brothers, attorneys in the case.

The timber-culture act provides that the affidavit of applicant to enter may be made before \* \* \* any "officer authorized to administer oaths in the district where the land is situated."

Rule 3 of the Rules of Practice of this office provides that in contest cases an affidavit must be filed by the contestant with the register and receiver, fully setting forth the grounds of contest. Rule 4 provides for corroborating affidavits in cases therein mentioned. No officer is specifically designated as a proper officer before whom these affidavits should be made. They may be made before any officer authorized to administer oaths in the district where the land is situated.

Whether an officer is qualified to administer oaths or not is to be ascertained by the law, whether State, Territorial, or national, as the case may be, under which his authority is claimed to be derived.

Section 1778 of the Revised Statutes of the United States provides that notaries public may administer oaths in all cases in which, under the laws of the United States, justices of the peace of any State or Territory may do so.

The qualification of justices of the peace and of notaries public to administer oaths generally comes from local law, and not from Federal authority. They are authorized under certain laws of the United States to administer particular oaths by virtue of their general qualification under State or Territorial laws.

Where, as in the timber-culture laws, the Federal statute provides that an affidavit may be made before any officer authorized to administer oaths, such affidavits may be made before any State or Territorial officer who is so authorized by the laws of the State or Territory. If he is not so authorized, he cannot take such affidavit. If there are any restrictions upon the exercise of his official functions under local laws, those restrictions render his official acts under the laws of the United States without authority in any case to which such restrictions are applicable.

Section 468 of the civil code of Dakota provides that *affidavits* may be made before any person authorized to take *depositions*.

Section 473 provides that the officer before whom depositions are taken "must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

A notary public, or other officer holding office under the laws of Dakota, is not therefore authorized by those laws to take affidavits or depositions in any case in which he is employed as an attorney, or in which he is otherwise interested, or if he is a relative of either party.

Not being authorized under the laws of Dakota to administer oaths in any such case, he is not qualified under the laws of the United States to administer such oaths.

But if the Territorial code did not prohibit attorneys from taking affi-

davits in cases in which they are interested, they could not be allowed to do so in the practice of this office. The reason of the law is the reason of the rule, and the rule has heretofore been established in respect to clerks of courts, and is equally applicable to other officers. An officer who is also an attorney at law or in fact cannot act officially and professionally at the same time. His official acts must be free from personal interest or they cannot be recognized as entitled to due faith and credit.

Attorneys of record in cases before the courts are regarded as disqualified from administering oaths in such cases, and attorneys in cases before this office must likewise be so regarded.

Your decision is approved, and the appeal dismissed.

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*DISBARRED—NOTARY PUBLIC.*

An attorney disbarred from practice is not prevented thereby from performing his duties as a notary public.

*Commissioner McFarland to H. R. Vaughn, Pembina, Dak., October 1, 1883.*

SIR: In reply to your letter of the 22d ultimo, I have to advise you that an attorney disbarred from practice before this and district land offices is not thereby prevented from exercising the duties of notary public, and such fact of itself does not in any way affect affidavits taken before him as such notary.

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*POWER OF ATTORNEY—DISBARRED—SUBSTITUTION.*

**BERRY AND EMERY.**

A power of attorney given to an attorney while disbarred may be used after his reinstatement. Such attorney cannot substitute another attorney unless his power contains a provision to that effect or the substitution is ratified by the principal.

The oath required by circular instructions of December 15, 1882, must accompany a soldier's filing.

*Secretary Teller to Commissioner McFarland, April 12, 1884.*

SIR: I have considered the appeals of George Berry and Horatio G. Emery from your decision of April 19, 1883, rejecting their respective applications (through an agent) to file soldiers' declaratory statements upon certain tracts in the Huron, Dak., land district.

It appears that January 31, 1883, the parties, respectively, appointed James L. Ayers, of Huron, Dak., their agent to file for them soldiers' declaratory statements upon the tracts in question. You rejected the applications made under these powers of attorney, for the reason that Ayers was disbarred from practice as an attorney before the Land De-

partment December 22, 1882, and was not reinstated until April 13, 1883, and that the powers to Ayers, executed pending his disbarment, could not be recognized.

Perhaps, in view of Ayers's reinstatement because of doubt of the truth of the allegations upon which he was disbarred, this objection might be overlooked were there not other fatal ones.

It appears that by a power of attorney dated February 14, 1883, Ayers substituted for himself and appointed one Crofoot to act as the agent of Berry and Emery in the matter of these homesteads. There was no power of substitution in either of the powers from Berry and Emery to himself, and Ayres was therefore without authority to substitute Crofoot. Under section 2309 of the Revised Statutes a soldier's declaratory statement may be filed "as well by an agent as in person." But in this as in other cases an agent cannot appoint a sub-agent unless expressly authorized so to do. In such case the sub-agent appointed without authority becomes only the agent of the agent, and not the agent of the principal, unless his appointment is ratified and confirmed by the principal, of which there is no evidence in this case. The substitution of Crofoot is therefore without force, and his acts cannot be recognized.

Besides, under your circular of December 15, 1882, the agent in this class of cases is required to file his own oath that he has no interest, either present or prospective, direct or indirect, in the claim; that the same is filed for the sole benefit of the soldier, and that no arrangement has been made whereby the agent has been empowered at any future time to sell or relinquish such claim, either as agent or by filing an original relinquishment of the claimant. This oath has not been filed either by Ayres or Crofoot in either of these cases. For these reasons I affirm your decision and dismiss the appeals.

The cases of Berry and Emery are distinct cases and have no relation to each other, but you transmit them as one. In order that each case may have its appropriate record status, and thus avoid confusion of names, dates, and rulings upon the docket of this Department, you have been heretofore requested to direct that each separate case be transmitted by itself, and I again call your attention thereto.

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## 5. CERTIORARI.

*SHOWING NECESSARY.*

**WILLIAM FULLER.**

The applicant for a certiorari must invariably make a *prima facie* showing of matter for supervision and requiring departmental intervention.

*Secretary Teller to Commissioner McFarland, October 3, 1883.*

SIR : I have considered the application of William Fuller (filed in the local office, Grand Forks, Dak., the 18th ultimo, by J. G. Hamilton,

his attorney) for a certiorari under Rule 83 of Practice, in re McQuinn v. Fuller, involving timber-culture entry No. 392 of the NW.  $\frac{1}{4}$  of Sec. 33, T. 160, R. 52, Grand Forks, Dak.

The paper is duly verified, but does not state what action, if any, has been had in the premises, nor is there filed a copy of any ruling, order, or decision at any time made by you therein, as a basis for specifications of error on the part of the applicant.

It should be observed that the applicant for a certiorari must invariably make a *prima facie* showing of matter subject to supervision, and requiring departmental intervention to prevent such undue haste in the issuance of patents or otherwise under your decisions as might jeopard the rights of parties litigant.

The matter subject to supervision must be so presented that a reasonable presumption is raised in the eye of the law that there has been such error or oversight, or at least there must be such showing in the application as will convince the Department that a proper administration of the public business requires its intervention, in order to prevent undue haste, or possibly injury to important and valuable interests. (Wight v. St. Bernard M. Co., 9 Copp, 9.)

But from applicant's own meager showing it appears that he has no legal status before this Department, and this by reason of his failure to appeal from some decision of yours, which, *ipso facto*, is a finality.

The application is not within the rule, and is accordingly denied.

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## 6. CONTEST.

### SECOND—FIRST UNADJUDICATED.

#### SNAVELY v. FLICK.

A second contest cannot be initiated against an entry until the first contest has been finally adjudicated, except where such first contest is illegal in its inception.

*Commissioner McFarland to register and receiver, McCook, Nebr., October 25, 1883.*

**GENTLEMEN:** For informality in the manner of service of notice, and other errors appearing in the record, this office, under date of July 21, 1883, dismissed the case of Rufus M. Snavely v. John Flick, involving homestead entry No. 1,332, made June 21, 1879, upon the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , 21, 2 N., 30 W., and allowed the plaintiff sixty days within which to appeal from its said action.

I am now in receipt of your letter of the 3d instant, from which it appears that on September 24, 1883, Morillo A. Spaulding applied to contest said entry, but his application was rejected on the ground that the prior case of Snavely v. Flick was still pending and undecided—the sixty days allowed Snavely within which to appeal not having then expired. It further appears that on October 1, 1883, the contestant,

Snavely, appeared at your office and filed waiver of right of appeal, whereupon Daniel A. Clements applied to contest said entry.

You ask for instructions on the following points:

First. Was the entry subject to Spaulding's contest?

Second. If not, did the waiver by Snavely, of his right of appeal, render the entry subject to contest by the next legal applicant?

In reply to your questions I have to state that it was held by this office, in the case of Schneider *v.* Bradley (9 Copp, 64), that, "as a condition precedent to the right of initiation of a second contest against the same entry, the former case must have been finally adjudicated; and this state of a case is not reached until determination of the question of appeal, either by waiver, by failure, or by prosecution to a final decision." (*Vide* also ruling of the Department in Van Ostrand *v.* Lange, 9 Copp, 7.)

It is true that it was held by the Department in the case of Bivins *v.* Shelly (10 Copp, 212), that a pending contest is no bar to the initiation of another contest against the same entry; but it will be observed that this is so only, "where the first contest is not supported by law"—is illegal in its inception.

A contest that was properly instituted, but dismissed from some defect or informality subsequently arising in the proceedings, would not therefore come within the purview of said ruling.

You will, therefore, be governed accordingly in the disposition of the cases referred to in your letter. \* \* \*

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*STRANGER TO THE RECORD—AFFIDAVIT—AMENDMENT.*

*MAY v. HAM.*

The motion of a stranger to the record in case of contest should not be accepted.

Where there are two witnesses to the affidavit initiating contest, one of whom is an attorney in the case, the contest should not be dismissed, as one witness is enough.

Informalities in affidavit of contest can only be taken advantage of on the day set for hearing, and then only by a party to the record; if not thus taken advantage of, the informalities are considered waived. If objection is made, the affidavit may be amended, or the motion allowed.

*Commissioner McFarland to register and receiver, Huron, Dak., October 31, 1883.*

GENTLEMEN: I am in receipt of your letter of the 12th instant, transmitting the appeal of Theron R. May, from your action rejecting his contest against timber-culture No. 5,462, by Albert C. Ham, for SE.  $\frac{1}{4}$  17, 112, 63, made September 10, 1880.

The facts are as follows: May filed said contest January 8, 1883, alleging as follows: "That the said Albert C. Ham has wholly abandoned said tract, for more than one year since making said entry," &c.; this you accepted, and ordered hearing thereon for October 9, 1883.

On September 11, 1883, upon a motion by John Carroll, a stranger to the record, you dismissed May's contest, and made thereon the following annotation, viz :

Within contest dismissed; affidavit of contest does not set up grounds sufficient for a cause of action; allegations not specific in this; the party does not set up wherein the claimant has not complied with the tree claim law, and for the reason that one of the witnesses to affidavit of contest is an attorney in the case.

From this action May appeals.

On reviewing the case, I think the appeal well taken, as you have been repeatedly instructed not to accept a motion from a stranger to the record, also the fact that one of the witnesses to the affidavit of contest is an attorney in the case does not invalidate the same, as one witness is sufficient.

When a contest is by you accepted and hearing thereon ordered, any informality in the affidavit of contest can only be taken advantage of on the day set for hearing, and then only by a party to the record.

Your proper course should therefore have been to await the day set for hearing, and if the defendant failed to take advantage of the informality, such informality should have been considered waived (see Gould v. Weisbecker, C. L. O., vol. 9, p. 151); but should the defendant take advantage of the same, and make a motion to dismiss thereon, your proper course should be, either to grant the motion or allow the contestant to amend his affidavit so far as to make the allegations specific. (See Austin v. Rice, C. L. O., vol. 9, p. 151.)

As the day set for hearing is now passed, and as the contestant seems to be acting in good faith, you will allow him to amend the charges and proceed thereon.

Inclosed find the affidavit of contest by May, and proceed as above directed.

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*WITHDRAWAL OF CONTESTANT—DEPOSIT FOR EXPENSES—SECOND CONTEST.*

A motion for withdrawal of contest, whether verbal or written, at or before the day of trial is only an interlocutory proceeding, and will be decided on the day of the trial.

Money deposited to meet the expenses of a contest should not be refunded until the contest is finally determined; only the balance unexpended should then be returned.

A second contest cannot be initiated until the first one is properly ended.

*Acting Commissioner Harrison to register and receiver, Niobrara, Nebr., November 20, 1883.*

GENTLEMEN: I am in receipt of the receiver's letter of the 26th ultimo, making inquiry whether or not where a contest is regularly instituted and withdrawn by the contestant prior to the day fixed for

hearing, the local officers are warranted in allowing another contest to be instituted against the same tract by any *other party* between the day of such withdrawal and the day of hearing; also is the receiver authorized to return the money deposited to defray expenses of contest at the time of such withdrawal of contest, or on day of hearing? The case of *De Laney v. Bowers*, reported in Copp's L. O., vol. 10, p. 67, appears to answer the first inquiry in the negative. In that case it was held that, "when a contest has been regularly instituted, and the contestant withdraws at or before the day fixed for trial, he will be regarded as in default, and the case will proceed and be decided accordingly"; in other words, that a motion for withdrawal of contest, verbal or written, whether at or before the day set for trial, is only an interlocutory proceeding, and "the case will proceed and be decided accordingly," that is, on the day of trial. Under this view of your inquiry, and well-established rules of common-law practice, in the absence of any law establishing a different rule, it would be manifestly improper to allow another contest to be instituted upon a tract before a prior one, legally instituted, was disposed of. The foregoing seems also to answer the second inquiry as well, for the reason that receivers are not authorized to return money deposited to defray expenses of contest until the contest is withdrawn or other final action taken—decided—on the day of trial, and then only the unexpended balance. Any other course of procedure is liable to confuse, to be misunderstood, and often vexatious.

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*RULE NO. 1 OF PRACTICE—CHANGE OF ENTRY—IRREGULAR HEARING.*

**JOHNSON v. BURKE.**

Practice rule 1 allows the initiation of contests against alleged abandoned or forfeited homestead or timber-culture entries by any person, whether in interest or not, but in all other cases (including pre-emptions) only by a party in interest.

In view of the irregular hearing in this case the contestant acquired no rights and the timber-culture entry, made after relinquishment of a pre-emption claim by the contestee, is allowed to stand.

*Secretary Teller to Commissioner McFarland, November 22, 1883.*

SIR: I have considered the case of *John Johnson v. Dominick J. Burke*, involving the NW.  $\frac{1}{4}$  of Sec. 25, T. 124, R. 46, Benson, Minn., on appeal by Johnson from your decision of October 30, 1882, dismissing the contest.

It appears that January 29, 1881, Burke filed pre-emption declaratory statement for the tract, and that October 4 following Johnson filed an affidavit of contest against him, alleging his abandonment and change of residence from the tract, and his failure to settle on and cultivate it as required by law.

Practice rule 1 allows the initiation of contests against alleged aban-

doned or forfeited homestead or timber-culture entries by any person, whether in interest or not; but in all other cases (including pre-emptions) *only* by a party in interest. When Johnson initiated this contest he was a stranger to the record and without interest. His contest was, therefore, irregularly brought and irregularly allowed by the local officers, and could acquire no validity except by consent of Burke, which does not appear.

Besides, as it does not appear that notice of the contest was served on Burke, and he never waived the want thereof, the subsequent proceedings were wholly without effect.

It appears also that upon January 4, 1882, the day assigned for the hearing, Johnson moved for a continuance, which was refused, and the case was dismissed, whereupon Burke filed a relinquishment of his pre-emption claim and made timber-culture entry of the tract. Upon January 6 Johnson applied to enter the tract under the homestead law, which was refused by reason of Burke's entry.

The appeal raises sundry questions growing out of the last-mentioned facts. Had the contest been a regular and valid proceeding, Johnson would have acquired a preference right to enter the tract upon Burke's relinquishment, filed pending the contest under the act of May 14, 1880 (*Johnson v. Halvorson, Copp, July, 1881*), but it being irregular and invalid, and Johnson having acquired no right thereby, Burke had the right to relinquish his filing as he pleased, without reference to any question or right growing out of the contest, and thereafter to make his timber-culture entry. This was an appropriation of the tract, and Johnson's subsequent application was properly rejected.

Your decision is affirmed.

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*STRANGER TO RECORD.*

*HANSON v. HOWE.*

It is contrary to the law and practice to permit the dismissal of a contest regularly initiated merely on the motion of a stranger to the record, without notice to the contestant, and prior to hearing.

*Secretary Teller to Commissioner McFarland, April 24, 1884.*

SIR: I have considered the case of *Nels B. Hanson v. John K. Howe*, as presented by the appeal of George M. Mills from your decision of September 21, 1883, overruling his motion to dismiss the contest initiated by Hanson against Howe's timber-culture entry No. 4,662 (Sioux Falls series) for the SE.  $\frac{1}{4}$  of Sec. 15, T. 112, R. 60, Huron, Dak.

Howe made his entry June 7, 1880, and some time in August, 1883, Hanson began contest, alleging in his affidavit "that the said John K. Howe has wholly abandoned said tract for more than one year since making said entry and next prior to the date herein; that the said

tract is not cultivated by said party as required by law; that he has failed to break five acres upon said tract."

August 13, 1883, the local office issued notice for publication, directed to Howe, and fixing the day for hearing on October 8, 1883.

August 29, 1883, the attorney of George M. Mills, who desired to contest Howe's entry, appeared at the local office, and, so far as the record shows, without notice to Hanson, moved the dismissal of Hanson's contest, on the ground of the indefinite nature of the allegations made in his affidavit of contest. The motion was sustained and Hanson appealed.

You held that the contest should not have been dismissed for the defect existing in the affidavit, that Hanson should have been permitted to amend, and directed the local office to allow Hanson to proceed with his contest. Mills appealed.

In all respects, save the one above noted, Hanson appears to have fully come within the law and the rules regulating the initiation of timber culture contests. In pursuance of your decision he furnished, on October 8, 1883, evidence showing that Howe had failed to comply with the law in the matter of breaking, cultivating, and planting, and the local office, on such showing, recommended the cancellation of Howe's entry. Howe made default, and no appeal was taken on his behalf from the decision of the local office.

Hanson's affidavit had been accepted and notice issued thereon. It was broad enough in its allegations to sustain a charge respecting Howe's failure to comply with the law, hence, under the circumstances, amendment was not necessary. The only person entitled to complain of a want of particularity in the affidavit was Howe, but he made default. If Howe on the day of hearing had appeared and objected to proceeding under the information in its original form, and his objection had been held good, the right of amendment would have been accorded to Hanson. If Hanson in his amended pleading set forth new matter, it might have furnished proper grounds for a continuance. This being true, it follows that Mills had no right to be heard at any stage of the proceedings. To permit the dismissal of a contest regularly initiated, on the motion of a stranger to the record, without notice to the contestant, and prior to the day of hearing, would be to adopt a rule contrary to all procedure in courts of law, that would lead to great confusion in the practice before your office and this Department, and effectually deprive the original contestant of his day in court.

With the modification indicated your decision is affirmed.

On the receipt of the papers herewith returned, transmitted with your letter of February 25, 1884, you will take such action on the evidence submitted by Hanson as to you seems proper.

**7. EXAMINATION OF RECORD.**

An attorney or other person who has not entered an appearance in a contest case, or who has no direct interest therein, not permitted to inspect papers in such case.

*Commissioner McFarland to register and receiver, Huron, Dak., September 28, 1883.*

GENTLEMEN: In response to the register's letter, dated Washington, D. C., September 21, 1883, asking to be advised whether an attorney or other person who has not entered an appearance in a contest case, or who has no direct interest therein, can have the privilege of inspecting papers in such cases, I have to state that such persons cannot have such privilege, and that you have the authority to refuse to recognize them under these circumstances.

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**8. FEES.*****OLD CONTESTS—NEW LAND OFFICES.***

Decisions relating to contests involving land transferred to a new office should, when received at the old office, be promptly forwarded to the new. The fees for issuing notices in such cases belong to the new register.

*Commissioner McFarland to register and receiver, North Platte, Nebr., October 24, 1883.*

GENTLEMEN: It occasionally happens where a new district land office has been established, embracing land that was formerly included in the district of some other office, that the decisions of this office, involving cases covering land situate in the new district, are inadvertently mailed to the old or former office.

In such cases it is the duty of the local officers to forward such decisions immediately to the new office, and promptly notify this office of such fact.

The foregoing is promulgated because of a letter, dated the 13th instant, of which I am in receipt, from the register of the lately established district land office at Valentine, Nebr., wherein he states that on the opening of that office some fifteen contests were transferred there from your office, but that the notice of cancellation by this office of the entries involved therein having erroneously been sent to your office, the register thereat claims that the fee for notice to the parties of cancellation belongs to him.

But the register of your office is not so entitled, for it is not within his jurisdiction, but that of the register of the new office at Valentine, to issue such notice.

Therefore, in like cases hereafter arising, you will be governed accordingly.

*OF WITNESSES.***WEAKS v. COBB.**

Witnesses to a land office contest are not summoned, nor is a subpoena issued.

The question of paying fees to witnesses is one that does not concern the local officers.

*Acting Commissioner Harrison to register and receiver, Natchitoches, La., November 23, 1883.*

GENTLEMEN: I am in receipt of the receiver's letter of the 18th ultimo, in which he refers to the case of D. B. Weak v. J. B. Cobb, involving homestead entry No. 2,196, and states that defendant had two witnesses, who appeared at your office on the day of trial, who did not testify, but who nevertheless claimed pay for attendance under summons from the contestant. He asks whether the contestant is required under the rules to pay said witnesses their fees. He also asks to be informed whether or not the fees of the witness on both sides are incident to a contest, and required to be paid by the contestant.

In reply, I have to inform you that in cases before local offices the witnesses are not summoned; there is no such thing as a subpoena for witnesses in such cases. The parties are notified to appear with their witnesses. The appearance of the witness is voluntary.

This office does not assume to decide, as between the party and his witnesses, whether or not there is any obligation to pay witness fees.

Rule 59 of the Rules of Practice, prescribes what costs, and what costs only, can be charged to the parties, and witness fees are not included therein.

Your attention is invited to said rule, and I am of the opinion that the questions propounded by the receiver are ones over which you need not give yourself any anxiety.

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**9. FINAL PROOF.****R. S. 2294—ALABAMA—CIRCUIT COURT.**

The court referred to in section 2294 Rev. Stat., is in Alabama the circuit court. Under act of March 3, 1877, certain proof may be taken before the judge or clerk of any court of record.

*Commissioner McFarland to Mr. B. M. Stevens, judge of probate, Elba, Ala.*

SIR: I am in receipt of yours of the 27th and 30th ultimo, petitioning for reconsideration of my decision of August 20, 1883, holding that "the clerk of the court" named in section 2294 Rev. Stat. refers to the clerk of the *circuit* court, and not of the *county* court.

In reply I have to state that this office has always held that the statute alludes to the court having original jurisdiction, &c. By the code

of Alabama the county court has original jurisdiction—concurrent with the circuit and city courts—of misdemeanors; and the circuit court has original jurisdiction of all felonies and misdemeanors, and of such actions and suits at law as are not cognizable before a justice; thus clearly establishing the fact that the latter court is, in your State, paramount to the former, and is “the court”; therefore I cannot see any valid reason for changing my opinion.

Under the act of March 3, 1877, which is amendatory to section 2291 Rev. Stat., final proof may be made before the judge of the court of probate, it being regarded as a court of record; and under act of June 9, 1880, amendatory to section 2262 Rev. Stat., the final affidavit in pre-emption and homestead entries may be made before the clerk of the county court or of any court of record.

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#### PROBATE JUDGES.

What proofs and papers in land entries may be executed before judges of probate courts.

*Commissioner McFarland to J. B. Eaton, Devil's Lake, Dak., February 15, 1884.*

SIR: In reply to your letter of the 4th instant, relative to the authority of probate judges in Dakota to take final proofs in homestead and pre-emption cases, I have to state that as probate courts are courts of record, the judge of probate is authorized, in his capacity as “judge” to take affidavits in final homestead cases, and that probate judges acting as clerks of their own courts are authorized, as such clerks, to take final affidavits in pre-emption and commuted homestead cases. They have, however, no authority to take such affidavits in either case at any other place than the county seat at which the court is holden.

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#### 10. HEARINGS.

##### RULE 5—CONTESTS.

*CORNO v. GJERBERG.*

Rule 5 applies to hearings in contests between homestead claimants and between homestead and pre-emption claimants also.

*Commissioner McFarland to register and receiver, Crookston, Minn., July 11, 1883.*

GENTLEMEN: On May 9, 1883, Owen Corno made homestead entry No. 8,762 for NE.  $\frac{1}{4}$  7, 151, 43, his affidavit showing him to be a duly qualified entryman.

On May 31, 1883, Johan O. Gjerberg made homestead entry No. 8,877 for said land, alleging in his affidavit that he had “settled upon and

improved said land on the 7th day of May, 1883," and claiming the benefit of said settlement and improvement. The land is of the unoffered class.

On June 12, 1883, Corno executed an affidavit of contest against Gjerberg's entry, alleging—

That the said Johan O. Gjerberg had not settled upon and improved said tract on the 7th day of May, 1883. That all the work he had ever done on the land above described was to assist in cutting a road across one corner of said land in 1882, in the summer, and that said entry was made in fraud of the rights of this affiant, who had made homestead entry No. 8,762 for said land on the 9th day of May, 1883.

This affidavit was filed in your office June 21, 1883, and is corroborated by two witnesses.

With your letter of June 22, 1883, the affidavit of contest was transmitted to this office, and you say :

As we are in doubt whether Rule 5 of Rules of Practice covers this case, we forward for instructions.

By the second paragraph of the Rule 5, referred to, registers and receivers are authorized to order hearings in "contests between homestead and pre-emption claimants." The language of the rule is such, that a question respecting its meaning might well arise, viz: whether it is intended that the district officers may order hearings in contests between homestead claimants and homestead and pre-emption claimants, or whether their authority is by it restricted to ordering hearings in contests between homestead and pre-emption claimants only. For your information and guidance in future, I will state that this office construes the rule to apply to hearings in contests between homestead claimants, also between homestead and pre-emption claimants. This case, coming therefore within the rule, is returned herewith for your action.

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*PREPARED TESTIMONY—CROSS-EXAMINATION.*

*DE MOTT v. DAY.*

A hearing may be had on testimony prepared by plaintiff's attorney in his office, if accepted by defendant's attorney, with privilege of cross-examination.

*Acting Commissioner Harrison to register and receiver, Bloomington, Nebr., December 20, 1883.*

**GENTLEMEN:** I have considered the case of *Edwin De Mott v. Almira M. Day*, involving the latter's homestead entry No. 9,438, made October 19, 1881, upon the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  33, and W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  34, 2 N., 22 W., on appeal from your decision dismissing the case.

It appears that when the case was called for trial the plaintiff's attorney submitted the written testimony prepared by him at his office, of plaintiff and his witnesses, with a proposition to permit the defendant

to cross-examine the said witnesses; that the proposition was agreed to by defendant, but, notwithstanding, you rejected such testimony; whereupon, the plaintiff failing to introduce any other evidence, you dismissed the contest on motion of defendant; and it is from said action that the plaintiff appeals to this office.

Your decision was based on the ground that when both parties appear for trial, as was the case in the present instance, the examination must be made orally in the presence of the register and receiver, and that the testimony must be written down by one or the other of said officers.

Such is the regular course of procedure, but there is no objection to parties stipulating to waive oral examination before the local officers and submitting an agreed statement of facts or testimony taken in the manner and with the reservation hereinbefore mentioned.

Hence, I think the evidence offered by plaintiff's attorney should have been received by you, on agreement of defendant to accept the proposition of the former to cross-examine.

The case is therefore remanded for further trial, and you are instructed to allow the introduction of the evidence proffered by the plaintiff's attorney, with privilege of cross-examination by defendant of plaintiff and his witnesses, as agreed upon by the parties.

At the proper time report action taken.

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*HOUR OF DAY—ADJOURNMENT.*

*CROSS v. BOWMAN.*

Where the local officers fail to fix the hour of day to which a hearing is adjourned, the parties have the entire day in which to appear.

*Commissioner McFarland to register and receiver, Oberlin, Kans., January 3, 1884.*

GENTLEMEN: I have considered the case of John H. Cross *v.* Charles H. Bowman, involving the latter's timber-culture entry, No. 2,234, made August 29, 1878, upon the SW.  $\frac{1}{4}$ , 28, 2, 29. The case is before me on appeal by the plaintiff from your decision dismissing the contest.

The contest, it appears, was instituted April 28, and the trial set for July 26, 1883, at 10 o'clock. When the case was called on the latter date both parties appeared by attorney. The attorney for defendant moved a dismissal of the contest on the ground that, when instituting contest, plaintiff failed to file application to enter, as required by section 3 of the act of June 14, 1878 (*Bundy v. Livingston*, 9 Copp, 173). Whereupon plaintiff produced evidence showing that application to enter under the timber-culture law had been filed by him, as required by said act. You therefore overruled defendant's motion, and upon agreement of counsel continued the case to September 24, 1883. At 50 minutes past 11 o'clock, a. m., on that day the attorney for defend-

ant appeared and filed a motion to dismiss because the plaintiff was in default.

This motion you granted.

At 1 o'clock the same day plaintiff appeared, by his attorney, and declared himself ready for trial. On October 16, 1883, an appeal was filed by him from your decision dismissing the contest; and in support of his appeal he makes the point that as no time was fixed when the case was to be called on September 24, 1883, he was not restricted to any particular hour on that day in which to enter an appearance.

On the other hand it is urged by defendant that in the absence of any fixed time the case stood for trial at the same hour set for the calling of the case on the day of adjournment, viz., at 10 o'clock a. m.

The Rules of Practice prescribe that notice of the *time* and place of hearing shall be given. This rule applies as well to adjourned as to original hearings, and the practice in the one case should be the same as in the other. In neither case should rights of parties be prejudiced by the adoption of strict technical rules outside the Rules of Practice, nor beyond a reasonable discretion within those rules.

As you did not fix the hour to which the hearing was adjourned in this case, and as the plaintiff actually appeared, as before stated, it is my opinion that you erred in dismissing the contest under the circumstances.

Your decision is accordingly reversed, and the case remanded for hearing upon its merits.

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#### 11. NOTICE.

##### *OF CONTEST—TO HEIRS.*

##### *DENNY v. TAYLOR'S HEIRS.*

The notice of contest in this case should have been served upon the several heirs, and not upon the administrator only. Notice served upon one of the heirs is not sufficient.

*Commissioner McFarland to Curtis & Burdett, Washington, D. C., July 31, 1883.*

**GENTLEMEN:** Your letter of April 14 last was duly received, asking in behalf of Francis M. Denny, for whom you appear as attorneys, a review of my decision of October 30, 1882, dismissing the case of said Francis M. Denny *v.* the Heirs or Devisees of Ralph Taylor, deceased, involving homestead entry No. 1,492, made by said Taylor May 31, 1879, upon the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , 2, 46 N., 19 W., Duluth, Minn. My said decision was based on the ground that the notice of contest was defective, in that it was served upon the administrator instead of upon the heirs or legal representatives of the deceased homestead claim-ant.

Your request for review is made on the claim that Denny is a poor man and unable to undergo the expense necessary to meet the requirements of my said decision; that he has taken up his residence and placed valuable improvements on the land; that due notice was served upon George Taylor, who, besides being the administrator, is also a brother and an heir of the deceased homesteader; and that no one is contesting the right of Denny to make entry.

While recognizing the hardship which, under the circumstances presented by you, will necessarily be entailed upon your client, by compelling him to bring a contest *de novo* in accordance with the requirements of said decision, I see no possible escape from such a proceeding.

I arrive at this view after a careful consideration, which convinces me that to hold that notice to one of the heirs is sufficient to put all the others on their guard, as claimed by you, would be unwarrantable as well as unjust to those heirs who, as a matter of fact, were not actually notified. Although notice to them was but constructive, they would nevertheless be estopped from denying receipt thereof, should they apply to be heard on that plea after the case had been tried and decided against them. It would be error, therefore, to conclude the rights of such heirs on the ground that the action of the administrator and heir, George Taylor, in allowing the case to go by default after due notice, was the joint act of all the heirs.

For these reasons I must decline to modify my said decision.

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SIGNING OF.

HAHN v. SPENCER.

The notice of contest must be signed by one or both of the local officers. It cannot be signed by a clerk.

*Commissioner McFarland to register and receiver, Larned, Kans., August 1, 1883.*

GENTLEMEN: Your letter of the 24th ultimo was duly received, transmitting the appeal of the plaintiff in the case of William H. Hahn *v.* Ichabod R. Spencer, involving homestead entry No. 6587, made September 30, 1881, upon the NE.  $\frac{1}{4}$ , 6, 24, 33.

It seems that on the day set for hearing the defendant made special appearance and moved the dismissal of the case, on the ground that the notice of contest was not legally issued, in that neither the register nor the receiver signed or authorized the same.

The said notice appears to have been prepared by a clerk of your office, and signed by him as follows: "C. A. Morris, Register, S."

You submit separate and disagreeing decisions.

The register holds the notice to be sufficient; the receiver that it is not, and it is from the decision of the latter that the plaintiff appeals.

Rule 9 (No. 2) of Practice prescribes in positive terms that "it must be signed by the register and receiver, or by one of them."

I must, therefore, affirm the decision of the receiver in recommending the dismissal of the case; and you will so advise the parties in interest, allowing the usual privilege of appeal.

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*PUBLICATION—REGISTERED LETTER—THIRTY DAYS.*

BUTTERFIELD AND PHELPS.

The instructions of August 13, 1883, are not retroactive. Copies of published notices must be mailed to last known address at least thirty days in advance of a hearing.

*Commissioner McFarland to register and receiver, Fargo, Dakota, January 15, 1884.*

GENTLEMEN: I am in receipt, by reference from the Department of Justice, of a letter addressed to the Honorable Attorney-General on December 20, 1883, by Messers Butterfield and Phelps, of Montrose, Dak., relative to the matter of mailing by registered letter a copy of the published notice in contested cases to the last known address of each person to be notified.

The writers refer to Rule 14 of Practice requiring such mailing, and to the letter of this office of August 13, 1883, addressed to you (Copp's L. O., vol. 10, p. 189), in which you are instructed that the rule requiring at least thirty days' notice of hearing, would be deemed applicable to such registered letters, and they inquire whether the latter ruling should be deemed to have a retroactive effect, stating, that under the construction of Rule 14, which had previously prevailed in the practice, at district land offices, registered letters had been mailed two weeks in advance of hearings instead of thirty days.

You are advised that the instructions of August 13, 1883, take effect only from the receipt thereof at the local office. Rule 14 of Practice does not specify the time when a registered letter shall be mailed. It appears to have been inferentially held that the two weeks before hearing, during which notice under Rule 14 is to be posted on the land, is the time required for a registered letter to be mailed in advance of hearings. This construction was reasonable, and the mailing of letters in accordance therewith was a sufficient compliance with the rule prior to the promulgation of different instructions.

You are moreover advised that when notice is given by publication, it is the publication that constitutes legal notice, not the registered letter. The latter is the transmittal of a copy of the legal notice, and is a requirement adopted to secure actual as well as constructive notice in cases of publication. This requirement must be observed for the reason upon which it is founded, and the rule that such copies shall be mailed at least thirty days in advance of hearings will be strictly adhered to.

*PUBLICATION—POSTING.***EMMERT v. KILPATRICK.**

When and how notice by publication should be given.

*Acting Commissioner Harrison to register and receiver, Hailey, Idaho,  
February 7, 1884.*

**GENTLEMEN:** Referring to register's letter of the 25th ultimo in relation to the hearing ordered in the contested case of Sarah L. Emmert v. William H. Kilpatrick, involving desert-land entry No. 189, Boise City series, the register states that the whereabouts of Kilpatrick cannot be found, and asks if you shall perfect service of notice on him by publication.

You are advised that the Rules of Practice prescribe what is to be done in such cases. See Rules 9 to 16 inclusive. You have nothing to do with ascertaining the whereabouts of the party to be notified. That is the duty of the contestant. You issue the notice as provided in Rule 9. The contestant must serve it. If he can make personal service, he must do so. If he cannot get personal service, and makes an affidavit to that effect, and you are satisfied that personal service cannot be had, you can authorize the contestant to give notice by publication. The contestant is to furnish the required evidence of publication, and he must also post a copy of the notice on the land, as required by Rule 14, and the fact of such posting should be proven by proper affidavit.

If you do not know any address to which a copy of the notice can be mailed by registered letter, as provided by rule 14, you cannot, of course, mail such letter. In that case you should so state in your report upon the hearing.

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*INSANE CLAIMANT.***MILLETT v. BROWN.**

Notice of contest cannot be served personally, nor on the superintendent of an insane asylum where the insane claimant is confined.

*Acting Commissioner Harrison to register and receiver, Yankton, Dak.,  
February 7, 1884.*

**GENTLEMEN:** Your letter of January 26, 1884, is received, transmitting the appeal of William Millett from your decision dismissing his contest v. James F. Brown, involving timber-culture entry, number 4,085, Yankton series, March 11, 1880, for NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of 17, 96, 48.

It appears that the defendant, Brown, was, at the time of initiation of the contest, an inmate of the insane asylum at Yankton, and service was made upon the superintendent of said asylum by delivering to him

a copy of the notice of contest, who refused to recognize the same as authorized, or to allow personal service upon the defendant, Brown, who had at the time no duly appointed guardian or committee of his person or property.

Your decision is affirmed. The superintendent of the asylum was the mere custodian, for the time being, of the person of the defendant, without any authority whatever to act for him, so far as is shown.

As to how Millett may make proper service of notice of contest is not for this office to advise under the circumstances, but to approve or disapprove of your action.

Notify the party hereof, and of his right of appeal.

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## 12. TAKING TESTIMONY.

### *PLACE—RULE No. 35—DISCRETION OF LOCAL OFFICERS.*

There is nothing obligatory in the rule. Registers and receivers must exercise their discretion in permitting testimony in contested cases to be taken elsewhere than at the local land office.

*Commissioner McFarland to register and receiver, Watertown, Dak., June 11, 1883.*

GENTLEMEN: In reply to your letter of the 5th instant, relative to the proper construction of amended Rule 35 of Practice, you are informed that paragraph 1 is to be read as if there was a comma after the word "cases," in the first line.

The rule contemplates that testimony in contested cases, as well as in hearings ordered by the Commissioner, may be taken before United States commissioner, &c., near the land, when it shall be so ordered. There is nothing obligatory in the rule. Registers and receivers must exercise their discretion in permitting testimony in contested cases to be taken elsewhere than at the local land office, being governed in every instance by the circumstances of the case.

Preferably, testimony should be taken by the district land officers, and this should be the course pursued whenever it can be done without involving too much inconvenience and expense to the parties.

The purpose of the amendment to Rule 35 was to provide a different method when great distance, or other good cause, renders the alternative course advisable.

*VEXATIOUS CROSS-EXAMINATION.**FOSTER v. BREEN.*

Vexatious and irrelevant cross-examination and testimony, intended solely to create expense, should be stopped by the local officers, unless the party introducing it is willing to pay for the expense of taking it.

*Secretary Teller to Commissioner McFarland, September 21, 1883.*

SIR: I have considered the case of Roseland L. Foster *v.* Jeremiah Breen, involving homestead entry No. 16,185, for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 14, T. 8 S., R. 3 W., Concordia, Kans., on appeal by Foster from your decision of October 14, 1882, dismissing the contest for want of due proof.

It appears by the record that at a certain point in the hearing the contestant protested against the line of cross-examination pursued by counsel for contestee, as being intended solely to create expense and delay, and asked that the local officers assess the expense of taking it upon the contestee. This motion was overruled under Rule 41 of the Rules of Practice, and on appeal your office sustained the decision.

In their appeal counsel very pertinently remark that a rule of practice should not be permitted to override the law, which forfeits the homestead upon satisfactory proof of abandonment; and that the law is overridden when the introduction of irrelevant testimony, whose sole purpose is to harass the contestant and create expenses beyond his means, is required by a rule which imposes no limitation as to the kind of testimony, and leaves no discretion with the local officers to bar it. These are self-evident truths; but it is plain that the Rules of Practice do not contemplate the introduction of testimony for such a purpose, or for any other than a legitimate purpose. They are devised for the purpose of obtaining testimony according to the rules of law, and Rule 41 merely reserves for consideration by your office testimony as to the admissibility of which there may be reasonable doubt. When it is clear that the line of cross-examination or the testimony offered is intended to vex or delay or cause unnecessary expense to the contestant, the local officers may, and they should, peremptorily end it. In *McCarter v. Dunn* (4 Land Owner, 76), Mr. Secretary Schurz says:

The defendant is entitled to a *reasonable* and *proper* cross-examination of a contestant's witnesses. The local officers should exercise a sound discretion in each case, and should they become satisfied that the cross-examination is for the purpose of creating expense and delay, and not to promote the ends of justice by ascertaining the facts, the same should be limited.

The wisdom of this ruling is apparent, and it is applicable to existing cases; for the Rules of Practice are made in aid of the law, and not to defeat it.

On the other hand, the ruling is designed to protect the contestant, but not to shut out testimony; and, therefore, when the local officers

have exercised their discretion by barring testimony on the grounds above stated, the contestee should be allowed to proceed upon paying the additional expense himself.

In the case at bar, I think contestee's counsel conducted the cross-examinations in a manner to cause unnecessary expense and delay; but, for the purpose of this adjudication, it does not appear that the contestant's interests are injured by it. He alleges that his means were exhausted by the expense of the trial at the point where it ended, and that he desired to introduce two other witnesses, particularizing the facts to which they would testify. If these witnesses were to testify, as it is alleged they will, to Breen's statements to them that he had sold his homestead right and abandoned the land, in my opinion it would not aid contestant's cause. For it is to be observed that his case, as to the alleged change of residence by contestee, depends on testimony to facts which occurred after the initiation of contest, and which should have been excluded; and, as to the sale of the homestead right, it is admitted by contestant that said sale was not perfected; consequently claimant's entry could not be affected by any of this testimony. In fact, it is quite clear that Breen's refusal to complete the sale was the cause of this contest; for the offer to sell was made to Foster, and had Breen accepted the payment which Foster swears he tendered, and which was not accepted, there would have been no contest.

I concur in your opinion that Foster failed to prove the alleged abandonment and sale, and affirm your decision.

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*BEFORE NOTARY PUBLIC—CONTINUANCE.*

*ERICKSEN v. WAY.*

When a continuance is granted by a notary public, it should not extend beyond the time set at the local office for examination of testimony.

*Commissioner McFarland to register and receiver, Grand Forks, Dak., November 23, 1883.*

GENTLEMEN: I am in receipt of your letter of July 23 last, transmitting the record of contest in the case of Edward R. Ericksen *v.* Thomas Way, involving the latter's homestead entry No. 5,786, SE.  $\frac{1}{4}$ , 19, 149, 58, dated June 19, 1883.

Upon examination thereof, it appears that in ordering a hearing the parties were summoned to appear before Mills Church, a notary public, at Larimore, Dak., on May 8, 1883, under amended Practice Rule 35, to respond and furnish testimony concerning the case.

On the day set for hearing before said notary, the contestant, Ericksen, was sick and unable to appear in person, but he appeared by his attorney, S. R. Barnett, and asked that the hearing be continued until May 21, 1883, which continuance was granted by said notary.

There is nothing to show that any time was set for a hearing at the local office to examine the testimony, in accordance with paragraph 4 of Practice, Rule 35, as amended, or whether or not the continuance granted extended beyond that time, if such a time was set.

When a continuance is granted by a notary public, care should be taken that it does not extend beyond the time set at the local office for examination of testimony, and enough time should elapse between the termination of the continuance and the day set for hearing at the local office, to allow the testimony to be transmitted there to.

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*CROSS-EXAMINATION—SOUND DISCRETION.*

How far redirect and recross examination of witnesses in contest cases may be carried. The local officers must exercise a sound discretion.

*Acting Commissioner Harrison to register and receiver, Hailey, Idaho,  
March 4, 1884.*

GENTLEMEN: Your letter of the 24th of December last was duly received, asking whether it is proper to allow an attorney after introducing a witness in a contest case and examining him, and the witness has been cross-examined, to go on to a redirect, and then after a recross to a further redirect examination of the witness, and so on without end, or whether you are empowered to enforce the rules laid down by Greenleaf as to the order of examining witnesses.

The examination of a witness should be conducted as much as possible in accordance with the established rules of evidence.

While I do not deem it expedient to lay down any fixed rule as to how far the examination may be protracted beyond the redirect and recross examination, you are nevertheless authorized to impress upon the attorneys the necessity, in order to avoid prolixity and delay, of so conducting the examination that all the facts within the witness's knowledge upon the issue raised may be drawn from him on his examination-in-chief and cross-examination.

And where you have reason to believe from the nature of the examination that such a course is not being pursued, you may personally direct the examination, under the authority delegated to you by Practice Rule 36.

A rule similar to that enunciated in *McCarter v. Dunn* (5 Copp, 21) should be applied. In said case it was held that the local officers should exercise a sound discretion in each case, and should they become satisfied that the cross-examination is for the purpose of causing delay, and not to promote the ends of justice by ascertaining the facts, the same should be limited.

*BEFORE OFFICER OTHER THAN LOCAL LAND OFFICERS.*

Proceedings under rule 35, as amended.

*Commissioner McFarland to C. R. Glover, United States Court Commissioner, Long Pine, Nebr., March 22, 1884.*

SIR: In reply to the inquiries contained in your letter of January 28 last, I would state as follows:

First. That under Practice Rule No. 35, as amended by official circular of January 3, 1883, it is incumbent upon the local officers where the testimony in a contest case is taken before an officer other than themselves, to insert in the notice of contest the day set for hearing at the local office, as well as the date of taking testimony before some other officer. Second, it is not necessary, under said rule as amended, for the contestant to file interrogatories as in cases where depositions are taken under Rules 23 to 28, inclusive; but the officer designated to take testimony will be governed by the rules applicable to trials before the register and receiver (see Rules 36 to 42, inclusive), and may therefore personally direct the examination of witnesses when necessary to draw from the witnesses all the facts within their knowledge pertinent to the issue raised, and reduce the questions and answers to writing. Such officer has also the authority to allow cross-examination in the absence of cross-interrogatories, which are not, under said rule, required to be filed.

Under the foregoing views the printed notice of contest submitted in your letter would be defective.

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**VII.—SOLDIERS' ADDITIONAL HOMESTEAD.****INADVERTENT ISSUE—NON-ASSIGNABLE—PURCHASER.****1. CERTIFICATE.****WILLIAM FRENCH.**

Where a certificate issues improperly, inadvertently stating that a certain party is entitled to make an additional homestead entry when he is not so entitled, the entry made thereunder should be canceled. As the right to make a homestead entry is a personal right, the assignment of such certificate cannot be recognized. A purchaser takes it subject to any defects, and cannot be treated as "an innocent purchaser."

*Acting Secretary Joslyn to Commissioner McFarland, August 30, 1883.*

SIR: I have considered the case presented on appeal from your decision of September 12, 1882, cancelling the additional homestead entry made in the name of William French, for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the SW.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 17, T. 16 N., R. 1 E., H. M., Humboldt, Cal.

It appears that your office, March 8, 1878, issued a certificate to William French, showing that he was entitled to make an additional homestead entry not exceeding 120 acres, and it also appears that such right

was based on military service performed in the "Missouri Home Guard" by the said French.

July 5, 1878, application to enter the above-described land was granted by the local office, and final certificate No. 204 issued, which was canceled by your order of September 12, 1882, on the ground that members of the "Missouri Home Guard" are not entitled to the benefits of section 2306 of the Revised Statutes.

Counsel for the present holder of the certified right of French alleges that the issuance of the certificate by your office was conclusive; that the cancellation of the entry, without any new facts, and without a re-hearing, or notice to the party in interest, was error, and that the present owner of the scrip purchased the same for a valuable consideration, after the seal and certificate of your office had been attached to the same, without notice of any defect, and is therefore entitled to protection as an innocent purchaser.

It will be observed that the assignment of error is based on the assumption that the soldier's right to make an additional homestead entry is assignable, and that the rules which govern paper of a negotiable character are applicable in this case; but this theory is without foundation in law.

The right to make entries of this character was conferred by the act of June 8, 1872 (17 Stat., 333), which provided in section 1:

That every private soldier and officer, who has served in the Army of the United States during the recent rebellion for ninety days, or more, and who was honorably discharged, and has remained loyal to the Government \* \* \* shall, on compliance with the provisions of an act entitled "An act to secure homesteads to actual settlers on the public domain," and the acts amendatory thereof, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands (not mineral) not exceeding 160 acres.

SEC. 2. That any person entitled under the provisions of the foregoing section to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter under the provisions of this act, so much land contiguous to the tract embraced in the first entry as, when added to the quantity previously entered, shall not exceed 160 acres.

The section last quoted was amended March 3, 1873 (17 Stat., 605), so as to read as follows:

Any person entitled under the provisions of the foregoing section to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres.

It will thus be seen that the right was a personal right, founded upon military service, and granted to soldiers who had, in part, exercised their rights under the general homestead laws. By nothing in the act itself, the amendment thereto, or subsequent legislation, has this enlarged privilege of the soldier been made assignable. This Depart-

ment held, May 17, 1876 (Copp's L. L., 1882, p. 486), that such right was not assignable, that the application should be made in person, and that in all cases the applicant should be required to make oath that he has not made, or agreed to make, any sale, transfer, pledge, or other disposition of his right to make the entry on the land which he applies to enter. This decision was modified March 10, 1877, so as "to allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim has been presented to you and certified as valid, and that the party is entitled to the amount of land claimed under such instructions and regulations as you may prescribe." (Copp's L. L., 1882, p. 478.) By reason of the applicant being excused from personal attendance at the district office, these claims found their way legitimately into the hands of attorneys and agents, but many of them were in effect assigned by means of two powers of attorney, one to locate and one to sell, and were thus treated as properly subject to sale and transfer under cover of an assumed agency; but this action did not change the fact that the soldier's right was not assignable. The whole transaction in your office, from the application for a certificate to the issuance of a patent, was in the name of the soldier, and if, by treating non-assignable rights as assignable, other parties became thus possessed of the soldier's right; they took it subject to any defect that would have defeated the claim in the hands of the soldier.

In this case your office, through inadvertence, certified that French was entitled to enter 120 acres of land, but, inasmuch as the military service upon which such right depended had been performed in a State organization, and French had never been mustered into or discharged from the service of the United States, such certificate was absolutely void and conferred no right on him or any purchaser thereof. In the hands of French the certificate was worthless, and it was equally so in the possession of any one substituting himself for French. The transfer of a right that never existed could not operate to create an obligation on the part of the Government where no authority for the transfer had been created by law.

Respecting notice to the party in interest, it appears that your office took up this case in the regular course of business, and having concluded that the entry should be canceled, you informed the register and receiver of your conclusion. This action of your office is, however, subject to appeal, and the party in interest has availed himself of his right, the case being now regularly before this Department on appeal. The right of the party affected by your decision to have a full hearing has in no manner been abridged, all the facts necessary to a consideration of the case being fully before this Department.

Your decision is therefore affirmed. The papers accompanying yours of November 23, 1883, are herewith returned, to be retained on file, as in other cases, instead of being returned to the claimant, as indicated in your decision.

*UNLAWFUL HOMESTEAD CERTIFICATE—PURCHASE UNDER ACT JUNE  
15, 1880.***WILLIAM FRENCH (REVIEW.)**

The purchaser of the unlawful homestead certificate in this case is allowed to purchase the entered land under the act of June 15, 1880.

*Secretary Teller to Commissioner McFarland, October 1, 1883.*

SIR : In the case of the additional homestead entry made in the name of William French for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ . and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 17, T. 16 N., R. 1 E., H. M., Humboldt, Cal., canceled by the decision of this Department August 30, 1883, a motion has been filed on behalf of the present holder of the certified right of said French to have said entry reinstated and referred for confirmation to the Board of Equitable Adjudication.

I am of the opinion that the motion should be denied, for the reason that the case does not come within the class where substantial compliance with the law can be shown.

William French was a member of the "Missouri Home Guard," and as such was not entitled to the benefits of section 2306 of the Revised Statutes. An additional homestead entry made by him was illegal at its inception, because the service upon which the right to make such entry was based was not in the army of the United States.

The motion is therefore overruled. The second section of the act of June 15, 1880 (21 Stat., 237), 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.

The present holder of the right of William French, upon showing his possession of said right by *bona fide* instrument in writing, will be entitled, under the provisions of the foregoing law, to purchase said lands, and you will so inform his attorney, together with the disposition of the motion referred to herein. Herewith you will find the said motion for reinstatement, which you will please place on file with the papers in the case.

*INADVERTENT USE OF ENTRY.*

## SAMUEL SMITH.

The inadvertent use of the same original entry in a certificate subsequently issued should not be held to invalidate a location upon a *prima facie* valid certificate.

*Secretary Teller to Commissioner McFarland, May 14, 1884.*

SIR : I have considered the case presented on appeal from your decision of July 20, 1883, holding for cancellation the additional homestead entry, final No. 74, made in the name of Samuel Smith, for the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 28, T. 22 N., R. 65 W., Cheyenne, Wyo.

The entry above described was made April 27, 1882, but you held it illegal, because the soldier "had previously, August 22, 1879, exhausted his rights under the law by making additional homestead entry for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 136, R. 47, Fergus Falls, Minn."

From the papers transmitted with this case the following facts appear:

June 1, 1878, your office issued a certificate showing that Samuel Smith, "who made original homestead entry, No. 1,617, at New Orleans, La.," was entitled to an additional homestead entry, not exceeding 79.15 acres. This certificate was issued upon an alleged service in Company F, Ninety-sixth United States Colored Infantry, the records in the War Department showing that Samuel Smith (1st and 2d) were enrolled in said organization July 27, 1863, and served therein until January 29, 1866, when they were mustered out. A certified copy of a certificate of discharge identifies the applicant as "Samuel Smith 1st."

January 14, 1879, your office issued another certificate showing that Samuel Smith "who made original homestead entry No. 1,617, at New Orleans, La.," was entitled to make an additional homestead entry, not exceeding 79.15 acres. The service alleged in this instance was Company B, Twenty-ninth United States Colored Infantry, and the records in the War Department showed that said Smith served in said organization from September 28, 1864, to September 30, 1865. Under this certificate the location at Fergus Falls was made.

It thus appears that original homestead entry No. 1,617 of the New Orleans series was twice used as a basis for determining additional homestead rights, but that the "Samuel Smith" whose application was presented at Cheyenne is not the "Samuel Smith" who made the entry at Fergus Falls.

There is nothing to show but that the certificate of June 1, 1878, was in all respects properly issued and correctly represented the right of "Samuel Smith" to make an additional homestead entry, and I see no reason why the inadvertent use of the same original entry, in a certificate subsequently issued, should be held to invalidate a location based upon a *prima facie* valid certificate.

Your decision is, therefore, reversed, and the additional homestead entry, final No. 74, is approved.

**2. LOCATION BY AGENT.****LAMON SHAFFER.***CERTIFICATE OF RIGHT—CIRCULAR, FEBRUARY 13, 1883.**Commissioner McFarland to register and receiver, Boise City, Idaho, October 10, 1883.*

**GENTLEMEN:** I am in receipt by reference from W. C. Hill, esq., of this city, of a letter from A. Whitehead, Boise City, Idaho, in which it is stated that you refused to allow him to locate the certificate of right issued by this office April 25, 1883, in name of Lamon Shaffer, to make a soldier's additional homestead entry, for the reason that Mr. Shaffer did not appear in person at your office, and in reference thereto have to state that the certificate in question is one of the cases referred to in paragraph 4 on page 2 of circular of February 13, 1883, which were pending prior to the issuance of said circular, hence the location should have been allowed.

You will permit the location—by agent—of *any certificate of right* to make an additional homestead entry (no matter what date it bears), issued by this office, as a number of claims are still pending which may be certified to and located by agent or attorney.

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**3. SUSPICION OF FORGERY.***MERE SUSPICION—OFFICIAL CERTIFICATE.***JOHN T. SMITH.**

The rights of a party who is entitled to make a soldier's additional homestead entry should not be impaired by a mere suspicion of forgery of his signature, without proof or allegation to that effect.

*Secretary Teller to Commissioner McFarland, June 20, 1884.*

**SIR:** With public lands abstract No. 183, of suspended entries, submitted by you on the 14th instant for consideration and action by the Board of Equitable Adjudication, was the following soldier's additional homestead entry: Case No. 20, San Francisco, Cal., F. C., No. 1,442, by John T. Smith.

The above case was submitted because you held, in letter of October 8 last to the local officers, that the papers on which the entry is based "are of doubtful execution," and the signatures do not agree, &c.

I fail to discover anything in the nature of proof tending to impeach either the integrity of the entryman or the official or witnesses before whom the affidavits were made. The papers throughout appear to be in regular form and no specific charges of irregularity are preferred. No person has appeared claiming that there has been either personation of

the soldier or forgery of his signature, and a mere suspicion of so grave a charge, growing out of a comparison of signatures on pay-rolls of the army, ought not to be allowed to acquire the force of presumption without express proof; and especially in the absence of even a general allegation. As, therefore, the official certificate of the General Land Office that the party was entitled to make an additional entry has not been assailed, there is no bar to your adjustment of the entry, and the papers are herewith returned for such action.

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#### 4. WIDOW'S RIGHT.

*ATTORNEY—CHILDREN—DEATH OF WIDOW.*

JOHN C. RULAND'S CHILDREN.

The attorney for the widow of a deceased soldier does not succeed to the right of being recognized as attorney for the children, in case of the death or marriage of the widow, especially if the guardian of the children has constituted another person his agent.

As certificate was not issued during the widow's life, her right was absolutely extinguished by death, notwithstanding any power of attorney she may have given, coupled with an interest or otherwise.

*Secretary Teller to Commissioner McFarland, March 14, 1884.*

SIR: I inclose herewith a motion filed February 2 ultimo, by H. N. Copp, in behalf of D. H. Talbot, attorney, for a review of my decision of 21st January, 1884, directing you to recognize O. N. Tindall, and deliver to him a proper certificate of the right of the minor orphan children of John C. Ruland, deceased, to enter 80 acres of land as additional to his original homestead entry No. 677, made July 3, 1863, at Winnebago City, Minn., said right having accrued in such children under section 2307 of the Revised Statutes.

The claim is made that said Talbot having some years since, and in her lifetime, presented an application for certification in behalf of Mary A. Ruland, widow of said deceased soldier, and she having died without having obtained it, he, her attorney, by reason of having so filed and proved her claim, is entitled to have custody and control of the certificate now due to the children. In other words, the position is assumed that the attorney of the widow succeeds to the right of being recognized as attorney for the children, on whom the law casts the right in the event of the death or marriage of the widow; and this, even though the proper guardian of such children has, by due appointment and power of attorney, constituted another person his agent to represent the right of his wards.

It is not necessary to state the reasons which negative such conclusion. There is absolutely nothing in the whole range of authorities to support it. Even where the right descends to heirs, the power of at-

torney granted by an individual is revoked by his death, and so much the more when the persons succeeding to the right take not as heirs, and not from the widow, but by appointment of the statute, as donees of the Government, as children of the soldier to whose right they are substituted when there is no widow, or in the event of her death or marriage.

It was accordingly stated in my decision that "the widow having died before the claim was approved by your office, it can not now be recognized." That is, her claim, being a right for her life only, or until her marriage, ceased at her death, and was extinguished absolutely.

The right of the children is entirely independent of that of the widow or that of the deceased soldier. True, it can only come into exercise when they can no longer interpose theirs, and may be defeated by such interposition, but only when such preceding right has been lawfully exercised.

This Department is therefore to deal only with the claim before it, and recognize only such attorney for its prosecution as may be designated by the real claimant; and in this view I see no error in the decision already rendered in this case. The motion for review is denied. \* \* \*

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## 5. WITHDRAWN FROM MARKET.

### ISOLATED TRACTS—PUBLIC NOTICE OF SALE.

MURRAY B. PATTON.

The tracts in question were withdrawn from entry, for the purpose of a sale under Sec. 2455, Revised Statutes, at the time the homestead entry was made. Said entry should be canceled.

*Secretary Teller to Commissioner McFarland, March 25, 1884.*

SIR: I have considered the case presented by the appeal of Mr. A. A. Thomas from your decision of September 5, 1883, holding for cancellation the soldier's additional homestead entry, made in the name of Murray B. Patton, for lot 8 in Sec. 20, and lot 5 in Sec. 29, T. 11, R. 19 E., Menasha, Wis.

It appears that on the application of Mr. W. O. White, this land, being an island in Cedar Lake, Washington County, was surveyed, and that the plat showing such survey was filed in the local office June 5, 1883.

June 1, 1883, you addressed a letter to the local office respecting the application of Mr. White to have this land surveyed and brought into market under section 2455 of the Revised Statutes, in which you said:

You will inform him [Mr. White] that he will be required to file in your office an affidavit showing that the lands herein described are un-

improved and unoccupied by any person other than himself having a color of title, and alleging his willingness to pay all expenses of advertising and offering the same, with the understanding that he secures no preference right to purchase the land by such proceeding, but that it will be sold at public outcry to the highest bidder for cash.

June 18, 1883, Mr. White having filed the affidavit required in your letter of June 1, and deposited the requisite amount of money to defray the expense of advertising and sale, the local office prepared the proper notice of sale, and sent the same to the press for publication.

June 20, 1883, the application to make the additional homestead entry heretofore described was presented to the local office and allowed, and the notice of the sale, issued for publication but not yet published, was withdrawn.

Section 2455 of the Revised Statutes provides that:

It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class [claims rejected by the Board of Adjudication], though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner. (Sec. 5, Act of August 3, 1846, 9 Stat., 51.)

It will be observed that by this statute specific authority is conferred upon you in the matter of ordering into market isolated tracts of land. Before such tracts can be thus ordered into market, or taken under the pre-emption or homestead laws, a survey of the same is required; and it appears that it was upon the application of Mr. White the survey was made in this case. One of the conditions upon which such a survey is ordered is the payment by the applicant of the expense attending the survey.

Having procured the survey in the manner required by the law, and deposited the money necessary to defray the expense of advertising and offering the land, Mr. White secured to himself the right to appear at the time when the land, pursuant to notice, was offered for sale, and bid for the same. He did not acquire any preference right to buy the land, but was entitled to have it offered at public sale. To this end he invested his money. By your letter of June 1, ordering the land into market, Mr. White was informed that if he filed the required oath, and guaranteed the expense of the sale, he would have an opportunity, in common with the public, to purchase the land at public sale. He accepted the conditions thus imposed, but the allowance of the homestead entry rendered inoperative all his properly directed efforts to bring the land to a public sale.

In *Shepley v. Cowan* (91 U. S., 330) it was said that "whenever, in the disposition of the public lands, any action is required to be taken

by an officer of the Land Department, all proceedings tending to defeat such action are impliedly inhibited."

I concur in your conclusion that at the time the homestead entry was made the tracts were withdrawn for the purposes of the sale, and that such entry should be canceled.

Your decision is therefore affirmed.

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### VIII. SOLDIERS' ORPHANS.

#### *MINOR CHILDREN—GUARDIAN.*

Proceedings required in making homestead entries in behalf of minor orphan children of deceased soldiers.

*Commissioner McFarland to W. A. Sickler, Esq., Valley Centre, Cal., April 9, 1884.*

SIR: I am in receipt of your letter of the 13th ultimo, in which you ask several questions relating to homestead entries made for the benefit of the minor orphan children of a deceased soldier, and in reply have to state as follows:

The same forms are used as in other homestead cases, the application being signed by the guardian for the benefit of the children, who must be named. The guardian must appear at the local land office and make the required affidavit, unless he, or some one of the minor children, is actually residing on the land applied for, in which event it may be made before the clerk of the court for the county in which the land is situated. In case the minor child or children should become of age before final proof is made, they are not required to establish residence on the land. None but the widow or minor orphan children can derive any benefit of a deceased soldier's service in the Army in making an original homestead entry.

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### IX.—TIMBER CULTURE.

#### *I. ACTS OF PUBLIC OFFICERS.*

##### *OFFICIAL ERROR—PRIOR RIGHTS.*

###### *STEPHEN S. GIBSON.*

The timber-culture entry of Gibson is allowed to stand, as the error in the case was the Government's, and no prior rights are now involved.

*Acting Secretary Joslyn to Commissioner McFarland, March 31, 1884.*

SIR: I have considered the appeal of Stephen S. Gibson from your decision of August 16, 1883, canceling his timber-culture entry, number 2,573, on the NW.  $\frac{1}{4}$  of Sec. 8, T. 9, R. 23 W., North Platte, Nebr.

It appears that the tract was covered by the timber-culture entry of

one Lantz, against whom one Hildebrand began contest on May 3, 1882. Hildebrand, however, failed to file an application to enter with his affidavit of contest, and his offer, in February, 1883, to cure said defect, pending the consideration on appeal of the evidence adduced at the hearing, was denied by the local officers. The said contest was dismissed by the local officers on March 5, 1883, without instructions from your office, and while the case was still pending in your office, and Hildebrand was advised of his right to enter a new contest, under Bartlett *v.* Dudley (9 L. O., 215). On March 6, 1883, Lantz's relinquishment was filed, and thereafter on the same day Gibson made his entry. On March 15 Hildebrand made offer to enter and contest, which was rejected by the local officers because Lantz's entry had been canceled. On March 20, 1883, your office dismissed Hildebrand's contest on the same ground as that on which the local officers had already dismissed it; on August 16 you canceled Gibson's entry as aforesaid, because Lantz's contested entry was pending before your office when he made it; and on September 15 you sustained the action of the local officers in rejecting Hildebrand's application to enter, because it was made while Gibson's entry was on file. Hildebrand is out of the case by failure to appeal.

It seems to me that there is some inconsistency in these last-mentioned rulings. You declared Hildebrand's contest to be void, but canceled Gibson's entry because it was on file; again, you thus declared Gibson's entry to be void, but rejected Hildebrand's subsequent application to enter because it was on file.

When Gibson applied to enter the record was clear, and his entry was allowed. That the clearing of the record and allowance of his entry by the local officers, pending consideration of a contest concerning the land in your office, is held to be erroneous, should not be permitted to affect his interests, now that Hildebrand has abandoned the case. The error was the Government's, and not Gibson's; and since there are no prior rights involved, and the question is, therefore, between him and the Government, his entry should be reinstated.

Your decision is therefore reversed.

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*OFFER TO ENTER—ERRONEOUS ADVICE.*

*MELLKE v. YOUNG.*

Where at the time of commencing a contest to cancel a timber-culture entry, the contestant tendered his application to homestead the land, and was advised that such application was not required, and the contestant relied on such advice, although it was erroneous, his contest will not be dismissed as illegal.

*Secretary Teller to Commissioner McFarland, April 10, 1884.*

**SIR:** I have considered the appeal of Frederick Mellke from your decision of April 26, 1883, dismissing his contest against the timber-culture

entry of George W. Young upon the NW.  $\frac{1}{4}$  of Sec. 23, T. 101, R. 51, Mitchell, Dak., because of his failure to apply to enter the tract when initiating his contest.

Young entered this tract November 6, 1877, and Meilke filed his affidavit of contest September 15, 1881, due notice of which was given; but Young failed to appear at the hearing. The proofs showed his abandonment of the tract since August 1, 1878, and that he had not in any respect complied with the law. It also appears that in the spring of 1881 Meilke, finding the tract abandoned, entered thereon, erected a house, granary, barn, and broke 15 acres. It also appears, from his own affidavit (corroborated), that when commencing his contest he tendered to the clerk of the local office, at the counter thereof, an application to enter the tract under the homestead law, but was advised that such application was not required, and his papers were returned to him and afterwards destroyed. May 2, 1883, he filed another homestead application and affidavit for the tract, and asked that they take effect from the date thereof, and that the entry of Young be canceled.

In the absence of any report from the local officers or counter-proof to the contrary, it must be held, under the affidavits, that Meilke applied to enter the tract when initiating his contest, and the refusal of the clerk to accept the application can not prejudice his rights. There does not appear to be an adverse claimant to the tract other than Young, whose abandonment, so far as the record shows, still continues.

I modify your decision and direct that the entry of Young be canceled, and that the application of Meilke to enter the tract under the homestead laws be allowed, to take effect as of September 15, 1881, when he first applied therefor.

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#### RECONSIDERATION—OFFICERS' NEGLECT.

#### POSTLE v. STRICKLER.

A timber-culture contestant's rights should not be prejudiced by his failure to file motion for reconsideration of decision until five months after the required time, where the excuse for such failure is the neglect of the local officers to complete the record of the case by including therewith his application to enter.

*Secretary Teller to Commissioner McFarland, April 29, 1884.*

SIR: On August 7, 1882, you considered the case of Martin Postle v. Jacob Strickler, involving the latter's timber-culture entry made June 18, 1877, upon the NW.  $\frac{1}{4}$  of Sec. 24, T. 20, R. 1 W., Grand Island, Nebr., and held the entry for cancellation for Strickler's failure to comply with the requirements of the law; but on appeal by Strickler I dismissed the contest June 25, 1883, because it did not appear that Postle applied to enter the tract when initiating his contest, as required by the rulings of this Department. A motion was thereafter (February 13, 1884) filed

for reconsideration of my decision upon the ground that Postle did in fact make such application at the required time. My decision was based upon the record as then presented, but which, as now appears, was deficient in the respect named. If Postle complied with this requirement he should lose no right by reason of a defective record for which he was not responsible, if he has also complied with the rules in respect to the time of filing his motion for reconsideration, or offers reasonable excuse for his non-compliance therewith. Practice Rule 77 requires a motion for reconsideration of the Secretary's decision to be filed within thirty days from notice thereof. Postle was notified of this decision July 17, 1883. He should therefore have filed his motion on or before August 17 following, but did not until February 13, 1884, or about five months after the required time. It appears, however, that immediately after notification of my decision he instituted and continued search at the local office for said application. It was not found, nor was there any note or memorandum of it on the records. He then filed his present motion, accompanied by affidavits tending to show that he duly filed the application, whereupon, February 19 last, I ordered a report from the local officers as to the facts, and on March 3 following they transmit the application to you, stating that it had been mislaid by the former officers of their office, and had been only then found.

As it now appears that Postle complied with the law in the respect named and used reasonable diligence to discover the lost paper, without laches on his part, the neglect of the local officers, and his failure to file his motion at the proper time, should not prejudice his rights. The motion for reconsideration is, therefore, granted, and the case will be considered on its merits.

Strickler made entry of the tract June 18, 1877, and Postle commenced his contest December 28, 1881, alleging Strickler's failure to comply with the law. The trial was February 16, 1882. You, as also the local officers, report the facts in detail, and you both reach the conclusion that Postle's allegations are sustained, and recommend cancellation of the entry. I have examined the testimony, and, concurring in your opinion, affirm your decision.

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*FAILURE TO FILE—OFFICIAL MISINFORMATION.*

*BURROWS v. FARNSWORTH.*

An entryman should lose no rights, where, through the misinformation of the local officers, he failed to file his application to enter in time. In cases of doubt, additional proof may be called for and the statement of the local officer requested.

*Secretary Teller to Commissioner McFarland, May 20, 1884.*

SIR: I have considered the appeal of Michael Landergan from your decision of June 12, 1883, denying his motion for dismissal of the contest of Frederick G. Burrows *v.* Anson Farnsworth, involving the

latter's timber-culture entry of May 11, 1881, upon the NW.  $\frac{1}{4}$  of Sec. 35, T. 154, R. 55, Grand Forks, Dak., and also rejecting his own application to contest the same entry.

It appears that Burrows commenced his contest against Farnsworth without applying—so far as appears from the records—to enter the tract. A hearing was held thereon and all papers were transmitted for your consideration in December, 1882. Pending the case Landergau moved a dismissal of Burrows' contest, because he did not apply to enter the tract with his affidavit of contest, and filed an affidavit of contest against Farnsworth with an application to enter the tract, but you rejected the same, because a second contest cannot be allowed until adverse determination of a prior contest against the same entry.

It has been held that when a contest was irregular, and not supported by law, and, for that reason, subject to dismissal, as Burrows' clearly was, it would not prevent a second contest against the same entry, but that the second should be held subject to final disposition of the first (*Bivins v. Shelly, Copp, October, 1883*, and other cases to the like effect). Under these rulings I think Landergan's application should not have been dismissed, but held to await disposal of Burrows' contest.

But Burrows alleges, under oath, that when he applied to contest Farnsworth's entry he also offered to file an application to enter the tract, but was advised by the local officers that this was unnecessary, and that his right to enter it would be good for thirty days after cancellation of Farnsworth's entry without such application, and that, relying upon this advice, he did not apply to enter it. If his statement be true, I think his offer should be held as an actual tender of such application, and that he should lose no right from the misinformation of the local officers. But his statement is not corroborated, and is therefore insufficient to base any action upon. To the end, however, that the facts may appear, you will call upon him for corroborative proof of his statement, and also upon the local officers for whatever may appear upon their records or be within their personal knowledge relative thereto; and should it satisfactorily appear to you that his statement is true, you will allow him to enter the tract under the proofs already submitted. If, however, his statement is not in your opinion sustained, his contest will remain dismissed, and you will permit the contest of Landergan to proceed.

Your decision is modified in accordance herewith.

**2. AFFIDAVIT.***OF CONTEST.—TIME FOR MAKING.***STEWART v. CARR.**

In timber-culture cases the affidavit of contest must be made after the year has expired. The difference of one day is material.

*Secretary Teller to Commissioner McFarland, April 11, 1884.*

SIR : I have considered the case of James M. Stewart *v.* William H. Carr, as presented by Stewart's appeal from your decision of July 7, 1883, dismissing his contest against the timber-culture entry of Carr for the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lots 3 and 4 of Sec. 18, T. 21 N., R. 38 E., Willamette Meridian, Colfax, Wash.

It appears that Carr made his entry for the land described April 26, 1882, and that April 27, 1883, Stewart filed in the local office an affidavit for contest, dated April 26, 1883, alleging non-compliance with the law. May 14, 1883, the local office denied Stewart the right of contest for the reason "that the full period of one year after the date of entry had not expired at the date when the affidavit was sworn to by James M. Stewart."

Under the timber-culture law contests are provided for whenever the original claimant fails to comply with any of the requirements of the law, in which event the contestant is required to give "such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office." (20 Stat., 113.)

As a basis for the issuance of the notice thus contemplated your office has properly required the contestant to file an affidavit setting forth specifically the grounds upon which it is proposed to contest the existing entry. It was alleged in the affidavit filed by Stewart, that "Carr has wholly failed to break 5 acres of said land during the first year since the date of his said entry, or any part thereof."

Now, by the terms of the statute Carr was entitled to a full year in which to do the said breaking, and this year had not elapsed when Stewart made his affidavit (*Tripp v. Stewart*, Copp's L. L., 1882, p. 707), hence on its face the affidavit did not justify the issuance of notice, because Carr might be able on the hearing to show that although he had not, at the time the affidavit was executed, complied with the law, he subsequently thereto, and prior to the expiration of the year, did the necessary breaking.

As the affidavit is the information upon which the issues are made up it should make out a *prima facie* case against entry; and although presumptively true when made, if antedated there can be no knowing whether the allegations are true when filed until after the contest.

The reception of antedated papers in one case, although the uncovered period may be brief, would lead to confusion in the practice and to

unnecessary litigation, as there could be no rule fixing the time when such papers might be sworn to before filed.

After his appeal from the decision of the local office Stewart filed an affidavit showing that he made his affidavit for contest late on the day of the 26th, and that after its execution it was under all the circumstances an impossibility for Carr to have done the breaking within the year, and that such affidavit was made with the knowledge that Carr had left the country.

As Stewart filed an application to enter the land with his original affidavit of contest he should be permitted a hearing on filing a new affidavit, such right relating back to April 27, 1883, to the exclusion of any intervening applications to contest Carr's entry.

With this modification your decision is affirmed.

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### 3. ALIENS.

#### *UNQUALIFIED ENTRYMAN—BECOMING CITIZEN—SECOND ENTRY.*

JACOB H. ULRICH.

An alien made a timber-culture entry which was canceled for non-compliance with law. Having become a citizen, he is allowed to make a second timber-culture entry, with credit for fee and commissions paid on his canceled entry.

*Commissioner McFarland to register and receiver, Niobrara, Nebr., October 18, 1883.*

GENTLEMEN: In further reply to your letter of September 27, 1882, transmitting the application of Jacob H. Ulrich to enter the SW.  $\frac{1}{4}$  23, 33, 3 W., under the provisions of the timber-culture act of June 14, 1878, without payment of fee or commissions, I have to state that it is shown by the records of this office that the party made timber-culture entry No. 197, for the above-described land November 26, 1875; that contest was instituted against Ulrich by Arthur L. Blunt, and the entry was canceled August 3, 1882, for failure to comply with the requirements of the law as to planting and cultivation of timber, the honorable Secretary of the Interior having affirmed the decision of this office of September 1, 1881, adjudging the entry forfeited.

The application to make a second timber-culture entry is accompanied by a relinquishment from Blunt of any right he may have acquired, by reason of his contest, to the land in question, and is based on the fact that Ulrich was not qualified to make the entry, No. 197, at the time of initiating the same. It appears that the party came to this country when a minor, and was not aware until some time in September or October, 1881, that it was necessary for him to become naturalized to entitle him to the benefits of the homestead and timber-culture laws; he thereupon appeared before the district court of Knox County, Ne-

braska, October 18, 1881, declared his intention, and was on the same day admitted to citizenship.

The timber-culture act of March 13, 1874, restricts persons who are not citizens of the United States, or who have not declared their intention to become such, from making entry thereunder. Ulrich's entry, No. 197, was therefore illegal, and he acquired no rights thereunder, and consequently it is no bar to his making a second and legal entry. (See decision of the honorable Secretary of the Interior, dated May 1, 1879, *Copp's Land Owner*, Vol. 6, p. 45, in the case of *Root v. Smith*.)

Under these circumstances you will allow the application, herewith inclosed, giving the party credit for fee and commissions paid on his canceled entry, referring to this letter as your authority for so doing.

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*DECLARATION OF INTENTION—ABSENCE FROM UNITED STATES.*

*McMURTRIE v. WRIGHT.*

An alien may declare his intention to become a citizen of the United States, make a timber-culture entry, and be absent from the United States thereafter for two years or more without forfeiting his entry, provided he returns and the timber-culture law is complied with.

*Secretary Teller to Commissioner McFarland, March 27, 1884.*

SIR: I have considered the case of *E. McMurtie v. Jesse H. Wright*, involving the NE.  $\frac{1}{4}$  of Sec. 14, T. 162, R. 53 (Fargo series), Grand Forks, Dak., on appeal by the first named, from your decision of October 2, 1883, dismissing his contest.

Said contest is based upon the charge that the entry was fraudulently made.

There is no dispute as to the facts, which appear as follows:

Wright made timber-culture entry for the tract in question August 19, 1879.

Being a native of Canada, he on the 8th of August, 1879, declared his intention of becoming a citizen of the United States. Three days after making his timber-culture entry he returned to Canada, and continued to reside for a time upon land the title to which he was trying to acquire under the land laws of the Dominion, and which he did acquire January 4, 1882.

January 10, 1882, he returned to and has since been a resident of the United States.

Contestant admits that he (Wright) has, since making his timber-culture entry, complied with the requirements of the law in the matter of improvement and cultivation, but claims that his returning to Canada and there remaining for nearly two and a half years after having declared his intention to become a citizen of the United States, was evidence of want of good faith, and was a fraud upon the timber-culture laws.

I agree with you in the conclusion that Wright was not, by reason of his declaration of intention to become a citizen of this country, precluded from going out of the country. I know of no law forbidding his doing just what he did, nor do I see in his acts any evidence of *mala fides*.

His declaration did not make him a citizen of the United States; he can be made such only after a residence of five years in the country. His absence for any length of time followed by his return to and domicile in this country does not impugn his declaration, nor can such absence of itself be regarded as evidence of bad faith.

It does, however, postpone the date when he can become a naturalized citizen.

The law does not require continuous residence immediately following declaration of intention. If it did, then an immigrant having made such declaration could not return to his country to adjust and close his business there, or to protect any rights which he might have, and which it appears this applicant did have. But it does provide that "No alien shall be admitted to become a citizen who has not for the continued term of five years *next preceding his admission* resided within the United States." (Section 2170, Rev. Stat.) This becomes a matter of proof when application to be admitted is made.

In making his preliminary or first declaration, an alien does not renounce allegiance to the country from which he comes; he only announces his intention so to do, and to become a citizen of the United States. Until duly admitted by the proper court, he, though having declared his intention, is not a citizen of the United States. The late Lord Chief Justice of England, discussing nationality and the effect of naturalization, in the view of other nations than his own says on this point:

Domicile residence preliminary to naturalization, declaration of intention with renunciation of former allegiance or rights, will not suffice to give the character of citizen or subject of the country of adoption, which can be acquired only by the act of naturalization itself. (Morse on Citizenship, p. 85.)

The timber-culture law itself clearly recognizes the principle above enunciated, for it extends its provisions to any person, the head of a family or twenty-one years of age, who "is a citizen of the United States, or who shall have filed his intention to become such," &c. This amounts to a legislative declaration that an alien is not constituted a citizen by making the formal declaration of his intention to renounce foreign allegiance and become a citizen.

Applying what has been said to the facts in this case, we find that the entry was made after declaration of intention duly made to citizenship; that the law has been complied with in the matter of improvement and cultivation; that, though the applicant was for a time out of the country subsequently to his declaration of intention and to his tim-

ber-culture entry, neither such absence nor the cause thereof in any way vitiates his entry or interferes with the rights conferred thereby, his acts furnishing no proof and raising no presumption of bad faith on his part, either under the land laws or the naturalization law. On the other hand, good faith is evinced not only by the oath of intention followed by improvements and cultivation of the tract entered, but by the applicant's return to this country after a temporary absence rendered necessary in order to protect and preserve his interests abroad, and by his settlement here as a denizen, and, as he avers, a prospective citizen of the United States.

Finding no violation of law in the temporary absence from the country under the circumstances mentioned, and this being the only ground of objection to the entry, I affirm your decision dismissing the contest.

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#### 4. AMENDMENT.

##### LAND COVERED—EQUITIES.

SAMUEL M. LUCE.

As other entries cover the land included by the proposed amendment of entry, the application for amendment is denied; but in view of the equities involved, the original timber-culture entry is cancelled and a new one is permitted, with credit for existing payments.

*Commissioner McFarland to register and receiver, North Platte, Nebr., June 11, 1883.*

GENTLEMEN: Referring to your letter of November 23, 1882, transmitting the application of Samuel M. Luce, who made timber-culture entry No. 2177, June 2, 1882, for the NW.  $\frac{1}{4}$  9, 16, 21 W., to amend the same so as to embrace in lieu thereof the NW.  $\frac{1}{4}$  Sec. 8, same township and range, and my letter of March 2, 1883, instructing you to call upon Robison J. Powell, who made timber-culture entry No. 2244, July 17, 1882, for the NE.  $\frac{1}{4}$  8, 16, 21, and George W. Huffman, who made home stead entry No. 3246, October 2, 1882, for the NW.  $\frac{1}{4}$  same section, to show cause, if any existed, why Luce should not be allowed to amend his entry in accordance with his application, and their entries be canceled without prejudice to their right to make new ones, I have to state that I am now in receipt of your letter of March 19, 1883, inclosing affidavits by Powell and Huffman protesting against the cancellation of their entries, Huffman showing improvements on his homestead to the value of more than \$150, and Powell being also an actual settler in the section.

Under the timber-culture law the claimant is allowed a year within which to make improvements, and when a party finds a tract vacant and subject to entry, as shown by the records of the local land office, and places his entry thereon, it would seem to be a hardship to allow

another to step in subsequently and amend his entry to cover said tract (no improvements having been made) on the plea that he intended to have entered it originally.

The year not having expired and no improvements having been made by Luce to show to subsequent claimants that the land was entered, I think it would be neither just nor equitable to disturb the entries subsequently made. On the other hand the tract described in Luce's entry papers, in consequence of a mistake in description, is not the one which he contemplated in making the entry. To hold him to this entry only would be in effect to deny him the benefit which the law intended to confer, as it is shown that the tract described in his entry papers "is composed entirely of sand hills, and is worthless for agriculture, grazing, or cultivation of timber."

The party's application to amend his entry is rejected on account of the adverse claim which has attached to the tract to which he desires to amend, and for the further reason that a timber-culture entry has been made in the section. But in accordance with the decision of this office dated July 28, 1881, in the case of Herbert H. Moody, Niobrara district, I am of opinion that it is competent for this office to cancel Mr. Luce's entry in view of the equitable principles involved, and permit him to make a new one with credit for existing payments.

Notify him that such action will be taken should he so desire, and that he will be allowed thirty days within which to signify his intentions in the matter, at the expiration of which time you will report the result.

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APPROPRIATED TRACT—SECOND ENTRY.

HERBERT H. MOODY.

A party who applies to amend his timber-culture entry cannot be allowed to embrace a tract entered by another timber-culture claimant who had no notice of the prior party's intention to claim the land. The first party may be allowed to take some other tract, or have the money paid as fees and commissions refunded.

*Commissioner McFarland to register and receiver, Niobrara, Nebr., July 28, 1883.*

\* GENTLEMEN: Under date of November 8, 1881, this office returned to you timber-culture application No. 1743, made by Herbert H. Moody, for the SE.  $\frac{1}{4}$  23, 34, 15 W., for amendment to the SW.  $\frac{1}{4}$ , section 32, same township and range, provided no prior adverse right existed to the SW.  $\frac{1}{4}$  32, said party having applied to amend August 30, 1880.

By your letter of May 16 last you returned the application without amendment, together with an affidavit by Moody, stating that an adverse right has attached, and asking to be allowed to make a new entry.

Moody's entry was made May 7, 1880, and July 9, following, William E. Pearson made timber-culture entry No. 2042 upon the same tract.

It will be seen, therefore, that at date when Moody applied to amend the land was covered by Pearson's entry. Moody's application to amend was based upon the fact that he intended to enter, and supposed he was entering, the SW.  $\frac{1}{4}$  32, and that an error was made in describing the land.

His reasons for requesting it were regarded satisfactory by this office, but the adverse claim of Pearson having been made prior to date of the request for amendment complicates the matter somewhat. Had Moody's claim been initiated under the homestead or pre-emption laws then his settlement and improvements upon the land would have been notice to Pearson that the tract was not vacant, and, consequently, notice to him of the rights which in that case would have attached thereto. But under the timber-culture law the claimant has a year within which to make improvements; and where a party finds a tract vacant and subject to entry as shown from the records of the local office, and places his entry thereon, it would seem to be a hardship to allow another to step in subsequently and amend his entry to cover said tract (no improvements having been made), on the plea that he intended to have entered it originally. The year not having expired, and no improvements having been made by Moody to show to a subsequent claimant that the land was entered, I think it would be neither just nor equitable to disturb Pearson's entry by allowing Moody to amend thereto. On the other hand, the tract described in Moody's entry papers, in consequence of a mistake in description, is not the one which he contemplated in making the entry. With regard thereto there was no mutual understanding, no agreement of minds between him and the local officers representing the United States in the transaction. The tract with reference to acquiring which he acted in paying the fee and commissions, and engaging to fulfill the legal requirements, and which was the consideration moving him thereto, is lost to him in consequence of the entry of Pearson, which has since intervened. To hold him to this entry only would be in effect to deny him the benefits which the law intended to confer.

I think, under the circumstances, that it is competent for this office, in view of the equitable principles involved, to cancel his entry and permit him to make a new one according to his request. His entry is, therefore, hereby canceled, and you will so note upon your records. Advise Moody of the action taken, and that he will be allowed to make a new entry with application of existing payments to his credit, upon any vacant public land subject to such entry; or, should he prefer, the amount paid as fee and commissions upon the canceled entry will be refunded to him, upon proper application therefor, through your office, as provided by the second section of the act of June 16, 1880.

*LIMITATION—ONE ENTRY IN A SECTION.***RICHARD GRIFFITHS.**

In view of the fact that the prior timber-culture entry in the section is illegal, and can never be patented, Griffiths' timber-culture entry is allowed to stand.

*Secretary Teller to Commissioner McFarland, January 18, 1884.*

SIR: I have considered the case presented by the appeal of Richard Griffiths from your decision of April 4, 1883, holding for cancellation his timber-culture entry, made October 20, 1882, for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 34, T. 6, R. 20 W., Bloomington, Nebr.

It appears that at the time Griffiths' entry was allowed there existed a prior timber-culture entry on said section, made by one George Barrowcliff, December 1, 1881, for the NE.  $\frac{1}{4}$ , for which reason you held Griffiths' entry for cancellation.

The records of your office show that Daniel R. Wilson made timber-culture entry November 18, 1878, for the NE.  $\frac{1}{4}$  of this section, and that by permission, granted him in a letter from your office dated September 6, 1879, he amended his entry, and made it for the NW.  $\frac{1}{4}$  of the same section. That December 1, 1881, Wilson's entry was canceled for relinquishment, and on the same day Barrowcliff made his timber-culture entry for the NE.  $\frac{1}{4}$  of said section. That December 18, 1882, you held said Barrowcliff's entry for cancellation, because it conflicted with final certificate No. 3648, issued under the act of May 27, 1878, to homestead claimant, J. S. Hoyt, September 20, 1882, for said tract. That January 27, 1883, Barrowcliff made application for permission to amend his entry, and make it for the NW.  $\frac{1}{4}$  of said section. That March 23, 1882, one W. S. Thomas made homestead entry for said NW.  $\frac{1}{4}$ . That Barrowcliff's application for permission to amend is now pending in your office.

The timber-culture act of June 14, 1878 (20 Stat., 113), contains the following proviso: "That not more than one-quarter of any section shall be thus granted."

By this limitation patent but for one-quarter, in any one section, can issue under the timber-culture law. The effect of such limitation is to restrict accordingly the number of timber-culture entries that may be made in one section, and your office has for this reason very properly refused to permit more than one such entry to exist in a section.

Although Barrowcliff's entry for the NE.  $\frac{1}{4}$  existed prior to Griffiths' entry, it becomes apparent from the record that no patent can ever issue to said Barrowcliff under his original entry, and that so far as his application to amend is concerned it cannot be held to exclude the intervening rights of others.

I am of the opinion, therefore, that Griffiths' entry should not be disturbed.

Your decision is reversed.

**5. AMICABLE AGREEMENT.****PRIOR RIGHT—WAIVER—TECHNICAL VIOLATION.****AYERS v. BUELL AND CONNALLY.**

A prior right by virtue of a contest may be waived in part by an amicable agreement.

Such agreement should be respected where it settles a controversy like the one in this case, and should not be overthrown because of a technical violation of a rule of practice.

*Secretary Teller to Commissioner McFarland, February 21, 1884.*

SIR: I have considered the case of James L. Ayers *v.* Alexander T. Buell and Henry Connally, involving the SW.  $\frac{1}{4}$  of Sec. 5, Tp. 110, R. 61, Huron, Dak., on appeal by Ayers from your decision of July 6, 1883, awarding the whole tract to Buell.

Connally made timber culture entry No. 1789, July 22, 1879, for said tract. Buell entered contest September 29, 1881, against said entry, alleging failure to break five acres, as required by law. The time of trial was fixed for November 4, 1881, at which time Buell submitted proofs, upon which the register and receiver declared the entry forfeited. August 12, 1882, a relinquishment by Connally dated July 10, 1880, was filed, and thereupon the entry was canceled at the local office.

On the 14th day of August, 1882, Ayers obtained an abstract from the local office, received by mail, which showed the tract in question to be free from entry or other adverse claim; and thereupon, on the same day, he entered upon the land, made settlement, and commenced improvements. Buell soon after came and informed him that he had a contest on the tract. Ayers replied that he had relied upon the information given by the abstract, but if he had no right to the land he would abandon it. A day or two afterward they made an amicable agreement to divide the land in controversy between them. Pursuant to that agreement, on the sixteenth day of said August, Ayers filed declaratory statement No. 19170 for the east half of the tract, and Buell made timber-culture entry No. 9862 for the remainder. Ayers thereupon continued his possession and improvements; and has ever since resided with his family upon the land. His improvements, consisting of buildings and other permanent betterments, are valued at \$1,000.

December 1, following, you directed Ayers' filing and Buell's entry to be canceled, because made in violation of Rule 53, which provides that upon a termination of a contest the local officers shall take no further action affecting the disposal of the land until directed by the Commissioner. The proceedings in Buell's contest having been transmitted to your office, you, on December 29, same year, directed the contest to be dismissed, because the record did not show that he applied to enter the tract at the time he initiated the contest. You further ordered Con-

nally's entry to be re-instated. January 6th thereafter, Ayers initiated contest against the entry so reinstated.

January 30th thereafter, Buell applied to you for a review of your decision of December 29th, alleging as cause that he in fact did apply to enter at the time he initiated his contest, but that the register refused to receive his application and informed him it was not necessary; that his right of priority as a contestant would be preserved without it. You granted the rehearing, and March 16 last, reinstated his contest, and directed that of Ayers to be dismissed; but reserved your decision upon the whole case until a future time. June 6, last, you heard the case upon oral argument and briefs submitted, and awarded the whole tract to Buell, by reason of his contest and the relinquishment, which you held to inure to his benefit, and directed Connally's entry to be canceled. (10 Land Owner, 122.)

I do not consider it necessary to review the numerous questions raised by the record and the arguments of counsel. Conceding that Buell had the prior right to the whole tract by virtue of his contest initiated against Connally's entry, it was a right which he could waive, and this he did as to a part of the tract by his amicable agreement with Ayers. Undoubtedly this agreement would have been carried out in good faith but for the cancellation of the filing and entry of the parties by direction of your office, and the reinstatement of Connally's entry. During the several months which elapsed before this was done the parties seem to have acquiesced in the agreement, and lived upon and improved the land in accordance therewith. It was not until the filing and entry were canceled and Connally's entry restored that each seems to have felt himself compelled to resort to some action to secure his claim to the land.

Buell made the agreement with Ayers with full knowledge of his rights under his contest, and it would be manifestly unjust to allow him by his violation to obtain Ayers' improvements, made, at least in part, under its sanction, with the knowledge and acquiescence of Buell, and before he manifested any intention of repudiating it by claiming the whole tract under his contest with Connally.

I do not undertake in this case to discuss the propriety of the action of the local officers in canceling Connally's entry and permitting the filing and entry of Ayres and Buell without direction from you, but refer you to Hoyt v. Sullivan (10 Copp, 258), as having a bearing upon that subject. Even if such action was wrong you should have respected the agreement of the parties, which settled the controversy, and not have overthrown it because of a technical violation of the rules of your office. Such rules are made to aid in the just and equitable disposition of the public lands by the Government to its citizens, and should not be held to hinder and delay such disposition. Strict adherence to the rule under the facts in this case was unnecessary, and has been a fruitful source of litigation and expense to the parties.

The filing of Ayers and the entry of Buell made in consummation of their agreement should be restored. The reinstated entry of Connally should of course be canceled.

For the reasons stated I reverse your decision.

Reaffirmed by Secretary Teller, April 17, 1884.

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#### 6. APPLICATION TO CONTEST.

##### *CAUTION—COLLUSION—DUTY OF LOCAL OFFICERS.*

##### **BROWN v. BROWN AND MOSES v. BROWN.**

Caution is suggested against collusive contests by relatives or others. The application of Moses to contest is suspended until the result in *Brown v. Brown* can be determined; when, if the defendant is successful, Moses may proceed to contest. Local officers should examine carefully and point out errors in applications to contest and allow amendments thereto.

*Acting Secretary Joslyn to Commissioner McFarland, March 15, 1883.*

SIR: I have considered the appeal of Sylvester H. Brown from your decision of July 21, 1883, affirming the action of the local officers at Larned, Kans., in denying his right to contest the timber-culture entry of John B. Brown.

John B. Brown's entry was made June 7, 1880, and on December 22, 1882, one Annie M. Moses initiated contest against it, alleging failure to cultivate in 1880, and failure to plant in 1881 and 1882. On the day appointed for a hearing, March 21, 1883, Brown's attorney moved to dismiss the contest for failure to set up a proper cause of action, and the motion was granted. This action was proper, for the entryman was not required to cultivate in 1880, and his first year for planting did not expire until June 7, 1883.

Prior to said dismissal the appellant, Sylvester H. Brown, filed an application and affidavit of contest, and shortly after the dismissal said Annie M. Moses filed a second affidavit of contest. The local officers decided that these applications to contest were simultaneous, and that the two parties should bid for the preference right to contest. Brown did not bid, but Moses did, and was accorded the right of contest. In this the local officers erred. The first affidavit of contest filed by Moses was void on its face, and was, therefore, no bar to the initiation of Brown's contest (*Bivins v. Shelley*, 10 L. O., 212), which should be reinstated as of the date that it was filed.

Your decision is therefore reversed.

I direct your attention to the fact that it is a Brown who contests Brown's entry, and that the same attorney appears for both Browns. These Browns are perhaps relatives, and it is not an uncommon practice for delinquent entrymen to forestall a bona fide contest by a collusive one, in which it is never intended to produce sufficient evidence to procure

the entry's cancellation. I am not satisfied that such is the case here, else I would take summary action upon it. But in view of its possibility, I think it proper to protect the interests of the Government in this instance. You will, therefore, please notify the local officers that the second affidavit of contest filed by Annie E. Moses shall remain on file, with the right to her to amend it, until the final determination of the contest between Brown and Brown, and you will also notify her of her right to amend it. If *Brown v. Brown* is decided in favor of the defendant, then Annie M. Moses may have the preference right of contest against him.

You will also please notify the local officers that Congress has in various ways invited and encouraged persons to inform against those who are endeavoring to acquire title to the public land fraudulently or illegally, as the only adequate means of protecting the United States; and that it is their duty to further this policy by examining carefully any application to contest a claim, pointing out its defects to the applicant, and allowing him to amend it at once.

Mrs. Moses granted a rehearing by Acting Secretary Joslyn, August 2, 1884, on a showing of collusion in said contests.

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#### 7. ATTORNEY.

##### *FILLING DATE IN BLANK IMMATERIAL.*

##### DUMAS v. COOK.

The filling in of a date in a blank form by an attorney, as described, is immaterial, and does not affect the validity of the affidavit.

*Secretary Teller to Commissioner McFarland, January 28, 1884.*

SIR: I have considered the appeal of Peter Dumas from your decision of April 27, 1883, dismissing his contest against timber-culture entry No. 2421 of Charles W. Cook (for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 22, T. 9 S., R. 6 W., Concordia, Kans.), on the ground that the affidavit of contest, as sworn to by Dumas, failed to specify the date of said timber-culture entry, and that the omission was supplied by his attorney at the time of filing it.

In all other respects the affidavit of contest and the accompanying application to enter are regular. The omission of the date of entry, namely, August 19, 1881, occurred by a failure to fill up a blank in a printed form, but said date appeared correctly below, in that part of the affidavit alleging a failure to break said land "between the 19th day of August, 1881, and the 19th day of August, 1882." Since the allegation of non compliance fixed the dates of the beginning and ending of a year, and since it was within the official knowledge of the local officers that the first-named date corresponded with the date of entry, it is my judgment that the said omission was not a material defect, that the date

might properly be inserted by the attorney, and that the local officers were justified in allowing the contest.

Your decision is therefore reversed.

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*MATERIAL ALTERATION BY—NOT ALLOWED.*

ANDREW C. MILNE.

A timber-culture application cannot be altered or amended by an attorney to include a different tract.

*Secretary Teller to Commissioner McFarland, February 20, 1884.*

SIR: I have examined the case presented by the appeal of Andrew C. Milne from your decision of May 10, 1883, denying his right to make timber-culture entry for the SE.  $\frac{1}{4}$  of Sec. 15, T. 127, R. 64, Aberdeen, Dak.

It appears that Peter Bertrang made timber-culture entry for the land described May 28, 1881; that said Bertrang executed a relinquishment of said entry, which was filed in the local office by Milne's attorney August 26, 1882, and the entry thereupon canceled. At the same time that Bertrang's relinquishment was filed, or immediately thereafter, Milne's attorney offered the timber-culture application of Milne for the corresponding tract in range 63, but as the plat of T. 127, R. 63, had not been filed in the local office, the application was rejected. The local officers also refused to allow the said attorney to so change the description of the land covered by the application as to make it correspond with Bertrang's relinquished entry.

August 28, 1882, Joseph Witherspoon entered the tract as a timber-culture claim.

September 25, 1882, Witherspoon's entry was canceled for relinquishment, and A. J. Davis made timber-culture entry for the same tract. The latter entry remains intact upon the record.

After the allowance of Davis's entry, Milne perfected an appeal from the ruling of the local officers.

It does not appear that Milne ever offered to file at the local office an amended application, after the refusal of such office to permit his attorney to make the desired alteration in the original application.

The rejected application made by Milne is not with the papers in the case, and from an indorsement made on the notice of appeal by the register and receiver it would appear that such document had been in the possession of Milne's attorney, but said attorney and Milne disclaim all knowledge of its whereabouts.

The local office properly refused to allow the attorney to alter the description of the land in the application. Under the law the application is accompanied with an affidavit made by the applicant, setting forth, among other things, "that the section of land specified in my said ap-

plication is composed exclusively of prairie lands, or other lands devoid of timber," and an alteration permitted on the part of any one but the applicant in the description of the "land specified" would make such oath absolutely meaningless.

Your decision is therefore affirmed.

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### S. BREAKING.

#### DEFALUT CURED—GOOD FAITH.

##### FITCH v. CLARK.

If a timber-culture claimant is not in default as to the whole amount of breaking required at the time affidavit of contest is filed, the entry should not be declared forfeited.

*Secretary Teller to Commissioner McFarland, June 13, 1883.*

SIR: I have considered the case of W. R. Fitch *v.* Hugh G. Clark, involving timber-culture entry No. 892, covering the NW.  $\frac{1}{4}$  of Sec. 20, T. 20, R. 11 E., Neligh, Nebr., on appeal from your decision of July 5, 1882, adjudging the entry forfeited.

The entry was made May 17, 1880. The affidavit of contest was filed January 14, 1882, and alleged that—

H. G. Clark failed to break, or cause to be broken, 5 acres of the tract claimed during the first year after the entry thereof, viz., between the 17th day of May, 1880, and the 18th day of May, 1881.

The proofs show that the land is low and wet in character, and was overflowed in the spring and early summer of the years 1880 and 1881; that the defendant made arrangement for breaking 5 acres during the spring of 1880, but that after May 23 there was no time during what is known as the breaking season (which is stated to be from about June 1 to August 1) in which it could have been done, owing to the wet condition of the land. It appears, however, that the work might have been done in September or October. In 1881, the ground was too wet for breaking until about August 1, when the defendant caused to be broken what was supposed to be 10 acres, but upon actual measurement it proves to be 9 $\frac{1}{2}$  acres. The good faith of the defendant is shown, and at the time of filing the affidavit of contest, the amount of land required by law had been broken, although 5 acres thereof were not broken within the first year. There was still left to the defendant the remainder of the second year within which he could break the half acre found by measurement to be short. (*Cornell v. Chilton*, 9 Copp, 174.)

At the time of the contest and of your decision, it was supposed that the statute absolutely required that 5 acres should be broken during the first year; but this Department held, in *Galloway v. Winston* (9 Copp L. O., 98), that if the entryman was not in default as to the whole

amount required to be broken at the time of filing the affidavit of contest, the forfeiture of the entry would not be declared; in other words, that if the default had been cured before any other rights had intervened the entry would be preserved.

This construction, since that decision, has been followed by this Department, (*Ewing v. Ricard*, 9 Copp L. O., 174). I therefore reverse your decision, and direct that the defendant's entry be allowed to stand.

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*DEFAULT EXCUSED—GOOD FAITH.*

**BOULWARE v. SCOTT.**

Since the failure to break was due to an error of judgment, and not to bad faith, and since the entryman had begun to cure said failure before initiation of contest, the contest is dismissed.

*Secretary Teller to Commissioner McFarland, November 15, 1883.*

SIR: I have considered the case of John B. Boulware v. George M. Scott, involving lots 3 and 4, and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 31, T. 12 S., R. 27 E., Oxford, Idaho, on appeal by Scott from your decision of November 13, 1882, holding his timber-culture entry No. 75 for cancellation.

The affidavit of contest alleges failure to break the required 5 acres within the first year.

The record shows that Scott made said entry on April 12, 1881, having paid quite a sum of money for the possessory right of the prior settler; that the land which he intended to plant was in such a condition that it required grubbing before the required breaking could be done, and that on account of the very early spring of 1881 such breaking was postponed until the spring of 1882; that meanwhile Scott constructed an irrigating ditch, provided posts for his fences, made arrangements for trees, and otherwise showed his intention to make a permanent improvement of the land, and to plant it; that in March and April, 1882, he made contracts with persons to break the land with oxen, the spring being so late and the ground so frozen as to prevent his breaking with his own team of horses; that these contractors failed him altogether, and it was not until the latter part of April, 1882, that he began to break, shortly afterwards, and as soon as the condition of the ground permitted, completing the breaking of the first 5 acres; and that he had begun the breaking and had 2 acres broken before the initiation of contest.

It is evident that, whatever error of judgment there may have been, there is no bad faith in this case, and that the cause of Scott's failure to break the required acreage at the intended time during the first year was the unusual lateness of the spring—the act of God—which excuses the failure. If therefore the question were between him and the Government alone, under a uniform line of decisions his prompt effort to

break the land at the earliest date possible, though shortly after the expiration of the first year, would be a substantial and sufficient compliance with the law. Now, the fact is that he had actually begun the breaking prior to the initiation of the contest, and I think that it would be unjust to hold that a third person might intervene at this juncture and defeat his entry.

The contest is therefore dismissed, and your said decision reversed.

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OBJECT—OVERTURNING SOIL.

BLUM *v.* PETSCH.

The object to be attained during the first year by a timber-culture claimant, is a thorough overturning of the soil, not in spots, but continuously throughout the prescribed area. It is immaterial whether this object be accomplished by plowing or otherwise.

*Acting Secretary Joslyn to Commissioner McFarland, March 24, 1884.*

SIR: I have considered the case of Simon Blum *v.* Adolph Petsch, on appeal by Blum from your decision of September 6, 1883, dismissing the contest.

Petsch made timber-culture entry No. 203, November 23, 1881, covering 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. 26, T. 1, R. 7, Los Angeles, Cal.

On November 24, 1882, Blum filed an affidavit of contest, alleging the failure by Petsch to comply with the requirements of the timber-culture law during the first year.

At the hearing, December 29, 1882, it transpired that during the first year Petsch cleared 10 acres of the land from grease-wood and sage-brush, the roots of which were dug out with "grubbing hoes;" no further breaking was attempted, for the reason that the soil within the 10 acres was considered by him to be sufficiently broken within the meaning of the law.

The law requires the party making a timber-culture entry of a quarter-section of land to break or plow 5 acres thereof the first year. The object to be attained is a thorough overturning of the soil, not in spots, but continuously throughout the prescribed area, thereby loosening and rendering it possible to properly cultivate a crop to the full extent of the 5 acres; whether this object is secured by means of a plow or otherwise is immaterial.

The testimony shows that but a small portion of the land is fit for planting timber in a body, and that portion is so stony as to render plowing impracticable.

It appears that Petsch is a man of more than ordinary intelligence, an old resident of the locality, and has been interested in adjoining

land for a long time, so that he could not have been ignorant of the character of the tract in question at the date of entry.

The law does not exact impossibilities from the settler; but in the event that he enters a tract of land under the provisions of the timber-culture law, with knowledge that it is unadapted for the purpose of tree-culture, he will be held to a strict compliance with its requirements.

His remark, that "the land is so prepared that it is ready for sowing, and if it don't produce a crop without plowing it could not produce a crop with plowing," clearly indicates an utter indifference as to whether the soil is in a fit condition for crop or not. This view is corroborated by his subsequent actions. On January 2, 1883—during the second year—no other breaking of the soil having been done than the grubbing out of the sage-brush and grease-wood roots, the 10 acres referred to were sowed to barley, and a cultivator run over the ground for the purpose of covering the seed.

I do not perceive that Petsch has complied with the requirements of the law in any respect, and must therefore reverse your decision.

The entry of Petsch will be canceled.

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#### 9. CHANGE OF ENTRY.

*CONTEST—RELINQISHMENT—NEW ENTRY—EVIDENCE—IMPROVEMENTS.*

##### McCALL v. MOLNAR.

While a contest is pending, the timber-culture entryman may file a relinquishment, and, if qualified, make homestead of the same land. But such homestead entry is subject to the contestant's rights.

When a relinquishment is filed as the result of a contest, no further evidence in the contestant's behalf is needed, for the entry no longer exists, and the record is cleared.

Where a timber-culture entryman, in anticipation of failure to comply with the law, erects a house and cultivates the land, he cannot be allowed a homestead entry on the land in the face of a contestant.

In absence of any provision in the local law or in the rules of practice, forbidding the attorney in a case from acting as a notary public in the preparation of an affidavit for his client, there is no reason for declaring a contest illegal because based upon such affidavit. Testimony in a case should not be taken before a notary public who is the attorney of record.

*Secretary Teller to Commissioner McFarland June 27, 1884.*

SIR: I have considered the case of William McCall v. George Molnar, as presented by the appeal of said Molnar from your decision of December 27, 1883, allowing McCall to make timber-culture entry for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 32, T. 7 N., R. 65 W., Denver, Colo.

June 19, 1879, Molnar made timber-culture entry for this tract.

August 13, 1883, McCall began a contest against Molnar's entry, al-

leging non-compliance with the law, and at the same time filed his application to enter. Notice of contest issued fixing September 28, 1883, for the day of hearing, and personal service thereof was made August 29, 1883.

September 1, 1883, Molnar filed a relinquishment of his timber-culture-entry, and immediately tendered his application to enter said land under the homestead law. The local office, acting upon said relinquishment, canceled Molnar's timber-culture entry, and allowed said Molnar to make the desired homestead entry.

September 17, 1883, McCall applied to enter said tract as a successful contestant, but his application was rejected on account of the prior homestead entry of Molnar. McCall appealed.

At the time when Molnar made his homestead entry, he filed his own affidavit, duly corroborated, to the effect that he had built a house on the land, and made some other improvements thereon, alleging that he intended in so doing to claim the land under the homestead law in the event that he was unable to comply with the timber-culture law. In his affidavit, accompanying his application to enter, dated September 1, 1883, he alleges settlement "prior to June 18, 1883," and in his application claims the benefit of the act of May 14, 1880.

On behalf of Molnar it is said that the relinquishment could not inure to the benefit of the contestant, except after a hearing and judgment thereon pursuant to notice; that the improvements and settlement of Molnar precluded timber-culture entry for the land; and that McCall's contest was void, because the affidavit of contest was executed before one of his attorneys, acting in the official capacity of notary public.

Now, it is well settled that when a relinquishment is filed, it takes effect at once, so far as relieving the land covered thereby from the existing entry is concerned (*Whitford v. Kenton*, 1 Brainard's Legal Prec., 415; *Glaze v. Bogardus*, 2 *id.*, 53), and that land covered by the entry of a timber-culture claimant in default is open to the entry of the first legal applicant. With this right of entry goes the right of contest, in order to clear the record of the existing entry. Hence, where a legal contest against such an entry is pending, and a relinquishment is filed, the suit of the contestant is successfully terminated if such relinquishment be filed as the result of the contest. No further evidence is required in aid of the contest, for the contestant entry has ceased to exist, and the record is clear.

By express provision of the first section of the act of May 14, 1880 (21 Stat., 140), where land covered by a pre-emption, homestead, or timber-culture claim is relinquished, the land thus relinquished becomes open to settlement and entry without any further action on the part of your office.

In this case, when the relinquishment was filed, the application of McCall to enter the land was pending, and took effect instantly as a legal application for public land.

The local office properly enough allowed Molnar to make homestead entry for the land after filing his relinquishment, but such entry was subject to the assertion of McCall's superior right as a successful contestant.

Molnar will not be permitted to assert any right as a homestead claimant which he attempted to initiate while holding the land under the appropriation of the timber-culture entry. While that entry existed, the land was not public land, and he could only, during such time, acquire further rights to the land by complying with the timber-culture law.

The third exception to your decision does not seem to be well taken.

In the absence of any provision in the local law or in the rules of practice adopted by the Department, forbidding the attorney from acting as a notary public in the preparation of an affidavit for his client, I see no reason for declaring a contest illegal, because based upon an affidavit of contest thus executed. In the case of Sweeten *v.* Stevenson (2 Brainard's Legal Prec., p. 42), where not only the affidavit of contest, but the *testimony in the case*, was taken before the attorney of contestant, I held that such action would not be recognized by the Department, but it was not intended in said decision to formulate a rule that would render inoperative contests already begun under a different practice.

Your decision is affirmed. Molnar's entry will be canceled, and McCall allowed to enter for said land.

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## 10. CHARACTER OF LAND.

### RULE FOR DETERMINING—PROVISION OF NATURE.

#### BLENKNER *v.* SLOGGY.

The question as to whether land is devoid of timber should not be determined by the exact number of trees growing thereon, but rather by ascertaining whether nature has provided what in time will become an adequate supply for the wants of the people likely to reside on the section in question.

*Secretary Teller to Commissioner McFarland, July 18, 1883.*

SIR: I have considered the case of Herman Blenkner *v.* Peter Sloggy, involving timber culture entry No. 603 of the NW.  $\frac{1}{4}$  of Sec. 7, T. 137, R. 47, Crookston, Minn., on appeal by Sloggy from your decision of July 5, 1882, holding said entry for cancellation.

The allegation of the contestant is—

That there is a tract of timber on the said section of land, to wit, about 8 acres of natural growth on said section; that said Sloggy has planted on said land about 8 acres of poplar slips; that no other timber is planted by said Sloggy, to fill the requirements of the law, on said tract.

No evidence has been offered by the contestant in support of the allegation that claimant had failed to comply with the requirements of the law in the matter of planting; so the only question for determination is, whether the land in controversy comes properly within that class of lands defined as "devoid of timber." Although it does not appear from the record that the contest was instituted under the provisions of section 3 of the act of June 14, 1878, yet, on the information of the contestant, a question has been raised between the Government and the claimant which should be settled.

From the preponderance of the evidence, it would appear that there were on this section about five hundred trees of natural growth, varying in diameter from 6 inches to 2 feet or more, and consisting of ash, oak, elm, and some underbrush; that this growth of timber is confined to a tract from 5 to 8 acres in extent, situated in a bend of South Buffalo Creek, in the extreme corner of the southwest quarter, and partially, if not wholly, subject to overflow; and that the remainder of the section, including the part entered by Sloggy, is prairie.

The general character of the surrounding country, outside of this section, should not be taken into consideration; but it is eminently proper that the situation of this natural growth of timber and its relation to the section should be considered, as well as the actual amount and character of the timber itself.

It was held by your predecessor, and I think properly, in Osmundson *v.* Norby (2 Copp, 645), that where the growth of timber is confined to fixed limits, and is inadequate to the demands of the people that usually reside upon one section, with no prospect that the timber will spread to meet said demands, such tract is subject to entry under the timber culture laws; and this case seems to fall within the rule as thus laid down. The question as to whether land is devoid of timber, as within the intent and meaning of the timber-culture laws, should not be determined by the exact number of trees growing thereon, but rather by ascertaining whether nature has provided what, in time, will become an adequate supply for the wants of the people likely to reside on that section; and the circumstances surrounding each case of this character should be carefully scrutinized.

I am of the opinion that such a tract of land as this was properly subject to entry under the timber-culture laws, and your action holding the entry for cancellation is therefore reversed.

## ENTRIES—VACANT UNIMPROVED LAND.

## BENDER v. VOSS.

Timber-culture entries should be made upon vacant unimproved land, not upon cultivated land covered by the valuable improvements of another and in the possession of another.

*Acting Secretary Joslyn to Commissioner McFarland, July 19, 1883.*

SIR: I have considered the case of Jeremiah C. Bender v. Frederick Voss, involving the NE.  $\frac{1}{4}$  of Sec. 32, T. 20 N., R. 4 W., Salina, Kans., on appeal by Bender from your decision of July 25, 1882, holding his entry for cancellation.

The material facts are as follows: On November 4, 1873, one Frederick Leibrandt made timber-culture entry No. 158 on said tract, which he relinquished May 9, 1876, and which was canceled at the local office August 5, 1876. On the day of said cancellation, Frederick Voss, the appellee, filed homestead entry No. 17786, covering said tract, the application being dated and the affidavit executed July 27, 1876, the register and receiver accepting them under a custom then obtaining at the local offices (*Circular, Copp's Land Owner*, February, 1878, p. 167). But your office had ruled, July 29, 1876 (Mary C. Hill, letter C to register and receiver, Salina, Kans.), that the "affidavit must bear a date subsequent to the time the land is open to entry at the local office;" and thereby invalidated Voss's entry; whereupon, on August 8, 1876, he offered to file a supplementary application and affidavit, which the register and receiver rejected on the ground that the tract was already covered by his original entry. Said rejection your office affirmed on appeal, and also held for cancellation homestead entry No. 17786, and, no appeal being taken, it was canceled June 19, 1879.

On the day of said cancellation, one Jacob Deffner made timber-culture entry No. 2618 for said tract, and his relinquishment was filed July 23, 1880, on which day Jeremiah C. Bender, the appellant, filed timber-culture entry No. 2877, which is now of record at the local office.

On April 9, 1881, Voss asked "that a hearing may be ordered to determine his rights and equities to said tract, and that said Bender's timber-culture entry thereon be canceled, and that this affiant's homestead entry be reinstated." On hearing, the register and receiver decided adversely to Voss, and on appeal your office decided, July 25, 1882, in his favor, from which Bender now appeals.

I concur in your decision for the reasons about to be stated—a number of the points raised during the consideration of the case below remaining undiscussed, because they are not necessary, in my judgment, to its adjudication.

In the entry of Jeremiah C. Bender there are several defects which might perhaps be cured, but the following defect is incurable, namely, that the entry violated a decision of this Department (*Shadduck v.*

Horner, Copp's Land Owner, October, 1879, p. 113) that timber-culture entries "should be made upon vacant, unimproved land, not upon cultivated land covered by the valuable improvements of another and in the possession of another"—the record showing that the tract in question was then in the possession and occupancy of Voss, and that it had been cultivated and improved annually for the preceding four years. You are therefore directed to cancel said entry.

The original homestead entry of Voss is thus restored to its status on August, 8, 1876, when he offered for filing his supplementary affidavit and application. The register and receiver should have received said papers in lieu of and as curing the defects in those filed August 5, 1876, according to the decision of this Department June 11, 1875 (Flanagan *v.* Mulligan, Wichita office, unreported), and December 22, 1877 (Hiram Campbell, *supra*). Voss's rights were not, however, affected by the rejection of the supplementary papers (Duffy *v.* N. P. R. R. Co., Copp's L. O., July, 1875, p. 51), the offer to file which made his original entry valid.

You are accordingly directed to reinstate Voss's entry.

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*LAND NOT SUBJECT—PRAIRIE, &c., DEFINED.*

SELLMAN *v.* REDDING.

Land whereon there was once naturally growing forty acres of timber, which has been cut off, is not "devoid of timber."

*Secretary Teller to Commissioner McFarland, November 12, 1883.*

SIR: I have considered the case of Anthony Sellman *v.* Thomas Redding, involving the SW.  $\frac{1}{4}$  of Sec. 25, T. 10 S., R. 6 W., Concordia, Kans., on the defendant's appeal from your decision of May 1, 1882, holding said tract not subject to entry under the timber-culture laws.

It appears that Redding, on the 21st of December, 1880, filed an application to enter said tract under the act of June 14, 1878, as a timber-culture claim, and that the application was rejected by the local office on the ground that said tract was at that time reserved as saline land. From this decision Redding appealed. On April 28, 1881, your office affirmed the action of the local office in rejecting the application; but the south half of the above-described section having been held by you to be agricultural land in the case of McClain *v.* The United States, the tract in question was declared subject to the entry of the first legal applicant, and May 5, 1881, Redding renewed his application, which was rejected on the insufficiency of the affidavit as to the non-timber character of the said tract, and Redding appealed. Pending this appeal, May 20, 1881, Anthony Sellman filed an application to enter said tract as a homestead, and his application was rejected on the ground that Redding's appeal was yet pending. Sellman appealed from the action

of the local office, and July 19, 1881, you affirmed the rejection of Sellman's application, and your decision was affirmed by this Department on Sellman's appeal, March 7, 1882. But Sellman in his application having alleged that the tract was not subject to entry under the timber culture laws, you, on July 19, 1881, ordered an investigation as to the true character of the tract in controversy. As the result of such investigation the local office held, October 20, 1881, that the tract was not subject to entry under the timber-culture laws; and May 1, 1882, you affirmed this decision, and the case is now under consideration on Redding's appeal from your decision of the last named date.

The evidence establishes conclusively that about ten or twelve years ago there was a body of timber of natural growth, extending along the banks of two creeks that cross this section, of at least 40 acres in extent, the greater part of which has since been removed by the settlers in the vicinity, and that at the time of the hearing there were growing on the section only about 375 trees, from 6 inches in diameter upwards, and of no present value except for fire-wood. It was in evidence that "hundreds of loads of timber" had been hauled away, and one witness testified to cutting 400 white-ash fence-posts from this section; from which it would appear that the condition of the land at the time the application to enter the same was filed was the result of the denuding process resorted to by the first settlers.

Under the act the entryman is required to make oath at the time of his application "that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber" (20 Stat.; 113). I am of the opinion that the phrase "other lands" should be taken as meaning lands similar to those described as "prairie lands." Primarily the word "prairie" in its commonly accepted meaning is used to describe land actually devoid of timber. But there are other lands also naturally destitute of trees which could not be properly described as "prairie," and hence these were included in the phrase "other lands devoid of timber." "Where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede" (Potter's Dwarris, 236). The phrase "other person or persons" is construed to mean persons of the same description as those before enumerated (*Ibid.*, 292). The object of the act was to promote tree culture in those portions of the country where nature had failed to provide a supply commensurate to the needs of the people who would likely reside there; and if such a supply existed at the time when the lands were thrown open to settlement, they were clearly not within the intent of the act. If the tract at any time was not subject to entry on account of the natural growth of timber on that section, the act of removing the timber would not bring the land under the operation of the timber-culture laws. It is to be presumed that, left to itself, the section would again

produce timber without artificial cultivation. (B. F. Griffin's case, Copp's L. L., 1882, p. 642; Nicholas Noel *et al.*, *Ibid.*, 673.)

I am of the opinion that the tract in question was not subject to entry under the timber-culture laws, and that the entry was properly refused.

Your decision is therefore affirmed.

The papers accompanying your letter of October 20, 1882, are herewith returned. The record and evidence in the case of Burritt C. McClelland *v.* Anthony Sellman, now pending before you on the appeal of the latter from the decision of the register and receiver, holding his homestead entry of this tract for cancellation, are also returned for your action.

Motion for rehearing denied February 13, 1884.

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*TREES DEFICIENT IN QUALITY—NOT TIMBER LAND.*

**MATTERN *v.* PARPET.**

If trees at maturity become deficient in quality, so as to render them unserviceable for the purposes for which timber trees are ordinarily used, the land upon which they grow cannot properly be designated timber land.

*Secretary Teller to Commissioner McFarland, November 26, 1883.*

SIR: I have considered the case of William Mattern *v.* Michael Parpet, involving timber-culture entry No. 45, made by Parpet March 8, 1880, covering the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 30, T. 40, R. 5, Del Norte district, Colorado, on appeal by Parpet from your decision of December 4, 1882, holding his entry for cancellation on the ground that the land was not devoid of timber at the date of entry.

The tract is situated in a section which lies in the mountains on a bank of the Rio Grande River, and is somewhat cut into by sloughs which contain water. Around these sloughs and along the river bank was an indigenous growth of cottonwood trees from 350 to 450 in number, ranging in diameter from 3 to 14 inches. This part of the land extends back from the river about 250 yards and consists of coarse gravel, the balance of the tract being entirely devoid of trees. It appears that, by reason of the poor quality of the land, which did not afford sufficient nourishment, the trees became rotten at the heart, and were comparatively useless by the time they became large enough for use as timber.

It is shown that there is no other species of trees growing on this section, and that the cottonwoods thereon are all of the same quality. The dryness of the atmosphere prevents a natural growth of timber on land such as is situated in this section, except along the edges of running streams. It is only by constant irrigation that a successful growth of vegetation of any kind can be attained.

The object of the timber-culture act is to promote the growth and culture of timber. While many of the trees growing on this tract were of the size of timber trees, still if at maturity they become deficient in quality, so as to render them unserviceable for the purposes for which timber trees are ordinarily used, the land on which they grow cannot properly be designated timber land.

I am of the opinion that the land in question was subject to entry under the timber-culture law.

This ruling affects the tract in question, and is not intended to be of general application.

Your decision is reversed.

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#### *DEVOID OF TIMBER.*

#### *WHEELON v. TALBOT.*

The evidence in this case shows that the timber trees growing upon the land are either dead or dying, and valueless for timber purposes.

*Secretary Teller to Commissioner McFarland, January 14, 1884.*

SIR: I have examined the case of John M. Wheelon v. Ralph S. Talbot, involving the timber-culture entry of Talbot for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and lot 3 of sec. 14, T. 6 N., R. 44 E., Miles City, Mont., on Talbot's appeal from your decision of April 23, 1883, holding his entry for cancellation.

The record shows that Talbot made his entry November 15, 1880, and that the contest was begun December 22, 1881.

The affidavit upon which the contest was founded set forth that—

On various portions of said tract and section 14 there exists valuable timber, now growing, and being of the kinds designated by the Commissioner of the General Land Office as fit for timber trees; that said tract is not naturally devoid of timber, nor is it composed exclusively of prairie land, &c.

From the evidence submitted by the contestant it would appear that there were growing on this section about two hundred cottonwood trees, averaging from one to three feet in diameter. Both parties agree that the timber is confined to a point of land on the north side of the section, inclosed between two "sloughs" and the banks of a small stream that enters said section at about the center of the south line thereof and makes its exit near the northeast corner of the section. On the part of the claimant it is fairly shown that the trees on this section are utterly valueless for timber purposes; that the greater portion of them are either dead or dying, and that many are rotten in the top.

In Blenkner v. Sloggy (10 Copp's L. O., 171) it was held that the question as to whether land was devoid of timber, as within the intent and meaning of the timber-culture law, should not be determined by the exact number of trees thereon, but rather by ascertaining whether na-

ture has provided what in time will become an adequate supply for the wants of the people likely to reside on that section. In *Mattern v. Parpet* (10 C. L. O., 299) this Department held that when trees at maturity become so deficient in quality as to render them unserviceable for the purposes for which timber trees are ordinarily used, the land on which they grow cannot properly be designated as timber land.

Applying the rule governing the two cases cited to the facts in this case, it becomes apparent that the tract in question was properly subject to entry under the timber-culture law.

Your decision is therefore reversed.

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*SCATTERING TREES—DEVOID OF TIMBER.*

BENJAMIN LOOMIS ET AL.

The affidavits filed by the applicants, as well as the official plats, show but a scanty growth of timber on the section; entry is allowed without further investigation.

*Secretary Teller to Commissioner McFarland, January 28, 1884.*

SIR: I have considered the appeals of Benjamin Loomis, Robert W. Miller, and Hugh E. Williams from your decision of April 19, 1883, denying their respective applications to make timber-culture entries of the SW.  $\frac{1}{4}$  of Sec. 4, T. 10 S., R. 13 W., the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 21, T. 8 S., R. 14 W., and the S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 6, T. 6 S., R. 17 W., Kirwin district, Kansas.

It appears that Loomis' application was presented at the local office January 27, 1883, but the register rejected the same because the township plat showed timber in said section, and the claimant's affidavit admitted the fact. Miller's and Williams's applications were presumably presented and rejected January 31 and February 5, 1883, respectively, when the fees in each case appear to have been tendered and rejected, although there is no note of rejection indorsed upon either application.

You sustained such action for the reasons stated by the register and receiver therefor.

The affidavits accompanying the applications in question are according to the stereotyped form prescribed by your office regulations, excepting a certain interpolation in each; in that of Loomis, to wit: "There is only 100 growing trees thereon, ranging in size from small bushes to trees 2 feet in diameter, only 3 of the latter size, and only 23 of the same exceeding 10 inches in diameter"; in Miller's affidavit: "Except an area of about one-half acre sparsely covered with about 15 trees scattered over same, only 10 of same exceeding four inches in diameter, and none of them exceeding a foot in diameter"; and Williams's affidavit: "Except 20 cottonwood trees."

The records of your office seem to corroborate such "admissions," for

they show a very sparse growth of timber—simply a clump or thicket, such as is frequently found throughout the prairie region—along the banks or edge of a drain or branch 20 links wide, running SE. through said Secs. 4 and 21; while through Sec. 6 “a small drain with scattering timber passes \* \* \* near the NW.  $\frac{1}{4}$  corner; all the balance of the section is prairie.”

Now, it has been repeatedly held by your office and this Department that where a scattering growth of timber trees exists solely along the margin of a stream running through a section, such a section should be regarded as devoid of timber, within the contemplation of the statute, and therefore subject to such entry. (See *Linden v. Gray*, 3 Copp, 181, and *Turner v. Moulton*, decided by Department April 4, 1883.)

In the light of the foregoing record showing, and in view of the apparent good faith of these applicants, their applications will be admitted—as they should have been in the first instance—and ample opportunity should be accorded them to submit proof in support of their allegations touching the character of the respective sections in which their several claims are situated. Hereafter, in such a case, you will see to it that the alleged record showing reported by local officers as a basis for their action be verified or otherwise by a scrutiny of your own office records, whereby the necessity of examination of the same by this Department may be obviated.

Your decision is accordingly reversed, and the cases submitted by your letter of July 20, 1883, are hereby remanded for such procedure as indicated herein.

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## 11. CONTESTS.

### *INTERPLEADER—PRE-EMPTION FILING—SETTLEMENT.*

#### R. H. TRUSDLE.

Case of *Hale v. Cook*. The timber-culture entry of Trusdle is allowed, subject to the pre-emption filing of Watson, &c.

*Secretary Teller to Commissioner McFarland, May 28, 1883.*

SIR: I have considered the appeal of R. H. Trusdle from your decision of September 19, 1881, rejecting his application to interplead in the case of *Jonathan C. Hale v. Lafayette Cook*, involving the latter's timber-culture entry made October 3, 1878, upon the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 27, T. 5, R. 16, Kirwin, Kans., and to contest said entry.

Hale initiated his contest against Cook March 2, 1881, notice of which was returnable June 2. Trusdle filed his application May 13, and on May 16 Hale filed an amended affidavit to the effect that his contest was in behalf and for the use of his daughter, Abbie A. Hale. Trusdle's application was properly rejected because, not applying to

enter the tract, he had no right to contest Cook's entry. (*Bundy v. Livingston, Copp, December, 1882.*)

The contest of Hale against Cook was also unauthorized because he did not apply to enter the tract when initiating the contest, and also because he had exhausted his right of further entry by entries under both the homestead and timber-culture laws which were then intact, and it would be a vain proceeding to permit a contest with a view to an entry which could not be allowed.

On June 21, 1881, Byron C. Davis filed Cook's relinquishment of his right to the tract, and it thereby became again public land, subject to the first legal applicant; and Davis applied on the same day to enter it under the timber-culture law, but did not tender the fees therefor as required by the act of June 14, 1878. He consequently acquired no right.

On October 10, 1881, Trusdle applied to enter the tract in due form under the timber-culture law, tendering the fees therefor, but his application was rejected under your decision of September 19, 1881, because the thirty days' preference right, within which you allowed Hale to enter it, had not expired. Even had Hale had such preference right, Trusdle's application should have been allowed subject thereto (*Shanley v. Moran, March 12, 1883.*). But Hale having no preference or other right (for the reason stated), and there being no valid claim to the tract, Trusdle's application should have been allowed.

Afterwards, November 9, Lafayette Wands (filing the relinquishments of Hale and Abbie A. Hale) applied to enter the tract under the timber-culture law, which application was rejected, because of Trusdle's rejected application of October 10, upon which his appeal was pending, and also because of his subsequent application of November 9, made prior to Wands's application on the same day; and on November 12 J. J. Watson applied to file a declaratory statement for the tract, alleging settlement October 3, 1881, which application was rejected because of the pending appeals from rejection of both Trusdle's and Wands's application.

I modify your decision and direct the allowance of Trusdle's application of October 10, 1881, and also the filing of Watson whose right will depend upon his actual settlement, October 3, 1881, which was prior to Trusdle's application of October 10, and will be determined by his proofs at the proper time.

*QUALIFIED PARTY—CONTEST OF TWO ENTRIES.*

MILTON F. BLOSS.

Where a qualified party desires to make both a homestead and a timber-culture entry, he may commence contest against two timber culture-entries.

*Commissionor McFarland to register and receiver, Mitchell, Dak., June 13, 1883.*

GENTLEMEN: By my letter C of April 28, 1883, you were directed to advise Milton F. Bloss that he would be allowed thirty days within which to elect as to which of the following contests he desired to prosecute to a final determination, viz, his contest against timber-culture entry 1,470 (Springfield series), Henry Hundemer, NW.  $\frac{1}{4}$  7, 102, 61, and the one against timber-culture entry 1,472 (Springfield series), SW.  $\frac{1}{4}$  6, 102, 61, Wm. Hundemer.

Both these contests were initiated January 11, 1883, and the above-mentioned action was taken pursuant to the rule laid down in my instructions under date of December 22, 1882 (see Copp, vol. 9, p. 186), which was to the effect that no person should be allowed to contest more than one homestead and one timber-culture entry at the same time.

I am now in receipt of the register's letter of the 22d ultimo, transmitting one from Bloss in which he states that he contested the above-mentioned entries in good faith for his own use and benefit, and not for the purpose of speculation, and intended, in case said entries were canceled, to enter one tract as a homestead and the other as a timber-culture claim, having filed proper applications at the time he initiated the contests.

The purpose of the instructions of December 22, 1882, was to prevent speculative contests, by restricting the number of contests which one person could carry on at the same time to his qualifications for making entry of the land. As one person cannot make two timber-culture nor two homestead entries, it was held that he could not institute two contests in either case to avail himself of the provisions of the third section of the act of June 14, 1878, or the second section of the act of May 14, 1880.

But where a party is qualified to make both a timber-culture and a homestead entry, and desires to do so, if successful in his contests, it is immaterial whether the entries he contests are both of the same character or not.

It appearing that Mr. Bloss desires to make a timber-culture entry and a homestead entry, respectively, of the lands embraced in the timber-culture entries contested by him, he will be permitted to prosecute the contests against both entries, and my letter of April 28, 1883, is modified accordingly.

The testimony in both of Bloss's contests is therefore herewith re-

turned, and when your decisions are rendered and indorsed upon the cases, you will, at the proper time, forward the complete records to this office.

Give notice hereof to all parties in interest.

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*RELINQUISHMENT—ACTION OF LOCAL OFFICERS—PRACTICE.*

**WHITMORE v. TUFTS.**

Relinquishment having been made to the Government, and having come to the hands of the local officers, it was, perhaps, their duty to enter it on the record, and thus open the land to entry by the first legal applicant and save the expense of a contest; but from an excess of fairness it was returned with Tufts application, and was an act of which he cannot complain.

The case as stated does not bring it within Rules of Practice No. 66 *et seq.*?

*Acting Secretary Joslyn to Commissioner McFarland, June 27, 1883.*

SIR: I have examined the case of Frank E. Whitmore v. Eben T. Tufts, involving timber-culture entry No. 2,962, dated December 24, 1879, for the NE  $\frac{1}{4}$  of Sec. 4, T. 7, R. 16 W., Bloomington, Nebr., on appeal from your decision of April 22, 1882, dismissing the contest and allowing John J. Tufts time to complete an entry.

Tufts made the entry and Whitmore contested it for non-compliance with the statute.

You state that "no evidence was submitted by the defendant," and that the evidence on the part of contestant shewed "beyond question a total failure to comply with the requirements of the law;" and that after due notice of the decision of the local office in favor of the contestant no appeal was taken.

The record fully sustains this statement; but you further say that "gross irregularity is suggested in this case, inasmuch as Rules 66 to 69, inclusive, do not appear to have been complied with."

The facts upon which this conclusion is reached by you are as follows:

September 24, 1881, John J. Tufts procured from the defendant (his father) a relinquishment of his said entry, and in October following went before the county clerk of the county where the land was situated and there made affidavit and application to enter the land. This application, with the relinquishment and \$14 for fee and commissions, were sent by said clerk to the local office. Upon an examination there it was found that there was an excess of land beyond a quarter-section, and this excess appeared upon the face of the application; and for this reason the amount of money sent was not sufficient to pay for the entry. The papers were therefore returned to the clerk, with a statement that the amount of money remitted was insufficient. Nothing further was done to complete the application.

About a month afterwards Whitmore, acting without any knowledge that such relinquishment had been made or the entry by John J. Tufts attempted, initiated the contest, produced witnesses at the trial, and obtained the decision of the local officers that the entry of the defendant should be canceled. The defendant was present at the trial, but, as before stated, did not appeal. Although the defendant had held his entry upon the land for nearly two years, he had done nothing after making his entry to comply with the law. He finally relinquished the entry to enable his son to make another. Whitmore, in good faith and at considerable expense, had proved the total failure of the defendant to comply with the law, and obtained the order that his entry should be canceled.

The gross irregularity for which you decide to dismiss the contest consisted in the fact that "No notes of any character were made on Tufts' application showing rejection of same, or cause of rejection, or advising him of his right of appeal."

It is clear from the facts recited that the local office did not regard the return of the application to the county clerk, with the statement that the amount of money was insufficient, as a final rejection of the application and such a final determination of the claim to enter as became appealable. The evident object of the return was to inform the party that the amount of money accompanying the application was not sufficient, and thus enable him to furnish the deficiency and complete his entry. If the papers had been returned with the necessary amount of money at any time before Whitmore began his contest or other rights had intervened, is there any doubt that the local officers would have received it and completed the entry? If they would have done so, then it was not such a final rejection of the claim to enter as became appealable. No issue was made upon the question of the sufficiency of the money. It was affirmed by the local officer that the amount was insufficient; but that was not and is not now denied by Tufts. Tufts only complains that because of his absence he was not informed of the call made through the county clerk for more money until after the contest was begun by Whitmore. He chose, however, to do the business through the county clerk, who became his agent, and it was not the fault of the local office or Whitmore that the deficiency was not made up or Tufts informed that it was required. The local office promptly informed the county clerk, and after the lapse of a month, nothing being heard in the mean time from Tufts or the county clerk, Whitmore initiated his contest.

The case, briefly stated, presents this proposition: A party goes to the local office with an application to enter a piece of land. He hands to the officer his application, with an amount of money. The officer examines the paper and the money, and finding the amount insufficient, passes the papers and money back to the applicant and informs him that there is not sufficient money to make the entry and explains why.

The applicant does not claim that the money is sufficient, makes no issue, says he supposed it was sufficient when he came with it, retains the papers and money, and leaves the office. Would that be such a final determination of the claim to enter as required the register and receiver to make "notes" upon the application and "promptly advise the party in interest of their action and of his right of appeal to the Commissioner," and enter "upon their records a memorandum of the transaction," and then allow the aggrieved "party thirty days from the receipt of notice in which to file his appeal in the local land office" under Rule 66 *et seq.*?

I think not. Tufts does not claim that the local office decided wrongly in holding that the money was insufficient. He is not an "aggrieved party," under Rule 67, in the sense of such a final determination of his claim to enter as required the register and receiver to make the record entries and give the notice of the right to appeal and allow thirty days to file an appeal in the local office. Such practice would unnecessarily tie up the land and encumber the business in the local land offices.

The relinquishment having been made to the Government, and having come to the hands of the local officers, it was perhaps their duty to enter it of record, and thus open the land to entry by the first legal applicant and save the expense of a contest, but from an excess of fairness it was returned with Tufts' application, and was an act of which he cannot complain.

Your decision dismissing the contest and allowing John J. Tufts to enter is reversed; and Whitmore should be allowed to enter the land under the act of May 14, 1880.

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*ACT OF 1878—ACCRUED RIGHTS.*

*ETTER v. NOBLE.*

Acts done or omissions by the timber culture claimant since date of initiating contest have no bearing on contestant's rights.

If a contest was not initiated against a timber-culture entry made under the act of 1874 until after the passage of the act of 1878, the claimant's rights under the latter act accrued and his compliance with law must be judged by the act of 1878.

*Acting Secretary Joslyn to Commissioner McFarland, July 31, 1883.*

SIR: I have considered the case of John F. Etter *v.* James A. Noble, involving timber-culture entry No. 702, of July 27, 1874, for the SW. $\frac{1}{4}$  of Sec. 8, T. 20 S., R. 3 W., Salina, Kans., on appeal by Etter from your decision of July 13, 1882, dismissing the contest on the ground that cause of forfeiture had not been shown.

Contest was initiated March 2, 1880, and any rights acquired by the contestant accrued on that date, if at all; consequently consideration

of the mass of testimony respecting delinquencies subsequent to that date is unnecessary for the preservation of contestant's rights.

The evidence shows that some 40 acres were broken by the claimant in 1874, cultivated in 1875, partially planted and cultivated in 1876, partially replanted and cultivated in 1877, and cultivated in 1878 and 1879, so that in the spring of 1880 there were some 7,000 trees on about 30 acres of the tract, as admitted by the contestant, and many more than that number as sworn to by the defendant and his witnesses. Among them weeds had sprung up abundantly in 1879, but it is in evidence that the season was exceptional in this regard, that there had been considerable cultivation, though probably inadequate, and that, on the whole, the trees were thrifty and the tract in as good condition as any similar claim in the county. The year ending July 27, 1880, had not yet expired.

I concur in your opinion that Noble's claim was not subject to forfeiture for violation of any of the provisions of the act of June 14, 1878.

The principal point made by appellant's counsel, however, is that his failure to comply with the requirements of the act of 1874 was the issue in the case, and that as such failure, in respect of the number of acres planted, is shown by the appellee's own admissions, it should work a forfeiture of his claim. There is no question but that the act of June 14, 1878, was intended to relieve claimants under earlier acts in certain particulars, and that they became entitled to its benefits from date of its approval (*Gahan v. Garrett*, 9 Copp's L. O., 63). Had Etter's contest been initiated prior to said approval his adverse rights would have at once attached, and there would be force in his plea that, as against him, Noble could not legally claim said benefits (*Lee v. Moran*, 8 Copp's L. O., 181). But the affidavit of contest was not filed until Noble's rights under the act of 1878 had accrued, and, among others, his right under section 7 to make final proof, by showing but 10 acres under cultivation after June 14, 1878, and 6,750 living and thrifty trees. It is clear that on said date he had more than the required number of acres and trees under cultivation, and hence he was entitled, upon performance of the condition subsequent, of cultivation and protection, to his patent. But to declare his entry forfeited for delinquencies that occurred prior to June 14, 1878, is to prevent his making such proof, to destroy said title, and to nullify the statute. To this result the logic of counsel's position inevitably leads, and it is therefore untenable.

Your decision is affirmed.

*ILLEGAL CONTEST—SECOND CONTEST—RELINQUISHMENT.**BIVINS v. SHELLY.*

Where the first contest against a timber-culture entry is not supported by law, another contest by another party may be initiated against the same entry notwithstanding the first contest is pending.

A relinquishment after contest has closed can have no effect.

*Acting Secretary Joslyn to Commissioner McFarland, August 31, 1883.*

SIR: I have considered the case of Burton Bivins *v.* Terry Shelly, involving timber-culture entry No. 514, covering the NE.  $\frac{1}{4}$  of Sec. 5, T. 151, R. 44, Crookston district, Minnesota, on appeal by Bivins from your decision of May 13, 1883, dismissing contest.

It appears that Shelly made timber-culture entry of the tract in question May 23, 1878, and that one William H. Foote filed an affidavit of contest July 1, 1880, and was allowed to proceed to contest. On appeal, this Department dismissed the case July 18, 1883, on the ground that, as Foote did not file an application to enter the land at the date of initiation of contest, he could not dispute the claim of Shelly. (*Bartlett v. Dudley, Copp's L. O., February, 1883.*)

Bivins filed application and contest was initiated against Shelly January 9, 1883, and on the day appointed for the trial he appeared and gave proof to the effect that Shelly had not complied with the requirements of the law relating to timber-culture entries, to which Shelly made no defense. The district officers held the entry forfeited and he took no appeal. You decided that Bivins should not have been allowed to make contest, on the ground that Foote had previously contested the entry of Shelly, which contest was still pending.

The right of Bivins to make application to enter the land is statutory. Section 3 of the act of June 14, 1878 (20 Stat., 113), provides:

That if at any time after the filing of said affidavit and prior to the issuing of the patent for said land the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office, and the rights of the parties shall be determined as in other contested cases.

Any regulation in contravention of such right must be held inoperative. (*Original Company, &c., v. Winthrop Mining Company, 60 California, 631.*)

The contest of Foote, not being supported by the law, was without jurisdiction, and cannot defeat the legal application of Bivins.

The fact that Shelly filed a relinquishment of his entry August 9, 1883, does not affect the status of this case, for the reason that such act

was performed subsequently to the closing of the case before the local officers. (John Powers, Copp's L. O., February, 1882.)

The entry of Shelly will be canceled, and Bivins will be permitted to make entry of the tract in question.

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*RULES OF PRACTICE—STATUTORY RIGHT—RELINQUISHMENT.*

*HOYT v. SULLIVAN.*

No rule formulated for the administration of the law will be permitted in its operation to defeat a statutory right.

At the moment the original timber-culture claimant fails to comply with the law, the right of another legal applicant to enter the land under the homestead or timber-culture law is complete.

While upon relinquishment of a timber-culture entry the land is subject to entry by a qualified party, such right may be subject to the right of another party who has duly contested and procured the cancellation of entry. A relinquishment may be shown to be an independent transaction, and not evidence in the contestant's favor, in which case the land will be open to the first legal applicant.

*Secretary Teller to Commissioner McFarland, October 25, 1883.*

SIR: I have considered the case of Melvin A. Hoyt *v.* B. H. Sullivan, involving timber-culture entry for the SE.  $\frac{1}{4}$  of Sec. 3, T. 103 N., R. 64 W., Mitchell, Dak., on Hoyt's appeal from your decision of June 13, 1883, canceling his entry for said land.

It appears that Luther B. Sanborn entered the above described tract under the timber-culture laws October 28, 1880, and that October 28, 1881, Sullivan initiated a contest against said entry on the ground of abandonment.

December 9, 1881, a hearing was had, and Sullivan introduced evidence showing that Sanborn up to the date of the hearing had in no manner cultivated, broken, or improved said tract. Sanborn did not appear at the hearing. The finding of the local office is apparently indorsed on the back of the contest affidavit in the following terms: "Declared forfeited and an appeal notice issued"; but the indorsement bears no date or signature.

March 10, 1882, the local office, on motion of one C. S. Rowe, claiming to be Sanborn's attorney, dismissed Sullivan's contest without notice to the said Sullivan, and allowed the said Rowe to initiate a contest against Sanborn's entry in his own name. The only record that appears of the action of the district officer dismissing Sullivan's contest is found indorsed on his contest affidavit as follows: "On re-examination of the evidence this case is dismissed, March 10, 1882. Wm. Letcher, Rg."

April 26, 1882, Sullivan filed in the local office a notice of appeal from the decision of March 10, 1882, alleging it to have been made without notice to him or his attorney.

March 16, 1882, Sullivan began a second contest against Sanborn's

entry, but this contest was dismissed on the completion of Rowe's contest before the local office.

Pending Sullivan's appeal from the decision of the local office dismissing his first contest, November 17, 1882, Sanborn filed a relinquishment of his timber-culture entry, Rowe withdrew his contest, and Melvin A. Hoyt made timber-culture entry for the same land.

November 22, 1882, Sullivan applied to enter the land, but the application was rejected on the ground that the land was embraced within Hoyt's entry, and from this decision Sullivan appealed.

January 25, 1883, your office took action on Sullivan's first appeal, and dismissed his contest on the ground that it was prematurely initiated.

April 21, 1883, you decided that as neither Sullivan nor Rowe appeared to have filed application to enter the land at the time of initiating their contests, neither of them gained anything thereby; and you allowed Hoyt's entry to stand subject to Sullivan's right to show that he did apply to enter the land at the initiation of his contest.

June 13, 1883, on review, you modified your decision of April 21, 1883, and canceled Hoyt's entry "because erroneously allowed, in conflict with Rule 53," and held the land open to the first legal applicant. From this decision Hoyt appeals.

Rule 53 of the Rules of Practice prescribed by your office and this Department provides, that after the papers in an appeal have been sent up by the local office, such office will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner. The reason for the adoption of this rule is obvious. In the absence of such a provision, a multiplicity of suits would frequently arise involving practically the same question, and thus incumber and obscure the record to no good purpose.

But no rule formulated for the administration of the law will be permitted in its operation to defeat a statutory right. Section 3 of the act of June 14, 1878 (20 Stat., 113), provides—

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, that the party making claim to said land, either as a homestead settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

From the foregoing it will be seen that the right to enter the land under the homestead or timber-culture laws is complete by express provision of the statute, in any legal applicant, at the moment when the original claimant shall fail to comply with any of the requirements of the act. It will also be observed that the right to contest a timber-culture

claim is limited to an applicant for the land; hence any attempt to initiate a contest, without having made application to enter, confers no legal standing upon the contestant, under section 3 of the act referred to above (*Bundy v. Livingston*, 9 Copp's L. O., 173), nor jurisdiction upon the local office to entertain such contest.

The act of May 14, 1880 (21 Stat., 140), provides—

That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

Section 2. 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 the land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

Now, under the first of these provisions, the land is, upon relinquishment, open to the entry of the first legal applicant as a statutory right. But, under the second, that right may be subject to that of another who has contested, paid the office fees, and procured the cancellation. This, however, in case of relinquishment, can only be so where the relinquishment is actually or constructively the result of the contest, and so made to inure to the benefit of the contestant after cancellation. And, generally, where the contest has been properly brought, a relinquishment has been construed as evidence in aid of the suit and not allowed to bar the preference right. But this is presumptive merely, and if it be conclusively shown that it was an entirely independent transaction, and not evidence of prior abandonment, it will not so inure to aid the original contestant. And if the contest is not properly brought, and is for that reason dismissed, no cancellation can result from it and no preference right attaches to it. Upon relinquishment after such contest, and in no wise connected with it, the land is open to entry as in other cases, under section 1 of the act.

At the time that Hoyt applied to enter the land it was open to such entry. The original claimant, Sanborn, having forfeited his rights and relinquished his entry, the local office properly allowed Hoyt's application, subject to outstanding rights of other parties. The illegal contest of Sullivan, then pending, could not deprive Hoyt of his statutory right to enter the land nor operate to remove the land from a proper disposition by the district officers. (*Bivins v. Shelley*, 10 Copp's L. O., 212.) The allowance of Hoyt's entry was not in contravention of any right acquired by Sullivan, but subject to the same, if any existed, and you subsequently properly decided that Sullivan's contest was without foundation.

Your decision canceling Hoyt's entry is therefore reversed, and said entry, as allowed by the local land office, held intact.

*PROCEEDINGS—IRREGULARITY—PROCEDURE.**O'DEA v. O'DEA.*

The defect of notice by publication, before affidavit is made that personal service cannot be had, is not necessarily fatal to the contest itself. The proceedings so far as irregular may be set aside and resumed in a proper manner from the point of departure from the requirements of practice.

*Commissioner McFarland to register and receiver, Mitchell, Dak., November 3, 1883.*

GENTLEMEN: I am in receipt of a letter from Messrs. Butterfield & Phelps, of Montrose, Dak., attorneys for contestant in the case of *O'Dea v. O'Dea*, involving timber-culture entry No. 1,314, of the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 102, R. 53, in which case contest was dismissed by my letter, C, of the 8th ultimo, for the reason that Rule 12 of Practice had not been complied with. Messrs. Butterfield & Phelps state that the affidavit required by said rule was filed with the evidence in the case, and they ask a re-examination of the papers with a view to the ascertainment of that fact.

It is true that the required affidavit was made, and that the same was sufficient in form, but it was not made and filed before publication of notice, as required by the rules. Such affidavit is the basis for publication, and it was so held in *Hewlet v. Darby* (9 Copp's Land Owner, p. 230).

The defect of notice by publication, before affidavit is made that personal service cannot be had, is not, however, necessarily fatal to the contest itself. The proceedings so far as irregular may be set aside and be resumed in a proper manner from the point of departure from the requirements of practice.

My action dismissing O'Dea's contest is accordingly reversed, the contest reinstated, and the case remanded to you for rehearing after due notice.

Advise Messrs. Butterfield & Phelps of this action.

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*ILLEGAL CONTEST—LEGAL CONTEST.**WILSON v. FRENCH.*

It should be observed that a contest having been declared to be invalid, it would neither be competent nor consistent to take cognizance of a record in a case that constructively never existed.

*Secretary Teller to Commissioner McFarland, November 3, 1883.*

SIR: I have considered the case of John W. Wilson v. Aaron J. French, involving the SE.  $\frac{1}{4}$  of Sec. 26, T. 111, R. 62, Huron (formerly Springfield) district, Dakota, on appeal by Wilson from your decision of April 5, 1883.

It appears that French made timber-culture entry No. 2,245 (Springfield series) of the tract March 12, 1880. April 19, 1881, one William T. Love initiated contest against the entry, but failed to file an application to enter the land. Citation, however, duly issued and service was had by publication; whereupon the register and receiver decided in favor of contestant, and no appeal having been taken from such decision they certified the entry for cancellation to your office. Pending consideration of the same, Wilson applied at the local office to contest said entry and to enter the land; but the register and receiver rejected such application upon the ground that the case of *Love v. French* was *pendente lite*. Wilson having appealed from such action, your office rendered the decision in question sustaining the local officers and dismissing Love's contest. Pending such procedure, however (Wilson having appealed from your decision April 9, 1883), the register allowed one Henry M. Jenett to contest the entry May 1, 1883.

Under date of July 27th ensuing, you advised the register and receiver that such allowance was erroneous, from which action Jenett appealed.

It should be observed, however, that Love having failed to file an application to enter the land with his affidavit of contest, such contest was initiated without legal authority, and must be regarded as though it had never been initiated. Hence it was competent for Wilson to initiate contest as he did, and he must be regarded as the first legal contestant. Your action, therefore, dismissing Love's contest was correct, but so much thereof as sustained the register and receiver's action in rejecting Wilson's application to contest French's entry was erroneous. (See *Bivins v. Shelly*, 10 Copp., 212.)

But Wilson having complied literally with the prerequisite statutory requirement in filing his application to enter with his affidavit of contest, it was not competent therefore for Jenett nor anyone else to contest said entry pending Wilson's contest. I accordingly approve your action of July 27, 1883, advising the register and receiver that the allowance of Jenett's contest was erroneous, and his appeal is therefore dismissed.

It is urged by Wilson's attorney that French's dereliction in the premises having been evidenced by the record in the contest of *Love v. French*, it would be a supererogation "to require a new advertisement and trial." But it should be observed that Love's contest having been declared to be *nil*, it would neither be competent nor consistent to take cognizance of a record in a case that constructively never existed. The proper procedure therefore is by a *remititur*, whereby the case should be tried *de novo*.

*INSUFFICIENT NOTICE—REQUIREMENT.*

VAUGHN *v.* KNUDSON.

Owing to insufficient notice and absence of application to enter by contestant, the contest in this case is dismissed.

*Secretary Teller to Commissioner McFarland, November 8, 1883.*

SIR: I have considered the case of William Vaughn *v.* Knud Knudson, involving the latter's timber-culture entry of July 31, 1880, upon the SW.  $\frac{1}{4}$  of Sec. 19, T. 154, R. 48, Crookston, Minn., on appeal by Knudson from your decision of November 28, 1882, holding his entry for cancellation.

This contest was initiated March 17, 1882, Vaughn alleging that Knudson "has not broken five acres of said land, and further that he does not know where said Knudson is, or may be, found." Notice by publication was commenced March 23, assigning April 27 as the day for hearing. Personal service was also made upon Knudson April 4; but as thirty days did not intervene between this date and the date of hearing as required by the rules, it was not a legal notice, and Knudson was not bound thereby.

The notice of publication was also insufficient. This notice cannot be given except upon affidavit of the contestant that personal service cannot be made upon the contestee. Vaughn's affidavit that "he does not know where said Knudson is, or may be found" may be true, and yet, by reasonable diligence and inquiry, he might have known. In fact, he did know April 4, and he also testified to Knudson's place of residence at the hearing. It does not appear why he might not have known such residence at the date of his affidavit as well as at the other dates had he made proper inquiry. An affidavit stating want of knowledge in this respect is insufficient unless it also states the reason for such ignorance, in order that the local officers may judge whether it is a suitable case for notice by publication. Any other rule opens the door for fraudulent practices, and for hearings without due notice to the party whose rights are involved.

Knudson did not appear at the hearing. The notices by publication and by personal service were both insufficient, and his rights cannot be impaired by a defective notice which he has not waived.

Besides, when initiating the contest Vaughn did not apply to enter the tract, as required under the ruling in *Bundy v. Livingston* (Copp, December, 1882), for which reason his contest was unauthorized.

Your decision is modified, and the contest dismissed.

*APPLICATION OF CONTESTANT—WHETHER RESTRICTED TO LAND IN CONTROVERSY.*

Discussion of the question how far entry by a contestant is to be restricted to the land in contest.

*Commissioner McFarland to register and receiver, Grand Island, Nebr., November 30, 1883.*

GENTLEMEN: I am in receipt of the register's letter of the 30th ultimo, making inquiry whether or not a successful timber-culture or homestead contestant is restricted in making his entry to the tract described in the entry contested. In reply I have to state that the rule in regard to timber-culture contestants being required, as an act precedent or simultaneous to instituting contest, to file an application to enter the tract to be contested, as announced by the honorable Acting Secretary of the Interior, in the case of *Bundy v. Livingston*, reported in Copp's L. O., vol. 9, p. 173, it would appear, from a fair interpretation of the language employed in said case, that a contestant of a prior timber-culture entry is restricted in making or perfecting his entry to the tract described in the entry contested, unless it embraces a less area than the maximum of a timber-culture entry, when it does not appear that he would be barred from applying to enter, and entering land not previously legally taken, and contiguous to the entry contested, enough to complete the maximum of 160 acres in a compact body; in the case cited it was held "this statute" (act June 14, 1878, section 3) "restricts a contest against a prior timber-culture entry to one who seeks to enter it under the homestead or timber-culture laws." Under a recent decision of the honorable Secretary of the Interior, in the case of *Bailey v. Olson*, not yet reported, it is held that in instituting a contest against a prior homestead entry no obligation is imposed upon the contestant at the inception of contest analogous to that in timber-culture contest for the reason that "the preference right allowed is to be exercised by making entry within thirty days from notice of cancellation, and not by a preliminary application;" hence it would appear that in such contests the contestant is not restricted to the tract described in the prior homestead entry contested, but may elect to take so much of it as he wishes, and of other contiguous land, not legally taken, to complete 160 acres in a compact body. It is held in the case last cited that a successful contestant of a homestead entry "may take or refuse to take the land at his pleasure," as under section 2297, Rev. Stat., the land reverts to the Government, and his preference right is a privilege which he may avail himself of or not, as he wishes; but to discourage so far as can be done what might result in vexatious and oppressive contests for speculation and gain, vigilance should be exercised for the protection of *bona fide* settlers. I prefer not to give opinions in general, but this may indicate my views at present.

*INSUFFICIENT EXCUSE OF CONTESTANT FOR NOT FILING APPLICATION FOR ENTRY.***FLEENER v. FREELAND.**

Where a timber-culture contestant merely informs the local officers of his willingness to file an application to enter with his application to contest, but does not offer the application for filing, their erroneous advice that it is unnecessary does not excuse his failure to file it.

*Secretary Teller to Commissioner McFarland, December 7, 1883.*

SIR: I have considered the case of John W. Fleener *v.* Freeman Freeland, involving timber-culture entry No. 1,385, made by Freeland, August 6, 1877, covering the NW.  $\frac{1}{4}$  of Sec. 13, T. 21, R. 16, Grand Island, Nebr., on appeal by Freeland from your decision of October 19, 1882, in which you hold his entry for cancellation.

Fleener failed to file an application to enter the land at the date of initiation of contest, therefore he could not dispute the claim of Freeland (*Bartlett v. Dudley*, 9 Copp's L. O., 215). Fleener is not debarred, however, from initiating a new contest, after making application to enter the land, subject to any intervening right.

On February 10, 1883, Freeland filed a motion, in which he asked that the contest be dismissed, on the ground that Fleener had failed to file the required application.

In answer to which, Fleener filed an affidavit, stating therein that at the time of initiating contest he informed the register of the land office that he had come prepared and desired to file an application to enter the land, but that such officer informed him that there was no need for it, as he would be entitled to a period of thirty days in which to file such document after the contest was decided.

The allegation of Fleener that he followed the advice of the register cannot be accepted as an excuse for his non-compliance with the law. If the officer refused to accept the application which he says he desired to file, he should have availed himself of his right to appeal.

Your decision is modified.

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*ENTRY ON LAND NOT DEVOID OF TIMBER—PREFERENCE RIGHT.***BUSE v. ROBERT.**

There is no authority of law for contests against timber culture entries that have been made on land not devoid of timber. But if the Land Department has accepted such contest for its own benefit, and if upon the proofs furnished at the expense of the contestant the entry is canceled, the contestant is entitled to a preference right of entry.

*Secretary Teller to Commissioner McFarland, December 14, 1883.*

SIR: I have considered the case of Martin Buse *v.* Joseph Robert, involving the SE.  $\frac{1}{4}$  of Sec. 6, T. 151, R. 44, Crookston district, Minne-

sota, on appeal by Buse from your decision of January 9, 1883, in which you held that Robert is entitled to the preference right of entry under section 2 of the act of May 14, 1880.

John Sutter made timber-culture entry No. 1,907 for the tract March 28, 1881.

Robert made affidavit of contest November 10, 1882, alleging that at the date of Sutter's entry the land contained large quantities of growing timber.

On the transmission of the affidavit by the district officers, you decided, November 24, 1882, that, as Robert had failed to file with his contest affidavit an application to enter the land, he could not be granted a contest.

You revoke this decision by letter of December 6, 1882, and instructed the district officers to retransmit the papers in the case for further action. This letter reached the local officers December 12, 1882. On the previous day, Sutter relinquished his entry, when Buse immediately filed declaratory statement No. 7,454, for the land, alleging settlement December 11, 1882.

There appears to be no provision in the timber-culture act which in terms warrants the permission of a contest where the character of the land in question is involved.

Section 5 of the act provides that the Commissioner of the General Land Office is required to issue such rules and regulations as will best carry its provisions into effect.

The intent of the act is to encourage the growth of timber, and the efforts of those intrusted with the execution of its provisions must be so directed as to secure the most beneficial results.

The form of affidavit set forth in section 2 of the act requires the party applying to enter the land to state whether the land is devoid of timber.

If the land is not devoid of timber within the meaning of the act, at the date of the application to enter, the entry must be disallowed, and if it has been mistakenly admitted it must be canceled.

No one can claim the right to contest except where that right is given by statute. The Land Department is not bound to entertain a contest except in cases where it is so given, but if it has accepted such contest for its own benefit (as in this case, for the purpose of ascertaining the true character of the land), and if upon the proofs furnished at the expense of the contestant the entry has been declared invalid and canceled, then the contestant is entitled to a preference right under the act of May 14, 1880.

It appears that Robert furnished the requisite information and paid the fees, but before the time when proof was required Sutter relinquished his entry. As in the case of *Johnson v. Halvorson* (8 Copp's L. O., 50), this relinquishment is held as an admission of the charges made by Robert.

Your decision is affirmed. The declaratory statement of Buse will be allowed to stand, subject to the right of entry in Robert.

*APPLICATION—QUALIFICATION—AFFIDAVIT.**SCOTT v. LIEDKE.*

The application of contestant, unaccompanied by affidavit showing his qualifications for entry, is insufficient to render contest legal.

*Secretary Teller to Commissioner McFarland, December 31, 1883.*

SIR: I have considered the case of W. T. Scott *v.* Fred. W. Liedke, involving the latter's timber-culture entry of March 16, 1874, upon the NE.  $\frac{1}{4}$  of Sec. 2, T. 12, R. 2, Lincoln, Nebr., on appeal by Scott from your decision of February 20, 1883, dismissing the contest.

This contest was initiated June 8, 1882, upon allegations that Liedke had abandoned the tract, and had also failed to comply with the law in respect to the planting and cultivation of trees.

It appears that Liedke abandoned his family in October, 1880; that in November, 1881, his wife was divorced from him for "extreme cruelty, violent temper, vicious habits, and of threatening to kill;" that the "custody, care, education, and control" of her children were confided to her exclusively, and that in August, 1882, she was appointed their guardian. She defends the present proceeding in that capacity and as the head of a family.

Your elaborate review of the testimony shows that there are over 100 acres of the tract under proper cultivation, 35 of which have been planted to trees, the injuries to which, if not now in a healthy condition, are the result of drought, hail-storms, and fire; that there is a good frame house on the tract, with other valuable improvements, and that there has been no want of good faith in respect to compliance with the law.

There are other reasons why your decision must be sustained. The third section of the act of June 14, 1878, restricts a contest against a timber-culture entry to one who applies to enter the tract at the date of initiating it. (*Bundy v. Livingston, Copp, December, 1882.*) The second section, prescribing who may make an entry, and how it may be made, provides that a person applying for its benefits must file an affidavit that he is the head of a family, or twenty-one years of age, and is a citizen of the United States or has declared his intention to become one; that his filing and entry are made for the cultivation of timber, and for his own exclusive benefit; that it is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use and benefit of any other person or persons; that he intends to hold and cultivate the land, and to fully comply with the provisions of the act, and that he has not heretofore made an entry under the act or the acts of which it is amendatory.

Scott has filed an application to enter the land under the provisions of this act, but no affidavit. It does not, therefore, appear that he is qualified to make the entry, or that he intends to comply with the re-

quirements of the law, or that his rights are not already exhausted. His application is wholly incomplete and of no more legal significance than if he had made none, and is consequently ineffectual for the purpose of an entry. Having, therefore, failed to make a legal application to enter the tract at the date of initiating his contest, it must be dismissed under the ruling cited.

Your decision is affirmed.

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*PRE-EMPTOR—ATTEMPTED CONTEST—PREFERENCE RIGHT.*

**BUTTERY v. SPROUT.**

Where a pre-emptor seeks to contest a timber-culture entry, such attempted contest confers no preference right, and is no bar to a subsequent contest properly initiated by a homestead or timber-culture applicant.

*Secretary Teller to Commissioner McFarland, January 4, 1884.*

SIR: I have considered the appeal of George Buttery from your decision of February 15, 1883, dismissing his contest against Charles H. Sprout's timber-culture entry No. 3,342 (Fargo series) of the NW.  $\frac{1}{4}$  of Sec. 26, T. 151, R. 53, Grand Forks, Dak.

It appears that Sprout made said entry September 29, 1879; that Buttery initiated contest against the same December 13, 1882, filing an affidavit alleging Sprout's failure to comply with legal requirements, and an application to pre-empt the land, alleging as a reason for making such application that he had exhausted his homestead and timber-culture rights.

January 18, 1883, John Jeorgus presented an affidavit of contest against said entry, but the register and receiver rejected the same because Buttery's contest was pending. Jeorgus thereupon appealed, and your office sustained his appeal, holding that—

The third section of the act of June 14, 1878, clearly restricts contests brought thereunder to parties claiming and qualified to enter land under the homestead law or said act, and Mr. Buttery, not being so qualified, was not a legal contestant, and his case should not bar that of Jeorgus (Jeorgus), who appears to possess all the necessary qualifications of a contestant.

Section 3 in question provides—

That if at any time after the filing of said affidavit the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act. (20 Stat., 113.)

It is true that the identical question presented by this appeal was considered by my predecessor, Mr. Secretary Schurz, in the case of Tewksbury *et al.* v. McPeck (4 Copp, 54), wherein he said, touching the third section of the act of March 13, 1874 (18 Stat., 21), which contains substantially the same provisions as the act of 1878:

The obvious purpose of this section is to provide for the cancellation of all entries where the claimant fails to comply with the law, and to give the person who successfully contests an entry a preference right to enter the land under the *timber-culture* or *homestead laws*. There is nothing in the act above cited which in express terms prohibits pre-emption filings on this class of lands, and the question is, has Congress, by granting a preference right of entry to those who expose an abuse of law, *thereby, by implication*, repealed the pre-emption laws and excluded these lands from pre-emption entry \* \* \*. There are no express words of repeal in the act under consideration, and the two laws are not antagonistic, inconsistent, or repugnant to one another. I am, therefore, of opinion that this class of lands may be entered under the pre-emption laws, *although the preference right is always with the homestead or timber-culture claimant who successfully contests the former entry*.

It should be observed that while it was unquestionably competent for Congress to repeal the pre-emption laws, *pro tanto* or otherwise, I concur with my predecessor in the opinion that no such repeal was either expressed or implied. But the question of repeal is impertinent to the issue in this case. It is simply a question involving the construction of the express language of a special statute, the manifest intendment whereof is to subject certain entries thereunder to contest by a certain class of contestants, upon whom the preference right of entry is conferred. Such view is sustained by the doctrine of the well-known maxim, "*expressio unius est exclusio alterius*," which is especially applicable to the interpretation of a statute.

Where, for example, certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude everything else, even of a similar nature—*a fortiori*, all things different in *genus* and description from those which are enumerated. So it is agreed that mines in general are not ratable to the poor within the stat. 43 Eliz., c. 2, and that the mention in that statute of coal mines is *not by way of example, but in exclusion of* all other mines. (Broom's Legal Maxims, 7th edition, p. 665.)

I doubt not, therefore, that Congress intended the third section of the act of 1878 to restrict the right of contest thereunder to certain species of claimants expressly named, to wit, homestead and timber culture claimants, and to them only upon the condition precedent that they file an application to enter the land themselves.

The contrary view could only be sustained upon the assumption that said act conferred, by implication, other rights and privileges than those conferred by the pre-emption law itself, which prescribes a previous settlement upon the tract as a condition precedent to the right to file a declaratory statement therefor. Compliance with such prerequisite requirement would be manifestly impracticable in the light of the well-known doctrine that a valid entry of land segregates the same from the public domain, so that such land is no again subject to any other claim under the same or any other law until such entry be canceled in the manner prescribed by law. (Wilcox *v.* Jackson, 13 Peters, 516; and Witherspoon *v.* Duncan, 4 Wallace, 218.)

This doctrine was recognised by the Department in the aforesaid case of Tewksbury *et al. v. McPeck*; for it should be observed that there the timber-culture entry of Omer Morehouse had been canceled for abandonment April 28, 1876, at Tewksbury's instance; and McPeck did not file his declaratory statement (for the land which had been thus abandoned) until May 15 ensuing, nor did he allege settlement until May 12. And as no adverse right had intervened meantime, my predecessor held aright that said land was subject to his filing. But in the case at bar it should be observed that Sprout's entry had not been canceled when Buttery initiated contest and applied to file for the premises. It was not competent, therefore, for him to initiate contest as he did. Such contest was initiated without authority of law, and must be regarded as *nil*. Hence it was competent for Jeorgus to initiate contest as he did, and he must be regarded as the first legal contestant. (See my decision rendered November 3 last in the case of *Wilson v. French*.)

I accordingly affirm your decision for the reasons herein stated.

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*APPLICATION TO CONTEST—FRAUD—PREFERENCE RIGHT.*

*WHEELAN v. TAYLOR.*

A contest on other grounds or by a different party should not be allowed while an application to contest is pending.

*Secretary Teller to Commissioner McFarland, January 10, 1884.*

SIR: I have considered the appeal of James N. Wheelan from your decision of May 12, 1883, rejecting his application to contest the timber-culture entry of Henry M. Taylor, upon the SW.  $\frac{1}{4}$  of Sec. 4, T. 1, R. 26 E., Bozeman, Mont. You also transmit, for consideration with the application by Wheelan, the respective applications of John R. King, Harry H. Hollidge, and Henry W. Foster to contest the same entry of Taylor, each of which was rejected by the local officers.

It appears that Taylor made his entry April 28, 1882, and that Wheelan, alleging Taylor's non-compliance with the law in respect to the first year's work, applied, April 28, 1883, to contest the entry. The local officers rejected the application for the reason that, at the date thereof, the first year following Taylor's entry had not expired. On appeal you affirmed the same, and he further appeals to this Department. I think your decision was correct. In computation of the first year following an entry, the day of entry should be excluded. Taylor had therefore the whole day of April 28, 1883, within which to perform that year's work, and a contest could not be initiated against him prior to the 29th. This contest was, therefore, prematurely brought, and I affirm your decision in that respect.

It also appears that on rejection of this application by the local officers, Wheelan forthwith appealed therefrom, pending which, and on

the same day, he filed another application to contest Taylor's entry, alleging that it was made in behalf of other persons, and therefore subject to forfeiture as fraudulent under the law. A hearing was ordered on this complaint, which, after due publication of notice, was held June 16 following. There was no appearance in behalf of Taylor. The testimony showed that he died in January, 1883, without having in any respect complied with the law, and that no one in his behalf had thereafter complied with it. The allegations of fraud were also satisfactorily sustained.

It is well settled that a contest against a timber-culture entry cannot be initiated pending a prior contest. The first must be adjudicated to final decision before a second is allowable; and in this respect it is immaterial whether the second is commenced by the same party upon different allegations from those alleged in his first, or whether it is commenced by another person. One is equally a new contest with the other. It follows that Wheelan's second contest, pending his first (or which is to the same effect, his application to contest), was erroneously allowed and must be dismissed, as also for the same reason the applications of King, Hollidge, and Foster, made respectively April 30, 1883, pending the first application of Wheelan; and you are directed accordingly.

Although the testimony in the case was submitted on Wheelan's second contest, which was invalid for the reason stated, and therefore strictly of no legal effect, yet, in view of Taylor's death and his non-compliance with the law to the date thereof, and of the non-appearance of any one at the hearing on his behalf after due notice, and of the fraud in his entry, which satisfactorily appears, I direct that his entry be canceled, and that thereafter the tract in question be subject to the first legal applicant.

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*FAILURE TO FILE—NEW CONTEST—DATE OF RIGHT.*

*FERGUS v. GRAY.*

Notwithstanding contestant did not file his application to enter the land until after the hearing, he is allowed to proceed with a new contest, dating his right from the time he filed his application to enter, subject to any intervening adverse rights.

*Secretary Teller to Commissioner McFarland, February 5, 1884.*

SIR: I have examined the case of James Fergus *v.* Rist A. Gray, as presented by the appeal of Fergus from your decision of May 17, 1883, dismissing the contest instituted by him against the timber-culture entry of Gray for the SW.  $\frac{1}{4}$  of Sec. 26, T. 141, R. 62, Fargo, Dak.

It appears that the record does not show that Fergus made application to enter the land under the homestead or timber-culture law at the

time he initiated the contest, and that you therefore dismissed the contest, following the rule in Bundy's case (9 Copp's L. O., 17.).

You state that after the hearing, before the local office had been closed, and the papers forwarded to you, the contestant transmitted his application to enter said land, with a view to curing the defect in his contest.

The right to contest a timber-culture entry is confined to an applicant for the land, and in the absence of such application there is no jurisdiction in the local office to entertain such contest, hence your action dismissing the contest was proper. *Hoyt v. Sullivan* (10 Copp's L. O., 258).

But as it has been held that a statutory right exists in the first legal applicant to enter land embraced within a timber-culture entry the moment that the claimant fails to comply with the law (*Hoyt v. Sullivan*), also that a pending illegal contest is no bar to the initiation of a second (*Bivins v. Shelley*, 10 Copp's L. O., 212), and that where contests are dismissed under the rule in the Bundy case the contestant may begin a new contest, filing therewith his application to enter the land (*Bartlett v. Dudley*, 9 Copp's L. O., 215), I see no reason why Fergus should not now proceed with such new contest, dating his right to initiate the same from the time when he filed application to enter the land, subject to any rights that may have intervened prior thereto. Your decision is therefore modified. The privilege of proceeding with the contest against Gray's entry is accorded to Fergus, as above indicated.

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#### *ILLEGAL CONTEST—STATUTORY RIGHT OF THIRD PERSON.*

##### *HERRIMAN v. HERRIMAN.*

The pendency of an illegal contest is no bar to the statutory right of a third person to make entry and institute a proper contest on the failure of the former entryman to comply with the law, especially in this case, where the dismissal of the illegal contest was requested by the contestant himself.

*Secretary Teller to Commissioner McFarland, February 7, 1884.*

SIR: I have examined the case presented by the appeal of Albert Herriman from your decision of March 24, 1883, rejecting his application to contest timber-culture entry No. 3,450, Fargo series, of Elbridge Herriman for the SE.  $\frac{1}{4}$  of Sec. 24, T. 152, R. 54, Grand Forks, Dak.

It appears that William D. Reily initiated a contest against the above-described entry January 5, 1882, alleging failure to comply with the law, but that Reily did not make application to enter the land embraced within said entry, under the homestead or timber-culture laws, at the time of beginning his contest.

March 21, 1882, was the day fixed for the hearing before the local

office, at which time Reily appeared with his witnesses, and made proof under his allegation of Herriman's non-compliance with the law.

April 12, 1882, the local office found that the proof warranted the cancellation of the said entry, and so recommended. Herriman appealed.

July 18, 1882, the local office transmitted the papers in said contest to your office.

January 3, 1883, Reily's attorney appeared at the local office and authorized the dismissal of the pending contest, and at the same time filed an affidavit of contest against the aforesaid entry on behalf of Albert Herriman, together with an application of said Albert Herriman to enter the land under the timber-culture law.

March 7, 1883, you instructed the district officers that where contestants had failed to apply to enter the land at the time of initiating contest, such contests were illegal, and no bar to the initiation of subsequent legal contests; but that the right of the local office to allow such second contests did not apply, except in cases where the illegal contest was still pending before said local office.

March 9, 1883, you dismissed Reily's contest on account of his not having filed an application to enter the land at the time he began his contest.

March 24, 1883, you held that the action of the local office in permitting Albert Herriman to initiate proceedings while Reily's contest was pending in your office was erroneous, and dismissed Albert Herriman's contest for that reason.

The pendency of Reily's illegal contest in your office, at the time Albert Herriman filed his application to enter the land and contest Elbridge Herriman's entry, was no bar to the statutory right existing in said Albert Herriman to make such entry and institute such proceedings, or the failure of the former entryman to comply with the law. (*Bivins v. Shelly*, 10 Copp's L. O., 212; *Hoyt v. Sullivan*, 10 Copp's L. O., 259.)

Apart from the right Herriman possessed in himself to enter the land and begin a contest, independent of any action on the part of Reily, it is to be observed that the formal authorization of the dismissal of the contest by Reily was a complete disposition of the pending contest, and left the field open for the institution of proceedings by the first legal applicant for the land.

Your decision is therefore reversed, and Albert Herriman will be permitted to proceed with the contest initiated by him.

*LOST PAPERS—LACHES EXCUSED—IMPROVEMENTS.***ANDERSON v. SLATER, AND AASLAND v. SLATER.**

Aasland's contest papers were lost in the local land office. Notwithstanding the lapse of five years, he is allowed to enter the land in view of his improvements and of the evidence of Slater's abandonment. The recent contest of Anderson is dismissed.

*Secretary Teller to Commissioner McFarland, March 7, 1884.*

SIR: I have considered the appeal of Andrew O. Anderson from your decision of July 16, 1883, dismissing his contest against the timber-culture entry of Thomas O. Slater, made May 3, 1877, upon the SE.  $\frac{1}{4}$  of Sec. 6, T. 144, R. 49, Fargo, Dak., and allowing Ole Larson Aasland to prosecute a contest against said entry.

It appears that Aasland commenced a contest June 28, 1878, against Slater's entry, alleging his failure to comply with the law and his abandonment of the tract, and that August 28 following was assigned as the day of hearing. There is no record of the testimony or of any proceedings upon that or upon any subsequent day before the local office. The case was not transmitted to your office, nor did you take any action therein until June 16, 1883, under the following facts:

In January, 1883, Anderson commenced a contest against Slater's entry, alleging his failure to comply with the law, and notice issued for a hearing thereon March 1 following. Aasland thereupon called attention to his own undetermined contest, claiming a right to enter the tract, and on transmission of his application to you, you ruled June 16 that as Aasland had taken no action in the matter for five years, "he had slept upon his rights," and that his contest must be treated as a nullity and that of Anderson's proceed. Aasland then filed his own and sundry affidavits, as follows: Each of the law-firm of Lowell, Skuse & Keeney severally testify that they instituted a contest in behalf of Aasland against Slater June 28, 1878; that after several adjournments the case was called and testimony was submitted by Aasland October 10, 1878—Slater not appearing; the said firm kept a docket of all contests commenced by them in the Fargo land office, and that the following is a true copy of that of Aasland:

U. S. Land Office, Fargo, Dak., June 28, 1878; Ole Larson Aasland v. Thomas O. Slater; on SE.  $\frac{1}{4}$  of Sec. 6, T. 144, R. 49 W.; Slater's entry made May 3, 1877. This date we filed complaint alleging abandonment for failure to comply with the law. Time set for trial August 28, 1878; Chambers' fees paid (meaning E. B. Chambers, formerly editor of the Fargo Times, for printing notice of contest). August 28 adjourned to September 28, 10 a. m.; adjourned until October 10, 1878; case called and testimony taken.

Two other affiants state that they were present at the Fargo land office October 10, 1878, and testified as witnesses in behalf of Aasland.

to the effect that Slater had wholly abandoned the land, nor had he broken any portion thereof or made any improvements thereon.

Another states that he was present at the land office June 28, 1878, when Aasland commenced his contest.

Another states that he has within the last two months with a clerk in the office examined the files and records of the office, making a thorough search for the testimony taken in this contest, and found nothing relative to the case except the following in an old contest docket:

Ole Larson Aasland against Thomas O. Slater. Notices issued June 28, 1878; for trial October 10, 1878, 10 a. m.; tract in contest SE.  $\frac{1}{4}$  of Sec. 6, T. 144, R. 49, claimed by defendant under timber-culture, No. 209; alleged non-compliance with timber-culture law; fees and application tendered; Lowell, Skuse & Keeney, attorneys.

Another states that he has examined the contest docket of the land office, and found the memorandum above set forth; but made no search for the testimony, because advised by the clerk that he had made thorough search therefor and could not find it.

Aasland states (under oath) that he commenced his contest against Slater June 28, 1878, applying at the same time to enter the tract under the timber-culture laws and paying fees; that the contest was tried and testimony submitted by him October 10 following at the Fargo office—himself and two others testifying to the effect that Slater had failed to comply with the requirements of the timber-culture law and had abandoned the tract, Slater not appearing; that Lowell, Skuse & Keeney were his attorneys and conducted the case; that the record of testimony has been lost, and cannot be found after diligent search; and he asks that Anderson's contest against Slater be dismissed, and that he be secured in the rights acquired by his own.

The register at Fargo, under date of March 14, 1883, stating that Aasland's contest antedates his own appointment to office, and that "the matter is complicated by the loss of the papers," asks you for instruction "looking to the straightening the matter"; and under date of July 5, 1883, referring to your letter of June 16 preceding, says:

From the case as it now appears it seems that the contestant Aasland has not "slept upon his rights" so soundly as this office appears to have done. He evidently did all that was necessary to do, and having complied with the requirements of the law, he should not be prejudiced because some of the papers were lost in this office. From the evidence in the second contest (*Anderson v. Slater*), which we have held in abeyance subject to this case, we find that Ole Larson Aasland has now valuable improvements on the tract in question—80 acres in wheat and 15 acres breaking.

On these statements you reconsidered, July 16, 1883, your ruling of June 16, dismissed Anderson's contest, and required Aasland to commence *de novo* his contest against Slater.

I concur with you in the opinion that Anderson's contest should be dismissed, but I cannot doubt that Aasland's contest was properly com-

menced and conducted, and that he acquired a right to enter the tract. As there were no laches on his part, and the facts and presumptions seem to establish the regularity of his proceedings, he should not be put to the expense and delay of another contest by reason of loss of the papers through the laches of the local office, especially as Slater appears fully to have abandoned the tract to the present time, not objecting to cancellation of his own or to another entry thereof. The fact that his (Aasland's) claim has remained undetermined for five years—through no fault on his part—cannot prejudice his rights.

I modify your decision, and direct that Slater's entry be canceled, and that Aasland be allowed to enter the tract.

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*BREAKING—ALLEGATION OF NON-COMPLIANCE.*

*WORTHINGTON v. WATSON.*

If eighteen months have elapsed from date of entry, it is not sufficient to allege non-compliance with the law during the first year, but it must be alleged that the proper amount of breaking was not done the first year, nor up to the time the affidavit was executed, or the contest cannot be allowed.

*Secretary Teller to Commissioner McFarlaud, April 23, 1884.*

SIR: I have considered the appeal of Thomas J. Worthington from your decision of July 31, 1883, dismissing his contest against timber-culture entry No. 3,985, made by Charles L. Watson, May 14, 1881, covering the SE.  $\frac{1}{4}$  of Sec. 33, T. 118, R. 65, Watertown, Dak.

Worthington made affidavit al- ging that Watson failed to break five acres of the tract in question during the first year; an indorsement on this application of Worthington to enter, accompanying the contest affidavit, indicates that the proceedings were initiated in the local office December 15, 1882.

From the papers before me it appears that no day was set for hearing, and that nothing was done towards facilitating the progress of the proceedings until May, 1883, when a party, alleging himself to be the heir of the entryman, filed affidavits with the local officers suggesting the decease of Watson. On this showing Worthington was cited to appear within five days and show cause why the contest should not be dismissed.

On June 11, 1883, the local officers dismissed the contest, on the ground that as the contestant was dead it should be directed against his heirs.

I deem it unnecessary to further advert to the question of regularity of the action by the local officers in dismissing contest on the ground stated, but shall consider a feature in the proceedings, which should have been entertained by them at the outset.

Worthington, in his affidavit of contest, does not allege non-com-

pliance with the law by Watson up to the date of initiating contest. The first year of Watson's entry ended May 14, 1882; from thence until the initiation of contest a period of seven months elapsed.

Watson or his representatives may have cured the laches, if any there were, prior to the initiation of contest. In accepting the affidavit and application and admitting the entry, the Government assumes that the party will be faithful to his trust. It will not presume that he has failed to comply with the requirements of the law in the absence of a specific charge to that effect. In the case of *Galloway v. Winston* (9 C. L. O., 98), it was held by this Department that—

If before contest and the intervention of an adverse claim, the party has cured the deficiency in the first year's work by putting the land in the required condition so that at the date of initiation of contest it is in the same condition it would have been had the work of the first year been duly performed, his entry will be saved from forfeiture.

Following the doctrine laid down in that case, it is clearly apparent that as the Government presumes that the entryman is acting in good faith in his attempts to secure the required growth of timber, he should not be obliged to appear and defend his interests in the absence of a specific allegation of continuous failure to comply with the requirements of the law up to the date of initiation of contest.

The question involved is one of forfeiture, and if the contesting party is successful the law allows him to have the preference right of entry of the land in contest as a reward for his endeavors. But the Government will not permit the entryman to be disturbed unless a sufficient basis for contest be established.

Worthington having failed to establish facts sufficient to warrant a contest, the proceedings are dismissed.

Your decision is affirmed for the reasons herein stated.

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#### ILLEGALITY IN INCEPTION OF ENTRY.

#### CAROLINE HALVORSON.

A contest before the local officers may be instituted against a timber-culture entry for illegality in its inception, without awaiting instructions from the Commissioner.

*Secretary Teller to Commissioner McFarland, April 29, 1884.*

SIR: I have considered the appeal of Caroline Halvorson from your decision of July 11, 1883, in the matter of the timber-culture entry of Halvor Olsen, made March 24, 1882, upon the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 18, T. 15 $\frac{1}{2}$ , R. 43, Crookston, Minn.

It appears that one Allen instituted a contest against Olsen's entry April 15, 1882, alleging that the tract was not devoid of timber, and not therefore subject to such entry. Olsen appeared specially upon the

day assigned for hearing, and moved dismissal of the contest for the reason that the local officers were not authorized to order such a contest without instructions from your office, and hence, in the absence of such instructions, they were without jurisdiction in the premises. The motion was overruled. Olsen appealed therefrom, and the hearing was continued. Upon the assigned day Allen submitted testimony in proof of his allegation (Olsen not appearing), in view of which the local officers recommended that the entry be canceled.

Your decision of March 12, 1883, upon Olsen's appeal, held that the local officers erroneously overruled his motion for dismissal of the contest, because a contest like that in question cannot be instituted except by direction of your office; and you also held that, as it appeared from the testimony already filed that the tract in question was not devoid of timber and the former hearing was unauthorized, a new hearing should be had, with a view to ascertain the character of the land and the validity of Olsen's entry; and to this end you advised the local officers that Allen might file a new affidavit and institute a new contest. In accordance with this suggestion, he filed a new affidavit March 27, 1883, at 3 o'clock p.m., alleging only that the land was not devoid of timber, and applied to enter it; and a hearing thereon was ordered for May 8 following. On the same March 27, at 10 o'clock a.m., Caroline Halvorson filed an affidavit of contest against Olsen's entry, alleging his failure to comply with the law, and applied to enter the tract under the homestead law; and a hearing was ordered thereon for May 7, subject to the rights of Allen. On May 4, Halvorson filed Olsen's relinquishment of the tract, whereupon the local officers asked you for instructions, and you held, July 11, that as Allen took prompt and proper measures to secure cancellation of Olsen's entry, as suggested in your letter of March 12, his rights were superior to those of Halvorson, and that Olsen's relinquishment, although filed by Halvorson, could not debar Allen from his preference right to enter the tract.

I think your ruling that a contest cannot be instituted against a timber-culture entry for illegality in its inception, except under instructions from your office, erroneous.

The mode of initiating contests and hearings thereon is regulated by Practice Rules 1, 5, 6, and 7. Rule 1 authorizes contests by any person against "alleged abandoned homestead entries," or against "alleged abandoned or forfeited timber-culture entries." Rule 5 provides that registers and receivers may order hearings in "contests to clear the record of abandoned or forfeited timber-culture entries" in cases "wherein entry has not been perfected and no certificate has been issued as a basis for patent;" Rule 6, that, "In case of an entry or location of record on which final certificate has been issued, the hearing will be ordered *only* by direction of the Commissioner of the General Land Office," and Rule 7, that applications for hearings under Rule 6 must be transmitted by the register and receiver with special report and rec-

ommendation to the Commissioner for his determination and instructions.

A homestead or a timber-culture entry is an appropriation of the tract upon the record, and so continues until the entryman, by abandonment or by some act of negligence or illegality, forfeits his rights, when the entry may be canceled. Undoubtedly the local officers may, without instructions from your office, allow a contest upon allegations of abandonment of a homestead entry, and the word "forfeiture," as applied to a timber-culture entry, has no such distinctive meaning as will exclude them from exercise of the same authority. A timber-culture entryman may abandon the land, or he may forfeit the entry and his rights. In either case, upon allegations to that effect, I think the local officers may, under the rules, order a contest and hearing; and this opinion is confirmed by the provision of Rules 6 and 7, that in cases where final certificate has been issued, the hearing will *only* be allowed by direction of the Commissioner after special report and recommendation from the local officers. This limitation, upon the powers of the register and receiver, in cases where final certificate has issued, would seem to admit their power in cases where such certificate has not issued, and may include cases where allegation is made that the tract was not originally subject to the existing entry.

I think that Allen's original contest, brought without direction from your office, was authorized by the rules. If so, having been admitted to such contest by the register and receiver, paid the expenses and obtained judgment, your dismissal of the contest was error; your finding upon the evidence to the effect that the land was not devoid of timber should have the effect of final judgment; the subsequent requirement of new proceedings by way of contest was unauthorized; and Allen should have his notice of cancellation and preference right of entry as a homestead under the act of May 14, 1880.

Your decision is accordingly modified.

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*ENTRY EXTINGUISHED—OPERATION OF LAW.*

ALBERT G. HARRIS.

The entry had been extinguished by operation of law, so that when the would-be contestant applied there was no foundation for a contest.

*Secretary Teller to Commissioner McFarland, May 29, 1884.*

SIR: I have considered the appeal of Albert G. Harris from your decision of September 6, 1883, rejecting his application to contest a timber-culture entry.

The record as presented shows that Urania Adams made timber-culture entry No. 1,620, June 17, 1879, covering the SW.  $\frac{1}{4}$  of Sec. 12, T. 111, R. 61, Huron, Dak.

On January 16, 1882, one Beckett initiated contest against such entry ; an *ex parte* hearing was had March 21, 1882, when the entry was declared forfeited by the local officers.

Relinquishment of the Adams entry was filed in the local office August 23, 1882.

A suggestion of irregularity in the transaction having been made to your office, an investigation was obtained, the result of which indicated that Beckett had secured possession of the relinquishment from Miss Adams on or soon after the date of her entry for the purpose of speculation ; and, in order to hold the tract free from entry until he could make a satisfactory disposition of the relinquishment, he had entered contest.

On December 6, 1882, your office directed that no further action be taken by the local officers towards a disposal of the land until advised, and that the entry of Adams should be reinstated upon the records pending further investigation.

On September 6, 1883, after a review of all the proceedings, you dismissed the Beckett contest, on the ground that it was fraudulent, and decided that as the Adams entry had been relinquished in due form it should be canceled and the tract held open to entry ; and rejected the application of Harris to contest the Adams entry on the ground that, when presented, July 12, 1883, the Beckett contest was pending and undetermined.

Section 1 of the act of May 14, 1880 (21 Stat., 140), provides :

That when a \* \* \* timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

The Adams entry has been extinguished by operation of law, so that when Harris applied there was no foundation for a contest.

Your decision is affirmed for the reasons herein set forth.

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## 12. CULTIVATION.

### *COMPLIANCE WITH LAW—PROSPECTIVE INABILITY.*

#### *REYNOLDS v. SAMPSON.*

Cultivation by hoeing and permitting a growth of grass or weeds around young trees, when it will insure their protection and growth better than the ordinary protection by plowing, &c., is deemed a compliance with the timber-culture law. Prospective inability of a timber-culture claimant to prove up gives no rights to a contestant.

*Acting Secretary Joslyn to Commissioner McFarland, August 7, 1883.*

SIR: I have considered the case of R. Reynolds v. Bernhard Sampson, involving timber-culture entry No. 45, of August 4, 1874, covering the

NE.  $\frac{1}{4}$  of Sec. 2, T. 149, R. 47, Crookston, Minn., on appeal by Sampson from your decision of July 12, 1882, holding said entry for cancellation.

According to your decision, "the testimony preponderates to show that during the first three years of the entry, expiring August 4, 1877, defendant had broken and planted to trees, &c., somewhere about 32 acres on the northeast quarter of his claim; that in the year 1878, or during the fourth year of the entry, nothing was done to the trees save replanting, in places where the trees had died, and hoeing them; that grass and a growth of rank weeds were allowed to grow up between rows, and in the spring of 1879, May or June, it would seem from the testimony, such weeds being in a very dry condition, it is testified that an incendiary set the same on fire, and that said fire resulted in the destruction of a considerable portion of the trees;" and that "after the fire and prior to September 11, 1879, the date contest was initiated, all that defendant did on the land was to plow, in another portion of his claim, what he called 10 acres, to which he states he intended to remove trees and sprouts that grew up after the fire." And your conclusion is that "the evidence shows gross negligence on the part of the defendant in the matter of cultivation during the summers of 1878 and 1879, and embracing the fifth year of the entry."

This recital of facts is substantially correct, but there are others which I think are material to a proper adjudication. It is shown that, by reason of unusual rains in 1877 and 1878, much of the land planted was flooded and the trees thereby killed; and defendant's statement that he designed removing the sprouts, &c., to the 10 acres broken in 1879 is corroborated. It is also shown that the hoeing around the trees and the failure to remove the grass and weeds between them was done advisedly, and that it was the proper method of cultivation in a region where the cold winters are apt to kill the young trees unless protected by the snow caught and held by the surrounding grass and weeds.

Your decision is based on "the rulings of the Department in the case of Lee *v.* Moran (7 Copp's L. O., 39)," where "it is held that the requirements of the act of June 14, 1878, must be strictly carried out." There is no evidence, in my judgment, showing that prior to 1878 there was any failure in respect of preparation of the soil, planting, replanting, or cultivation; in fact, contestant's witnesses were unacquainted with the land prior to 1878 or 1879, and testimony shows that in the fall of 1878 the trees were abundant and thriving. As to the cultivation in 1878, I am of opinion, on the evidence, that defendant complied with the requirements of the law. The case cited uses the following language:

The intention of the act is expressed in its title; it is to encourage the growth of timber on the Western prairies, and this intention should be kept in view in determining whether or not a claimant has failed to comply with the requirements of the act.

This is undoubtedly the true rule. It may be best to "cultivate to

crop," or to plow up surrounding weeds and grass, in some latitudes; but as it is shown that this is not the best method in the region where the land in contest lies, that it should be cultivated "otherwise" than to crop, and that defendant employed the best method to protect the young trees and secure their growth, it is clear that he is within both the letter and the spirit of the law.

In regard to the cultivation, &c., in 1879, it is established that there was no lack of good faith on defendant's part, and this is the important fact to be kept in view in considering his acts (*Curtis v. Griffes*, 9 Copp's L. O., 172). He should not be held responsible for the results of the incendiaryism, nor for the destruction caused by the floods; and there is no evidence tending to show that the proposed transplantation, from the burned and flooded land, was not the wisest thing for him to do in the emergency. I therefore think that it is not shown that he failed to comply with the law in 1879.

Contestant's counsel argues that at the expiration of thirteen years from date of his timber-culture entry it will be impossible for the claimant to show that he had 10 acres of trees under cultivation for eight years. Whether this be so or not is immaterial to the adjudication of this case, since the claimant's prospective status before your office can confer no rights on the contestant.

For the aforesaid reasons your decision is reversed.

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*FAILURE—CANCELLATION—PREFERENCE RIGHT.*

**SATTERLEE v. DIBBLE.**

As failure to cultivate during the seventh and eighth years is shown, the timber-culture entry is ordered canceled. As no application to enter was filed, the contestant is allowed a preference right of entry under the act of May 14, 1880.

*Acting Secretary Joslyn to Commissioner McFarland, March 15, 1884.*

SIR: I have considered the case of R. W. Satterlee *v.* C. F. Dibble, involving the NE.  $\frac{1}{4}$  of Sec. 18, T. 6, R. 15, Kirwin, Kans., on appeal by Satterlee from your decision of March 15, 1883, dismissing his contest for failure to prove non-compliance.

Dibble made timber-culture entry No. 178 on said tract, on April 18, 1874, and the affidavit of contest alleges failure to cultivate during the sixth and seventh years, and failure to plant in a proper manner at any time since entry. At the hearing in April, 1882, it was shown that there were on the land four rows of thrifty young trees, about four hundred and fifty in number; that is to say, at the end of the eighth year of his possession of the land there was about one-quarter of the number of trees required. The contestant affirms that this fact is *prima facie* proof of his allegations; the defendant puts in a plea of drought, but fails to support it by testimony.

It is admitted by the defendant that two contests against his claim have been heretofore brought, with his consent, by a brother and a sister; there is another now on file, instituted by one G. R. Dibble, probably a relative. It is suggested by the contestant that these contests were collusively brought for the purpose of covering up the defendant's delinquencies, and the facts certainly lend color to such a presumption. It would be extraordinary, it seems to me, that the four rows of trees would continue to grow and thrive where they were originally planted, whilst every tree on the eleven or more acres adjoining, which are alleged to have been properly planted and cultivated yearly, have died on account of drought. I think the *prima facie* case against him a strong one, and that it is made stronger by his failure to offer a witness in support of his assertions. He holds that as to everything prior to 1879 your preceding decisions have affirmed his compliance with the law, but in this he errs; the dismissal of the contests amounted only to a verdict of "not proven"—a necessary consequence if they were collusively brought—and that question is again put in issue by the affidavit of contestant now before me.

As to the allegation of failure to cultivate during the sixth and seventh years, it is proved by four witnesses, and by them it is also shown that what planting the defendant did was done poorly and carelessly. To this he replies that he planted 11 acres of cuttings in both years, none of which have lived; that in 1879 they took root and grew well; that he cultivated them once, and that they died from drought; and that in 1880 they died from drought before he cultivated them. He offers no evidence in support of these assertions. He admits that on the largest part of 40 acres adjoining, he raised crops of corn during said years, and that the four rows of trees before referred to continued to thrive, though without cultivation. The contestant's witnesses testify that the 11 acres which he swears he planted each year were never cultivated; that weeds, grass, sunflowers, and fox-tails covered them luxuriantly, and would have killed the cuttings even if they had been planted properly; and that on adjoining farms hundreds of young trees were planted during those years, which lived and thrived because they were properly planted and cultivated.

My judgment is that the evidence shows Mr. Dibble to have been grossly and inexcusably negligent in complying with the law, and that his entry should be canceled.

Satterlee, who failed to file with his affidavit an application to enter, may have the preference right under the act of May 14, 1880 (*Buse v. Robert*, 10 L. O., 328).

Your decision is reversed.

Motion for rehearing denied by Secretary Teller July 15, 1884.

*PREPARATION OF LAND—CONDITION OF TREES—ADDITIONAL TIME.*

BENJAMIN F. LAKE.

The preparation of the land and planting of trees are acts of cultivation, and the time actually so employed should be computed as part of the eight years required in timber-culture cases.

If at the expiration of eight years from date of entry the timber growing upon a claim is not in a fit condition to meet the requirements of the law, the claimant may be allowed five years additional time in order to attain the required results, as in this case, notwithstanding the party had 22,600 trees upon his claim.

*Commissioner McFarland to register and receiver, Bloomington, Nebr., April 25, 1884.*

GENTLEMEN: I have received your letter of January 24, 1884, transmitting the application of Benjamin F. Lake, who made timber-culture entry No. 911, May 19, 1875, for the NW.  $\frac{1}{4}$ , 7, 3, 16 W., and final proof thereon June 2, 1883, as per certificate No. 109, for a reconsideration of my decision of November 1, 1883, rejecting the proof for the reason that "the size of the trees is not sufficient to warrant this office in approving the case for patent."

In his application Lake swears that the trees are of the natural height of trees planted on similar ground; also that the ash, box-elder, and catalpa are not "high-growing" trees, especially the ash and catalpa, which attain only one-fifth the size of the cottonwood trees.

It appears from the proof submitted in this case that during the months of March and April, 1877, the party planted 10½ acres with cottonwood, "scions and cuttings," having previously (in March, 1876) broken the ground, and having replowed and harrowed the same just before planting. In March and April, 1878, he plowed and harrowed 10 acres of ground, and planted box-elder and cottonwood scions and cuttings thereon, and also "filled in the vacancies in the 10½ acres planted the spring before," so that the trees and cuttings stood 12 feet apart each way. In March, April, and May, 1879, the 10½ acres planted in 1877 were cultivated, and "soft maple, box-elder scions and seeds, and catalpa and ash seeds" were planted between the rows so as to make the trees 4 feet apart each way, to conform to the requirements of the act of June 14, 1878; he has since continued to "fill up with cottonwood cuttings and ash scions during the fall and spring months of each year," and now has 8,160 trees growing on said land, consisting of 6,300 box-elder, 1,100 cottonwood, 360 white ash, 350 catalpa, and 50 soft maple, diameter about 1½ inches, average height 6½ feet, in addition to which the party claims to have 14,500 ash trees from one to two years old.

Under the act of June 14, 1878, it is required of the entryman to prove at the expiration of eight years from date of entry, or at any time within five years thereafter, that he has planted and for not less than eight years cultivated and protected the required number of trees, and that

he has, at time of making proof, not less than 675 living and thrifty trees to each of 10 acres, or a total of 6,750 trees, before he is entitled to receive a patent for the land.

In the instructions issued by this office February 1, 1882, which were approved by the Secretary of the Interior, it is held that—

The preparation of the land and the planting of trees are acts of cultivation, and the time authorized to be so employed and actually so employed is to be computed as a part of the eight years required by the statute.

It follows, therefore, that one-half, or 3,875 trees, must actually have been growing for five years, and the remaining half for four years, to conform to the above requirements.

In the case now under consideration, the first planting was done in the spring of 1877, or six years before making proof; but it is also shown that some of these trees failed to grow, and that the party has from year to year replanted, in order to keep the number of growing trees up to the requirements of law; and while the party's good faith in the premises is not questioned, in the absence of positive proof to the contrary, the size of the trees at present on the land is considered as evidence that they have not been growing for a sufficient length of time; and it is not necessary for this office to prove that these trees have not been growing for five years, but it is for the entryman to show satisfactorily that the requirements of the law have been fully complied with.

The object of the law, as expressed by its title, is the growth of timber; and it is clearly the duty of this office to see that the law is complied with, and that the trees are of such size before approving the entry for patent as to render their permanent growth, without further cultivation or protection, reasonably certain, which certainly is not the case when the trees are of the dimensions stated in the proof now before me.

It is claimed that the box-elder, ash, and catalpa are trees of slow growth, and that this accounts for the average size of the timber being so low in this case; but from the Report on Forestry issued by the Agricultural Department for the year 1877, I find that in Iowa the catalpa has attained a sufficient size in five years to be used for small posts for wire fences; that the box-elder, of which Lake has over 6,000, is of rapid growth, attaining a diameter of 6 inches in seven years; also that the ash, although of slower growth than either of the other varieties, would, under ordinary circumstances, attain a size fully equal to that stated to be the average in this case.

While under the act of June 14, 1878, final proof may be made at the expiration of eight years from date of entry, provided the required amount of timber of a suitable size and age is then growing on the land, yet the entryman is allowed five years additional, in case the desired result is not sooner attained; and I am of opinion that this additional time was granted to cover such cases as the one under consideration,

where, through no fault of the entryman, he was unable to show a satisfactory growth of timber at the expiration of eight years from date of entry. I therefore decline to modify the requirements of my letter of November 1, 1883, and you will so inform Mr. Lake.

### 13. DESERTED WIFE.

#### *HEAD OF FAMILY—RELINQUISHMENT—PREFERENCE RIGHT.*

##### *GLAZE v. BOGARDUS.*

A deserted wife is the head of a family within the meaning of the law, and entitled to make a timber-culture entry.

When an entry is relinquished after a contest to cancel it is commenced, the relinquishment inures to the benefit of the contestant, who has the preference right of entry by law.

*Acting Secretary Joslyn to Commissioner McFarland, March 31, 1884.*

SIR: I have considered the case of Joseph Glaze *v.* Ella R. Bogardus, as presented by the appeal of Mrs. Bogardus from your decision of September 13, 1883, holding for cancellation her timber-culture entry for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 10 N., R. 14 W., Grand Island, Nebr.

The records show that Rebecca Jane Glaze made homestead entry for the land described August 28, 1879. That Mrs. Bogardus, October 28, 1881, began a contest against said entry, alleging abandonment, and that the hearing therein occurred December 7, 1881. At this hearing counsel for the defendant filed a motion attacking the service of the notice in the case, which was sustained and the contest dismissed. No appeal was taken from this action of the local office.

Shortly after the dismissal of the contest, and on the same day, December 7, Mrs. Bogardus filed a new affidavit for contest, and notice was issued thereon fixing the day for hearing on January 18, 1882.

December 23, 1881, the relinquishment of Rebecca Jane Glaze was filed in the local office and her homestead entry canceled.

January 18, 1882, the day set for the hearing, there was no appearance for the defendant; and the local office, holding that the relinquishment was in aid of the pending contest, and that no further proof was required, decided the same in the contestant's favor, who thereupon made timber-culture entry for said land.

December 23, 1881, counsel for Joseph Glaze filed in the local office an affidavit setting forth that after the dismissal of the first contest, and at the time Mrs. Bogardus was preparing the papers for the second contest, December 7, and before said contest was perfected, the relinquishment of said Rebecca Jane Glaze, together with the application of Joseph Glaze to make timber-culture entry, accompanied by the legal fees, were filed in the local office. That on the day following said papers

were returned by the local office, the application of Joseph Glaze being rejected for the reason "that a contest was initiated by Ella R. Bogardus against entry of Rebecca Jane Glaze before relinquishment of Glaze was presented to us with this application, said contestant having acquired inception right." Also alleging that the affidavit for contest, filed December 7, by Mrs. Bogardus, was not corroborated, as required by Rule 4 of the Rules of Practice; that Mrs. Bogardus was a married woman, and that if she sought to make entry as a deserted wife, evidence could be furnished that she had not been so deserted.

On this affidavit a hearing was asked for the purpose of determining the rights of the parties herein. The local office refused to order a hearing, but on appeal you ordered a hearing May 14, 1882.

As the result of this hearing you found that the affidavit of contest filed by Mrs. Bogardus was not corroborated as required by the Rules of Practice; that she was a married woman at the time of the initiation of her contest, and that her entry should be canceled, because it was illegal and void at inception.

In *Houston v. Coyle* (3 Reporter, 242) this Department held that it was by notice to the settler that the local office acquired jurisdiction, and not by virtue of any affidavits on which such citation issued. Hence, it follows that the point raised as to the want of a corroborating affidavit is not well taken as affecting the validity of the contest.

The right to make a timber-culture entry is conferred upon "any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such." (20 Stat., 113.)

In *Wakeman v. Bradley* (Copp's L. L., 1882, p. 530) a deserted wife was held to be the "head of the family," and as such competent to make a valid pre-emption settlement, although the marriage relation existed at the time the said settlement was made. Again, it was said in the case of *Sarah Hazelrigg* (Copp's L. L., 286) that a married woman who has minor children and has been abandoned without cause by her husband, and is left to support and maintain herself and children, is the "head of a family" within the meaning of the pre-emption law, and as such is entitled to pre-empt in her own name. The right of a deserted wife as the "head of a family" to enter land under the homestead law has also been fully recognized (*Bray v. Colby*, 10 Copp's L. O., 360).

The legal right, then, of Mrs. Bogardus to make an entry under the land laws is settled, if it appears that she was in fact at the time of making such entry a deserted wife.

By reference to the application filed by her it will be seen that she alleged herself to be "the deserted wife of James H. Bogardus." On the trial she testified that for three years prior thereto she had been entirely dependent upon her own resources for a support for herself and three children, and in this she was fully corroborated by her father's testimony. It also appears, by a duly authenticated copy of a decree

rendered by the district court of Buffalo County, Nebraska, at the May term for 1882, that Mrs. Bogardus was then divorced from her husband and the custody of the children awarded to her.

The only evidence submitted to show that she was not a "deserted wife" was in substance made up of neighborhood rumor and hearsay testimony, going to show that she was in fault as to the cause of the separation, and that she had been visited by her husband during the alleged period of desertion. But no witness pretended to swear that she had in any manner been assisted by her husband in the maintenance of herself and children during that time.

I am of the opinion that her corroborated testimony, supported as it is by the presumption raised in its favor by the decree of divorce, fairly entitles her to be regarded as the "head of a family," and hence qualified under the law as such to make a timber-culture entry.

From the foregoing it will appear that Mrs. Bogardus, on December 7, instituted a legal contest against the entry of Rebecca Jane Glaze, and that at such time Mrs. Bogardus was qualified in her own right to make a timber-culture entry. With this state of facts existing, the relinquishment of Rebecca Jane Glaze was presented to the local office, together with the application of Joseph Glaze. The local office held the papers for advisement, but finally, without taking action on the relinquishment, rejected the application, and returned the same, together with the relinquishment.

This was error. The moment the relinquishment was filed it operated to extinguish all the prior existing rights of the party executing the same, and it was the duty of the local office to accordingly cancel the entry at once, and afterwards determine to whose benefit such relinquishment might inure. (*Whitford v. Kenton*, 3 Reporter, 365.) In this case the cancellation could but be regarded as fairly the result of the contest, and that therefore, under the second section of the act of May 14, 1880 (21 Stat., 140), the preference right of entry accrued to Mrs. Bogardus from December 7, the time when the relinquishment was first filed.

Your decision is reversed. The timber-culture entry of Mrs. Bogardus is held intact, with the right accorded to her of dating the same at any time within thirty days next following December 7, 1881.

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#### 14. ENTRY BY OFFICER OR CLERK.

##### INSTRUCTIONS.

*Commissioner McFarland to register and receiver, Fargo, Dak., August 28, 1883.*

GENTLEMEN: I am in receipt of the receiver's letter of July 7, 1883, in which the following question is submitted to this office:

Is it admissible for a register or receiver or special agent or clerk to

make a timber-culture entry in a district other than the one in which he is located?

I reply that I think such entry, excepting as to special agents, is admissible. The officer or clerk making such entry should state in his affidavit the particular position he holds, that the entry may be intelligently dealt with.

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*COMPLIANCE WITH LAWS—ENTRY ALLOWED.*

**GRANDY v. BEDELL.**

As the evidence shows a substantial compliance with the timber-culture laws, in view of the unfavorable weather, the entry is allowed to stand, notwithstanding the party was a clerk in the local land office at date of making entry.

*Secretary Teller to Commissioner McFarland, October 30, 1883.*

SIR: I have considered the case of Noah E. Grandy *v.* Gilbert Bedell, involving the timber-culture entry made by Bedell for the NE.  $\frac{1}{4}$  of Sec. 34, T. 22 S., R. 18 W., Larned, Kans., on appeal from your decision of May 23, 1882, dismissing the contest.

The contestant alleges that—

The said Gilbert Bedell has wholly abandoned said tract and failed to do the breaking and to plant the timber thereon as required by law since making said entry, and that said tract is not cultivated by said party as required by law.

The plaintiff's attorney alleges as an additional reason why said entry should be canceled that the claimant at the time of making the entry was a receiver's clerk in the district land office at Larned, Kans.

From a careful review of all the evidence in this case, I am of the opinion that the defendant in all respects had substantially complied with the requirements of the law up to the time when the contest was instituted. The unfavorable character of the weather seems to furnish a sufficient reason for the failure of the first planting, and the diligence manifested by the defendant to remedy this failure is evidence of his good faith. This Department has held that the good faith of the timber-culture claimant may be taken into account, and if he shows on final proof that he has, for the requisite period, cultivated an area of not less than one-sixteenth of the amount entered, and that the requisite number of trees are living and growing thereon, it is a substantial compliance with the law. (*Curtis v. Griffes*, 9 Copp's L. O., p. 172; *Reynolds v. Sampson*, 10 Copp's L. O., p. 170.)

At the time of making the entry the claimant was a receiver's clerk in the local office at Larned, and the question of his competency to make such entry having been brought to the attention of the Department cannot be ignored.

Section 452 Rev. Stat. provides that—

The officers, clerks, and employés of the General Land Office are pro-

hibited 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 office.

It will be observed that the section quoted, and this is the only statutory provision bearing on the subject, does not extend to clerks in the district offices, but by its terms is confined to those employed in the General Land Office. Your office has, however, by rule, extended the operation of this statute so as to include clerks in the local offices; and this Department held in the case of the State of Nebraska *v.* Dorrington (Copp's L. L. 1882, p. 647), the defendant being at the time of making his timber-culture entry a clerk in a local land office, that such fact was sufficient ground for the cancellation of the entry.

But in the case now under consideration the entry was allowed November 8, 1875, and since that time the claimant has apparently in good faith observed the requirements of the timber-culture law so far as within his power. At the time of the contest the claimant was not an employé of the district office. Taking these facts into consideration, and the further one that he was not by express provision of law incompetent to make the entry, I am of the opinion that it should be permitted to stand. Under the existing regulations of your office the entry should not have been allowed in the first instance, but inasmuch as it was, to insist on its cancellation after so many years' compliance with the law would seem to be giving undue importance to the rule forbidding such entry.

Your decision is therefore affirmed.

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#### 15. EXCESS OF QUANTITY.

##### *ENTRY HELD FOR CANCELLATION AS TO EXCESS.*

MORDECAI R. BULLOCK.

*Commissioner McFarland to register and receiver, Wichita, Kans. October 1, 1883.*

GENTLEMEN: I am in receipt of the receiver's letter of August 18, 1883, relative to timber-culture entry No. 376, made May 26, 1874, by Mordecai R. Bullock, under the act of March 13, 1874, for lots 1 and 2, and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 3, T. 26 S., R. 8 W., containing 262.35 acres.

The receiver states that Bullock has presented his final proof which appears to be regular and shows that he has 67 acres of timber, containing 16,080 living thrifty trees. He also states that you "are instructed to allow such entries where the excess exceeds \$1, and does not exceed 20 acres," and "to collect the cash price per acre for such excess," but that your records do not show that Bullock ever paid for any excess of area, and you therefore ask for instructions.

In the case of homestead entry No. 1748, made at Huron, Dak., by

H. P. Sayles, for a quarter section of land containing 230.15 acres, the honorable Secretary of the Interior, under date of September 17 instant, decided as follows:

A quarter section generally contains just 160 acres, but sometimes unavoidable inaccuracies occur in adjusting meridians and making surveys; the effect of which is that what is technically called a quarter section may contain sometimes more, sometimes less than 160 acres. The law, on the assumption of absolute accuracy in surveys, plainly intends to make 160 acres the maximum amount of land to be entered by any one person.

Where, for the reason state<sup>1</sup>, however, an excess is found, your office has a rule of practice, which I think a good one, of including and allowing the excess above 160 acres, where it amounts to less than the deficiency would be should a subdivision be excluded from the entry, the object being to approximate as nearly as possible the 160 acres.

In the present instance lot 1 contains 91.14 acres, lot 2 91.21 acres, and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , 80 acres. The combined area of the two lots is 182.35 acres, making an excess of 22.35 acres; that of lot 1 and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  is 171.14 acres, and of lot 2 and S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  is 171.21 acres, an excess of 11.14 and 11.21 acres, respectively. Forty acres of the S.  $\frac{1}{2}$  of the quarter section added to lot 1 would make 131.14 acres, and to lot 2, 131.21 acres, leaving a deficiency of 28.86 and 28.79 acres, respectively. Adding either 40-acre tract to the two lots combined would make 222.35, an excess of 62.35 acres.

It will thus be seen that Bullock's entry can be made to approximate 160 acres, and it is therefore held for cancellation as to either the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  or one of the lots (the excess in area to be paid for in cash in accordance with instruction contained in letter C from this office of March 26, 1880), or one of the lots *and* the adjoining 40 acres, as he may elect, and according to the location of his timber.

Advise him of this decision, and at the expiration of thirty days report his action.

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## 16. FRAUDULENT ENTRY.

*STATUTORY RIGHT—INNOCENT PARTY—RELINQUISHMENT—CANCELLATION.*

JOSEPH HURD.

The theory that a certain entry was fraudulent at inception, cannot operate to defeat the statutory right of another to enter the land, who was not a party to such fraud.

An entry should be canceled *instanter* upon the filing of a relinquishment, without regard to preference right. (See circular of January 12, 1883, 9 Copp, 194.)

*Secretary Teller to Commissioner McFarland, June 4, 1884.*

SIR: I have considered the case presented by the appeal of Joseph Hurd, from your decision rejecting his application to make timber-culture entry for the NW.  $\frac{1}{4}$  of Sec. 9, T. 119 N., R. 65 W., Huron, Dak.

September 12, 1881, Nicholas Haas entered the tract above described under the timber-culture law.

December 1, 1882, Hurd filed an affidavit of contest, alleging non-compliance with the law on the part of Haas, and at the same time applied to enter the land. The record fails to show any action by the local office on this application and affidavit, except that on the application there appears the indorsement "Rejected." When it was rejected, or why, is not stated.

January 18, 1883, Hurd formally withdrew and dismissed his contest, filed a relinquishment, duly executed by Haas, and dated March 29, 1882, and again applied to enter the land. The local office denied the application and refused to act upon the relinquishment, for the reason "that the date of the execution of the same gives ground for the doubt that it was so executed for the purpose of barter and sale;" and January 19, 1883, transmitted the relinquishment to your office for instructions.

February 6, 1883, you returned Hurd's application, directing the local office to reject the same, and held the entry of Haas for cancellation, on the ground that it was fraudulent from its inception, as appeared from the date of the relinquishment.

Acting on your instructions, the local office rejected Hurd's application, and Hurd appealed from such action on the ground that "it was contrary to, and in express violation of, the act of Congress passed May 14, 1880." The date of this appeal does not appear from any filing marks, but it must have been about April 7, 1883, as the papers bear such date.

Accompanying the said appeal were two affidavits, showing that at the time Hurd began his original contest he was unaware that Haas had executed a relinquishment, and after the initiation of the contest, he bought such relinquishment, for the reason that he desired to avoid the trouble and expense of a contest.

April 12, 1883, Hurd filed a new application to enter the land, and with it the written waiver of Haas of all his rights to show why his entry should not be canceled, and requesting that such cancellation be at once made.

This application was rejected by the local office, as appears from the following indorsement:

HURON, D. T., April 14, 1883.

Rejected—ordered canceled by the Commissioner.

G. B. ARMSTRONG, Reg'r.

From this rejection Hurd again appealed.

June 2, 1883, your office, acting on the case as presented by Hurd's application of April 12, rejected said application, canceled Haas' entry for fraud, and held the land open to the entry of the first legal applicant.

June 9, 1883, the local office allowed Edwin G. Wheeler to make timber-culture entry for said land.

June 11, 1883, you dismissed the appeal first taken by Hurd.

No appearance is made on behalf of Wheeler.

Your decision in this case rests upon the proposition that a relinquishment should not be received, and the entry canceled, when such relinquishment, from its date, gives room for the suspicion that the original entry was made for speculative purposes.

From the statement of facts it appears that over one year had elapsed from the date of Haas' entry when Hurd filed his affidavit of contest and application to enter. The ground of contest was the failure of Haas to break the 5 acres required by the timber-culture law.

Now, under the provisions of said law (20 Stat., 113), as soon as Haas failed in any respect to comply with the requirements thereof, the land covered by his entry became, by such default, subject to the entry of any other legal applicant.

Hurd filed an application to enter, basing the same on the alleged default of Haas, and, while the question as to such allegation was pending before the local office, he presented the relinquishment of Haas and renewed his application.

The relinquishment established the fact that Haas has no longer any legal claim to the land, and should have been received as conclusive evidence that Hurd was entitled to complete his entry, the only obstacle thereto being the subsisting entry of Haas.

It, therefore, will be observed, if the theory that the entry of Haas was fraudulent at inception is accepted, such conclusion could not operate to defeat the statutory right of another to enter the land, who was not a party to such fraud.

In the circular of instructions issued March 20, 1883 (10 Copp's L. O., 37), under the head of "Relinquishments," it was said, referring to the first section of the act of May 14, 1880 (21 Stat., 140), "This act refers to bona fide relinquishments of bona fide entries. An entry fraudulent in its inception is not an entry capable of being relinquished. It is an entry to be canceled upon a proper showing of the facts and circumstances of the case, whereupon the land will become subject to proper entry by the first legal applicant."

I am of the opinion that said act will not bear such a construction, and my decisions in the cases of *Whitford v. Kenton* (1 Brainard's Legal Precedents, 415), and *Glaze v. Bogardus*, (2 *id.*, 53), wherein I held that it was the duty of the local office to cancel the entry instanter upon the filing of a relinquishment, in effect left out of consideration any question as to the motive that prompted the original entry. Hence, in the general circular of instructions issued March 1, 1884, the propositions laid down in the circular above referred to were not repeated, but all questions as to rights attendant upon the filing of relinquishments were left for determination under the terms

of the law itself, in connection with other statutes *in pari materia* therewith.

Your decision is reversed. The entry of Hurd will be allowed, and that of Wheeler canceled.

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### 17. OFFER TO FILE.

#### *APPLICATION EQUIVALENT TO FILING—PREFERENCE RIGHT—IRREGULARITY OF APPEAL.*

##### *PIERCE v. BENSON.*

In a timber-culture contest, an offer to file an application to enter is equivalent to filing. The contestant, having proved his allegations, is entitled to a preference right of entry.

Notwithstanding informality of appeal, the contest is sustained, and entry canceled.

*Secretary Teller to Commissioner McFarland, April 21, 1884.*

SIR: I have considered the case of Levi Pierce *v.* Herman M. Benson, involving the SW.  $\frac{1}{4}$  of Sec. 9, T. 118, R. 52, Huron, Dak., on appeal by Pierce from your decisions of August 14 and November 16, 1883, and February 19, 1884, dismissing his contest and closing the case.

It appears that Pierce filed affidavit of contest against Benson's timber-culture entry, and proved his allegations at the hearing. Benson did not appear, and his whereabouts was then and is now unknown. You dismissed the contest because there was no application to enter the land. Pierce replies proof that he offered to file an application at the hearing, but did not file it because informed by the local officers that it was unnecessary. The answer is good. If he had filed an application then, it would have cured the defect, and his offer to file it was equivalent to a filing. On the other hand, as he was allowed to contest without filing an application, and as he has proved his allegations, he is entitled to a preferred right of entry. Further, it appears that on March 6, 1883, he made a new application to contest and enter, and, if the former had been *prima facie* void, it should have been received. This application having been made, and the informality as to service of notice of appeal appearing to have been caused by Benson's absence in parts unknown, I think that the contest should be sustained and the entry canceled.

Your decision is therefore reversed.

**18. PLACE OF OFFICIAL BUSINESS.*****PRIVATE RESIDENCE UNWARRANTED.*****CLEWELL AND MARSH.**

A check on a bank in payment of fees is not money. The transaction of official business at a private residence or other place than that designated is unwarranted by law.

*Secretary Teller to Commissioner McFarland. March 4, 1884.*

SIR: I have considered the appeals of Tilghman H. Clewell and John M. Marsh, involving a tract of land situated in the Helena, Montana, district, from your decision of August 1, 1883; rejecting the timber-culture application of Clewell, and holding for cancellation homestead entry No. 2102, made by Marsh May 24, 1883.

It appears that it was the custom of that office to receive applications and permit entries of land to be made at any hour of the day or evening.

On May 24, 1883, at about 7 o'clock p. m., during the absence of the district officers, the clerk received from Clewell a timber-culture application for entry of lots 2, 3, and 4 of Sec. 4, T. 24, R. 5, accompanied by a check, which was tendered in payment of the required fees.

During the same day, at about 5 o'clock p. m., Marsh visited the receiver at his residence, which was situated some distance from the office, and presented an application to enter the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lots 2, 3, 4 of Sec. 4, T. 24, and the SW.  $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 33, T. 25, R. 5, with the fees, which that officer accepted.

On returning to the office a few hours later the receiver discovered the application of Clewell, which was rejected and that of Marsh admitted for entry.

The timber-culture law provides that upon filing the requisite application and affidavit, and on payment of a certain sum of money, the applicant shall thereupon be permitted to enter the land specified. The district officers are not required to inquire concerning the solvency of the presenter of a check, or of the depository of his funds. The law is clear and unmistakable in its recital of the requirements to be performed by the applicant; if he elects to proceed in a manner contrary to its provisions he must expect to abide by the consequences.

The presentation by Marsh of the application and fees to, and acceptance by, the officer, at a place other than that designated for the transaction of official business, was an action wholly unwarranted by law, and under other circumstances would tend to deprive the applicant of the privileges sought.

Your decision is modified. The entry of Clewell will be canceled.

In view of the fact that the entry of Marsh was allowed to be made it will be permitted to stand.

**19. PREFERENCE RIGHT.***FIRST LEGAL APPLICANT.***ALONZO PHILLIPS.**

Notwithstanding timber-culture entry by the first party was refused under the Secretary's and Commissioner's instructions, and entry by another party was afterwards allowed, such entry is cancelled and the first party is permitted to make his desired entry.

*Secretary Teller to Commissioner McFarland, June 12, 1883.*

SIR: I have considered the appeal of Alonzo Phillips from your decision of March 11, 1882, dismissing his appeal from the rejection by the local officers of his application to make a timber-culture entry on 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. 26, T. 1 S., R. 8 W., Los Angeles, Cal.

The tracts were formerly embraced in the homestead entry of one Fitzpatrick, which was canceled upon proof submitted by one Timmons. Timmons was notified, January 20, 1882, of his preference right to enter the tracts under the act of May 14, 1880; and the local officers report that Phillips, on applying to enter the tract, January 26, 1882, was informed of the rights of Timmons, and, because thereof, they rejected his application. They also state that he thereupon laid his application and affidavits (all signed, but the latter not sworn to), on their table and left the office, not tendering money for their fees and commissions.

Phillips files affidavits to the effect that he presented his application and affidavits upon the day named, tendering his oath to the affidavits and also \$20 in gold for fees and commissions, and that the officers admitted that (as was the fact) Timmons had previously notified them verbally that he did not intend to avail himself of his preference right. Afterward, January 28, Timmons appeared at the local office with Charles F. Warren, and made formal waiver of his right, whereupon Warren was permitted to enter the tracts.

The refusal of the local officers to accept Phillips's application was in accordance with the strict reading of my predecessor's subsequent decision of March 13, 1882, in the case of William Ehmen (Copp, May, 1882), which held that during the thirty days allowed Ehmen—the successful contestant—within which he might enter the tract, "the land was in a state of reservation, subject only to his entry."

This expression was broader, I think, than my predecessor intended to state his ruling, or than a proper construction of the act of May 14, 1880, seems to me to warrant. Land in this condition is, undoubtedly, in a state of reservation to the extent that the contestant cannot be deprived of his preference right if he applies to enter it within the required time; and during this time no one else can enter it to his exclusion. The ruling in Ehmen's case, thus construed as respects a reservation of the land, and as I think my predecessor intended, is in harmony

with my decision of March 12, 1883, in the case of *Shanley v. Moran* (The Reporter, May, 1883), which held that during the thirty days of preference right allowed a contestant the tract may be entered by another *subject to the right of the contestant*. Under the ruling, this application of Phillips should have been allowed—if regularly made—subject to the right of Timmons; and after Timmons's waiver of his right entry should have been permitted to Phillips as the first legal applicant. The only apparent defect in his application is that his affidavits are unsworn. But if, as he alleges, he tendered his oath thereto when presenting them, it was the duty of the local officers or one of them to have administered the oath, and he should lose nothing from their laches or refusal to do so; and if, as he also alleges, he tendered the fees and commissions for his entry, his right would seem superior to that of Warren. But whether he did or did not follow all the details of a complete application after being told by the district officers that his entry could not be received, need not be considered as material to the allowance of his right. He had been refused, and has followed it by proper appeal. His entry should be admitted, and upon the allowance of the same that of Warren must be canceled. Your decision is reversed.

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## 20. QUANTITY ALLOWED TO BE ENTERED.

### FRACTIONAL QUARTER SECTION.

C. A. RICE.

One hundred and sixty acres may be embraced in a timber-culture entry, notwithstanding the section in question is fractional and contains only 342 acres.

*Commissioner McFarland to register and receiver, Susanville, Cal., May 16, 1883.*

GENTLEMEN: I am in receipt of your letter of the 4th instant, from which it appears that C. A. Rice has applied to make timber-culture entry of 160 acres in Sec. 2, T. 45 N., R. 17 E., and as the entry, if allowed, would embrace more than one quarter of the section which is fractional, containing 341.93 acres, the register is in doubt as to whether it should be allowed.

In reply I have to state that notwithstanding the proviso to section 1 of the timber-culture act of June 14, 1878, to the effect that not more than one-quarter of any section shall be granted thereunder, this office holds that a qualified person has the right to make a timber-culture entry of 160 acres of vacant land in any section devoid of timber, even though said section may contain a less area than 640 acres.

You will so advise the claimant and allow him to make the entry desired, if free from objection in any other respect.

**21. RELINQUISHMENT.****PREFERRED RIGHT—NOTICE****EUGENE Q. POWLISON.**

During the thirty days' preferred right of entry, an entry by a third person was allowed; in view of the relinquishment of said right by the contestant, the entry is allowed to stand.

*Secretary Teller to Commissioner McFarland, September 20, 1883.*

SIR: I have considered the appeal of Eugene Q. (not O.) Powlison from your decision of January 23, 1883, holding for cancellation his timber-culture entry No. 6241 of the SW.  $\frac{1}{4}$  of Sec. 4, T. 142, R. 53, Fargo district, Dakota.

It appears that the tract was formerly covered by timber-culture entry No. 2957 in the name of one John E. Bergrem, which one William P. Burdick contested and procured the cancellation of, but that by reason of the register and receiver's having inadvertently notified one J. W. Burnham (who was merely a witness in the case), he had received no notice of the cancellation until April, 1882, when, upon inquiring at the local office, he was informed thereof, and that Powlison had entered the tract November 17, 1881; whereupon Burdick asked that the entry be canceled and he be allowed to enter the tract as a preferred claimant under the provisions of the second section of the act of May 14, 1880 (21 Stat., 140.)

Burdick having procured the cancellation of Bergrem's entry, was unquestionably entitled to notice of the same by virtue of the express provision therefor contained in the said second section; provided, of course, he had paid the "land office fees," which is presumable; for that is a condition precedent to the operation of such provision, and it nowhere appears that he had not so paid. I would therefore affirm your decision, had Burdick not filed a relinquishment of his rights in the premises, which was done subsequently to your decision; but having done so, the land is *ipso facto* open to settlement and entry, and this, by virtue of the provisions of the first section of the act cited, without any further action on your part. No reasons appearing to the contrary, I do not see why it is not competent for Powlison to enter the tract. For the reasons stated your decision holding his entry for cancellation is accordingly reversed.

**DATE OF FILING.—DATE OF CANCELLATION.—FIRST LEGAL APPLICATION.****SIM v. McGREW.**

The relinquishment of a timber-culture entry, held for examination and declared valid, relates back to date of filing, and an application to enter presented between the date of filing the relinquishment and the date of canceling the entry should be received as the first legal application.

*Commissioner McFarland to register and receiver, Fargo, Dak., November 24, 1883.*

GENTLEMEN: In a letter dated November 10, 1883, Messrs. Thompson & Krogh, of Fargo, Dak., state that on May 24, 1883, the relinquishment of Edward A. Hepburn (timber-culture entry 7305, September 2, 1882, SW.  $\frac{1}{4}$ , 32, 143, 50) was filed in your office, together with an application of Joseph Sim, and \$14 was also tendered for fee and commissions on Sim's application to make a timber-culture entry on same tract.

Reference is also made to your letter of September 3, 1883, now before me, explaining the case, and Messrs. Thompson & Krogh claim as attorneys for Sim that as he was the first legal applicant for said tract, after the relinquishment of Hepburn was declared valid by this office, that his case comes "under the head of Instructions, Circular January 12, 1883, Copp's Land Owner, p. 223, October 15, 1883."

It appears from your letter of September 3, 1883, that Hepburn's relinquishment, made under act of May 4, 1880, was submitted by you to this office, "for the reason that the relinquishment of Hepburn was made within one year from date of entry."

You further state that you, "on the 27th of August, 1883, allowed one Charles E. McGrew to enter the land per timber-culture application and affidavit No. 8777, without reference to the papers and money of Sim, on file in the safe, or to his rights, if any he has, by virtue of those papers."

By my letter P of August 21, 1883, the relinquishment of Hepburn was returned to you for cancellation; "no evidence of speculation or bad faith on the part of Hepburn was apparent."

And by your letter of August 27, 1883, transmitting sundry timber-culture relinquishments made under act of May 14, 1880, that of Hepburn appears as "filed and canceled by relinquishment, August 25, 1883, 10 a. m."

You go on to state in your letter of September 23, 1883:

To-day Messrs. Thompson & Krogh have called up the case, presented another relinquishment executed by Hepburn (more than one year having now expired since he made entry), supposing of course that the first one had not been acted upon; with this second relinquishment they presented the timber-culture application and affidavit of a party *other than Sim* for the land. These papers were handed back to them by the clerk in charge, with the notice that the entry of Hepburn had

been canceled, and that of McGrew allowed. They then fell back upon the application of Sim, and called our attention to the fact that the same was on file in this office.

Whatever deductions may be made from this last recorded action of Sim's attorneys, it is clear that his rights should not be denied him, and his application to make a timber-culture entry should be allowed.

In the case of an application transmitted with a relinquishment, which after consideration by this office you are directed to accept, the application should also be accepted as the first legal application; for, though the cancellation dates subsequent to the filing of the relinquishment and the application, yet, it having been determined that the relinquishment is valid, by virtue of the act of May 14, 1880 (which contemplates a valid entry), the land became subject to disposal at the date of filing it, and the right of the applicant relates back. (See Instructions, Copp, Vov. X, p. 223.)

You will, therefore, receive the timber-culture application of Joseph Sim for the SW.  $\frac{1}{4}$ , 32, 143, 50, which you will number of current series, with a reference thereon to this letter C by date.

You will also cite Charles E. McGrew, timber-culture entry 8777, August 27, 1883, SW.  $\frac{1}{4}$ , 32, 143, 50, to appear and show cause why his entry be not canceled for illegality, and if he so elects, he may relinquish his entry for cancellation without prejudice, with credit for fee and commissions already paid.

Of this, you will in due time report action taken by McGrew.

Acquaint, with the contents of this letter, the parties in interest.

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*IMPROPERLY OBTAINED—MENTAL HELPLESSNESS.*

*DUNCAN v. CAMPBELL.*

A relinquishment obtained while the claimant was in a drunken stupor, and objected to afterwards, cannot be considered a voluntary act.

*Secretary Teller to Commissioner McFarland January 8, 1884.*

SIR: I have considered the case of Oliver P. Duncan *v.* L. M. Campbell, as presented by Campbell's appeal from your decision of July 14, 1883, holding for cancellation the said Campbell's timber-culture entry for the SW.  $\frac{1}{4}$  of Sec. 34, T. 10, R. 8 W., Lincoln, Nebr., and reinstating Duncan's timber-culture entry for said tract.

From the record it appears that C. J. Davis filed declaratory statement for this tract June 3, 1873, canceled April 15, 1882; that Caspar J. Davis made timber-culture entry therefor March 9, 1874, canceled for voluntary relinquishment October 9, 1878; that Oliver P. Duncan made timber-culture entry therefor October 23, 1878, canceled for voluntary relinquishment October 10, 1881; that Samuel M. Campbell made timber-culture entry therefor October 10, 1881.

March 17, 1882, the local office transmitted the affidavit of Oliver P.

Duncan, in which it was alleged that he had duly complied with the requirements of the law in the matter of his timber-culture claim; that "he never, in fact, relinquished his said entry, or intended so to do, and whatsoever may appear thus to be was obtained by fraud and surreptitiously, and without consideration," and asked that a hearing be allowed with a view to the cancellation of Campbell's entry and the reinstatement of his own.

By your letter of May 3, 1882, a hearing was ordered for the purpose of ascertaining the facts in the premises, and the local office designated June 20, 1882, as the day for such hearing.

From a careful review of the evidence submitted, I fully concur in your conclusion that Duncan was "mentally helpless" when he signed the said relinquishment.

It appears that Duncan was in the habit of indulging in what some of the witnesses denominated as "periodical drunks;" that on September 8, 1881, he was confined to his bed as the result of such a debauch, and while in a drunken stupor, being sufficiently revived by the administration of liquor, he sat up in bed and signed said relinquishment, and at the same time executed a deed of his homestead to a daughter, who it seems returned the same to her father upon his recovery.

C. J. Davis is a stepson of Duncan, and a former claimant for this land, as appears from the record, and at his solicitation the relinquishment was obtained. L. M. Campbell is a friend and fellow-employé of Davis, who admits that he made the entry on the suggestion of Davis. It appears that Campbell has never seen the land covered by his entry, and that since said entry Davis has exercised control over the land.

I am of the opinion that the relinquishment was fraudulently obtained by Davis, in order that he might regain control of the land, and that no equities appear of sufficient gravity to warrant any conclusion favorable to Campbell's entry.

Your decision is therefore affirmed. Mr. Campbell's entry is canceled and Mr. Duncan's reinstated.

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*TRANSPORTATION BY MAIL.—CONSIDERATION TO BE ACCORDED.*

WILLIAM C. YOUNG.

Where a relinquishment was received by mail, but the letter transmitting it was not opened by the local officers for some time afterwards, the relinquishment is to be regarded as filed at the moment of the receipt of the letter containing it.

*Acting Secretary Joslyn to Commissioner McFarland, March 28, 1884.*

SIR: I have considered the appeal of William C. Young from your decision of July 11, 1883, dismissing his contest against timber-culture entry No. 2248, made April 22, 1879, by Parley Round, covering the SW.  $\frac{1}{4}$  of Sec. 24, T. 17, R. 15, Grand Island, Nebr.

From the papers presented it appears that on April 3, 1883, Young was allowed to file an affidavit of contest, together with an application to enter the land, for failure by Round to comply with the requirements of the timber-culture law. Shortly afterwards, on examining the mail received on that day, one of the letters was discovered to contain the relinquishment by Round of the entry, which had been executed before the clerk of a court of competent jurisdiction on March 28, 1883; whereupon the local officers canceled the entry and allowed one Hiddleston to make timber-culture entry No. 4522 of the tract. Hiddleston, it appears, obtained the relinquishment, and purchased the improvements of Round.

An indorsement on the receiver's receipt, over the signature of the register, shows that the relinquishment was received at the district office on April 3, 1883, at 9 o'clock a. m.

There is nothing to indicate the hour of the day when Young filed his contest proceedings; but it appears that on the opening of the office in the morning he received information concerning the status of the Round entry; he then departed and obtained the services of an attorney in making the contest affidavit, which was then filed. The register reports that, at the time when Young came to the office, the mail had not been opened. Whether the officer refers to Young's first appearance or return is immaterial, since it is evident the relinquishment was in the office prior to the filing of the contest affidavit.

The applicant, under the timber-culture law, is not required to present his application to enter the land in person; and if he has recourse to the mail for the purpose of presenting to the local officers the instrument of his intention, he is entitled to the same consideration as if personally present.

The relinquishment having been received prior to the application to contest, the latter proceeding cannot be permitted to stand, for the simple reason that there was no cause for action when the contest affidavit was offered.

Your decision is affirmed.

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## 22. SECOND ENTRY.

### *COMPLIANCE WITH LAW RENDERED IMPOSSIBLE.*

FREDERICK C. ZIMMERMAN.

As a Texas cattle trail was established across the land during the first year after entry, which the entryman could not prevent, and which destroyed it for timber-culture purposes, the rights of relinquishment without prejudice and of new entry are granted.

*Secretary Teller to Commissioner McFarland, May 10, 1883.*

SIR: I have considered the appeal of Frederick C. Zimmerman from your decision of November 17, 1882, denying his application to make

another entry in lieu of his timber-culture entry No. 1397, of the NW.  $\frac{1}{4}$  of Sec. 20, T. 26 S., R. 25 W., Larned district, Kansas, which he asks may be canceled with remission of fees.

It appears that he made said entry December 29, 1877; that he made the application in question October 10, 1882, basing the same upon the following state of facts, as set forth by him under oath: That in the spring of 1878, just after he had broken 10 acres of his claim, what is known as the "Texas cattle trail" was established across the same, whereby large herds of cattle are herded upon and driven over his land, thus preventing him from further cultivating and planting in compliance with legal requirements; that he is not endeavoring to evade such requirements, but that he has done everything possible under the circumstances to comply therewith.

Although the law doubtless contemplates that under ordinary circumstances no one shall be permitted to make more than one entry, I am of opinion that under the peculiar circumstances of this case, it being a matter solely between the Government and this petitioner, the general rule ought to be relaxed to the extent of canceling his entry without prejudice, and permitting him to make another. You will accordingly permit him to make such entry upon the usual terms and conditions. The application for remission of fees cannot be allowed.

Your decision is therefore reversed.

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### 23. SIZE OF TREES.

#### *FINAL PROOF—REQUIREMENTS OF LAW.*

JOHN SHOTTEN.

It is not only the number, but the size of the trees, that meets the requirements of the timber-culture law of June 14, 1878.

*Commissioner McFarland to Hon. S. R. Peters M. C., House of Representatives, May 31, 1884.*

SIR: I am in receipt by your reference of a letter (herewith returned) from John Shotten, dated Kenilworth, Kans., 17th inst. He contends that this office has no right to decide as to the size of the trees required on a timber-culture claim, in order to insure the acceptance of final proof as basis for final entry, and that it should be sufficient if the requisite *number* of trees are growing.

In reference thereto, I have the honor to state that this office has made no rule prescribing the size of trees required on a completed claim, but I have felt it my duty to see that the requirements of the timber-culture act of June 14, 1878, as to the number and age of trees necessary on a claim, are fully met and set forth in proof.

Said act allows final proof to be made at the expiration of eight years from date of entry, and requires that the trees on one half of the area

planted shall have been cultivated and protected for a period of five years, and the trees on the other half for four years, before final proof can be accepted. At such ages, if the trees have been well cared for, it is believed they will have reached such size as will reasonably insure their maturity without further protection.

But it sometimes happens that the first plantings are destroyed by drought or other unavoidable cause, and this causes one or more years' delay in getting the trees started on the road to permanent growth. In such cases the trees cannot reach the necessary four and five years' growth within eight years from date of entry. In order to meet such delays in planting, and to secure the necessary ages of the trees, the laws extends the time five years from the expiration of eight years within which to present the required proofs of the cultivation and protection of the timber planted.

The object and intent of the law is to encourage the growth of permanent timber, and I deem it a public duty to insist that the requirements of the law shall be fully satisfied before transferring the Government's title to land embraced in such entries.

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#### 24. SPECULATIVE PURPOSES.

##### *CULTIVATION—GOOD FAITH—SALE OF LAND.*

###### *KLOCK v. HUSTED.*

Husted entered in 1876, but claimed the benefits of the act of 1878. This act enlarged the provisions of the act of 1874, but is not inconsistent therewith in respect to affidavit required, to the effect that the entry is made for the cultivation of timber, for his own exclusive use and benefit, in good faith for himself, and not for the purpose of speculation.

The evidence shows the law not to have been complied with in this respect, as Husted had bargained and sold or agreed to sell the entire tract to another, who was to cultivate the land for a time for a part of the proceeds of the agricultural crop. *Held*, That the entry should be canceled, as not having been made with a view to appropriate the land to his own use, but for speculative purposes.

*Secretary Teller to Commissioner McFarland, March 5, 1884.*

SIR: I have considered the case of George W. Klock *v.* A. W. Husted, involving the latter's timber-culture entry made April 5, 1876, upon the SW.  $\frac{1}{4}$  of Sec. 20, T. 96, R. 42 W., Des Moines, Iowa, on appeal by Klock from your decision of April 16, 1881, holding the entry intact.

Klock initiated this contest August 28, 1882, alleging Husted's failure to comply with the law in respect to planting and cultivating trees, and also that he had bargained and sold the tract to one Hutchinson. The local officers (not considering the testimony as to the alleged sale) recommended cancellation of the entry because of Husted's failure to comply with the law in the other matters named. Your decision found

that Klock, upon whom was the burden of proof, had not sufficiently established such failure, and that the matter of the sale should be left to Husted's final proof.

This entry was made under the act of March 13, 1874, which requires one applying for its benefit to make affidavit that his entry is made "for the cultivation of timber." As the purpose of the act was "to encourage the growth of timber" this object is a continuing obligation upon an entryman, which he cannot avoid by diverting the land to purposes otherwise lawful; and whenever afterwards—notwithstanding the validity of the entry—he uses it as trading capital, or for speculative or any purpose inconsistent with such object, he holds it in violation of law and it becomes subject to forfeiture.

Husted claims the benefits of the act of June 14, 1878 (amendatory of that of 1874), which authorizes completion of an entry made under the act of 1874, under *its* provisions. This act enlarges the affidavit named in the latter act, and requires the applicant to swear that his filing and entry are made for the cultivation of timber; that his entry is for his own exclusive use and benefit; that he has made his application in good faith and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomever, and that he intends to hold and cultivate the land and to fully comply with the provisions of the act. The requirements of these affidavits are not inharmonious. The latter are only more specific than the former; and when the entryman fails to observe those of the act of 1878, he shows that his entry is not "for the cultivation of timber" as required by both acts.

Neither of the acts contains, in terms, the provision of the pre-emption law that one claiming under that law shall not make any agreement or contract by which the title he may acquire shall inure to the benefit of any person except himself, but the tenor and spirit of both are to that effect; and as a timber-culture entry is not assignable, whenever it appears that the entryman has sold the land or holds it for another, or does any act manifesting a purpose to evade the law and not to meet the duties imposed upon him, to wit, honestly and in good faith to devote the land to the cultivation of timber as the law requires, he is no longer a legal or an equitable beneficiary of the Government, because he violates the conditions upon which his entry was allowed, and under which only it can be maintained.

It appears from the testimony at the hearing in October, 1882, that in the spring of 1877 Husted planted 10 acres of the tract to trees. In October of that year he executed a bond to one Hutchinson, by which he agreed to sell and convey the tract to Hutchinson for \$1,250, as soon as he should acquire title thereto. At the same time Hutchinson, by another instrument in writing, agreed to deliver to Husted one-half of all the grain which should be raised on the land in 1878, and each successive year thereafter, until the \$1,250 and interest thereon should be

fully paid, at the market price of grain, and agreeing also to sow 140 acres of the tract (it having been all broken and under cultivation) to wheat in 1878, and thereafter at least 100 acres. He also agreed to plant 10 acres of the tract to trees in 1878, and 10 acres in each succeeding year, until 30 acres were so planted ; and it was mutually agreed that if Hutchinson failed to cultivate the wheat as provided, Husted might re-enter, and do what was necessary towards securing the crop. Husted thereupon delivered possession of the land to Hutchinson, and Hutchinson paid to Husted (under the arrangement) \$120.50 in December, 1878, and \$100 in December, 1879, and he also planted about three hundred trees in 1878, all of which appear to have died, and about the same number in 1879, which shared the same fate ; but neither he nor any one cultivated those planted by Husted in 1877, or those planted by himself in 1878 and 1879. There is, however, testimony tending to show that many of the trees were destroyed by a hail storm in 1881. It will be noticed that none of the work upon the land after October, 1877, was performed by the entryman Husted, or by Hutchinson, in behalf of Husted, but was all done by Hutchinson in his own behalf after he had possession of the land. In fact, Husted appears to have turned over to Hutchinson his entire interest in the land, excepting his right of re-entry, upon Hutchinson's failure to meet his obligations under their agreement ; otherwise it was an absolute sale of (or an agreement to sell) all his rights under his entry, so far as he could effect a transaction of that nature. He did nothing nor caused anything to be done in his own behalf during the years 1878, 1879, 1880, or 1881, relative to the planting and cultivating of trees, but left that whole matter to Hutchinson to be performed by him in his own (Hutchinson's) behalf. But in 1882, after Hutchinson had discontinued his money payments and failed to plant and cultivate trees, and differences had arisen between them, and their agreements had been apparently abandoned, and for pretended compliance with the law he caused some tree slips to be placed in rows on the land and plowed furrows over them ; but it does not appear that this was a successful enterprise, and it cannot condone his failure for four years or more to meet the requirements of the law.

On these facts I am of the opinion that Husted abandoned the land from the fall of 1877 to the spring of 1882, with intent during that time to convey it to Hutchinson—for whose use and benefit he held his entry—upon his acquisition of title ; that the entry was held for speculative purposes and the cultivation of grain, and not for the cultivation of timber. This was wholly inconsistent with the policy and intent of the timber-culture law ; and I modify your decision, and, as recommended by the local officers, direct cancellation of the entry.

Motion for reconsideration denied April 15, 1884.

**X.—TIMBER AND STONE ACT.****1. MARRIED WOMEN.**

A married woman cannot make entry under the act of June 3, 1878, where the effect would be to allow the head of the family to make two entries.

*Commissioner McFarland to register and receiver, Oregon City, Oreg., January 12, 1883.*

**GENTLEMEN:** In reply to your letter of the 20th ultimo, in which you ask if married women will be allowed to purchase timber land under the act of June 3, 1878, you are advised that while it is possible that the statute is broad enough to admit of such a construction, still in view of the restriction of the act to one entry by any person, and the general policy of the laws confining entries of public lands to heads of families and persons over the age of twenty-one years, I am of the opinion that it would not be in consonance with the intention of the act to allow entries in such manner that one person could control two entries instead of the one to which he is restricted by law.

I prefer, however, not to decide absolutely that a married woman cannot make an entry under the timber-land act, unless an actual case should come before me on appeal from your decision.

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**2. MINOR.**

LUTHER MANN.

Timber-land entry by a minor under act of June 3, 1878, is not allowed.

*Commissioner McFarland to register and receiver, Olympia, Wash., January 12, 1883.*

**GENTLEMEN:** Referring to my decision of September 22, 1882, in the matter of the appeal from your action refusing to allow Luther Mann, who was a minor, to make a timber-land entry under the act of June 3, 1878, in which your action was overruled, and Mann was allowed to perfect his entry, you are advised that this action was not intended to establish a rule authorizing you to allow minors to purchase land under said act, and you are instructed to reject all such applications, and advise the applicant of his right to appeal.

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**3. NON-CONTIGUOUS TRACTS.**

Tracts comprising an entry under the act of June 3, 1878, need not be contiguous.

*Commissioner McFarland to register and receiver, Shasta, Cal., November 25, 1882.*

**GENTLEMEN:** Referring to your letter of the 31st ultimo, I have to state that it is the practice of this office to allow entries under the tim-

ber-land act of June 3, 1878, to embrace non-contiguous tracts, as in ordinary cash entries, there being nothing in the wording of the statute to indicate that it was intended to restrict such entries to contiguous tracts.

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#### 4. PRELIMINARY AFFIDAVIT.

##### *RELINQUISHMENT—PREFERENCE RIGHTS.*

###### *SMITH v. MARTIN.*

The filing of a preliminary affidavit under the timber and stone act of June 3, 1878, does not appropriate the land involved so as to prevent a homestead entry subject to the rights of the timber claimants.

A relinquishment under the above circumstances by the timber claimant prior to the hearing can give no preference right to a third party.

*Acting Secretary Joslyn to Commissioner McFarland, August 13, 1883.*

SIR: I have considered the appeal of Oscar Smith from your decision of June 30, 1882, holding that J. A. Martin was entitled to enter as a homestead 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. 2, T. 16 N., R. 1 E., Marysville district, California, subject to the rights of Aaron Pugh.

It appears that February 4, 1882, Aaron Pugh filed an affidavit in the local office of his intention to enter the land above described as a timber claim, under the act of June 3, 1878 (20 Stat., 89); pending publication of the required notice, Martin filed an affidavit alleging that the land was not timber land within the meaning of the law; citations were issued and a hearing held April 26 and 27, 1882. On the first day of the hearing, Martin made a formal application to enter the land as a homestead. The local office held, after the investigation, that the land was in fact agricultural, and not subject to entry under the provisions of the act of June 3, 1878, and "recommended that the homestead applicant be allowed to enter the land." From this decision there was no appeal; but June 7, 1882, Pugh filed a relinquishment of his claim, and Oscar Smith made an application to enter the land as a homestead on the same day.

The register and receiver, June 14, 1882, forwarded to your office the record and evidence in the matter of Pugh's application to make timber-claim entry, together with the homestead applications of Martin and Smith, and submitted the case for your instructions.

June 30, 1882, you informed the local office that the application of Martin should have been allowed at the time of its presentation, subject to any rights Pugh might establish on the hearing; and from this decision Smith appeals.

The filing of a preliminary affidavit, as required in the act of June 3, 1878, did not operate as a complete segregation of the tract from the mass of public lands, and Pugh acquired no rights on filing such affi-

davit, unless he should fully show, on the day fixed by the expiration of the sixty days of publication, that the land was more valuable for the timber growing thereon than for agricultural or other purposes, and until such time as that fact was established, the land was subject to entry by the first legal applicant, under the homestead or pre-emption laws, subject only to the rights of the said timber claiman.. as es-tablished on the hearing.

If the filing of the affidavit constituted no appropriation of the land, it follows that a relinquishment made by Pugh conferred no preference rights on the party obtaining the same.

Your decision is therefore affirmed, and inasmuch as the land has been determined to be not subject to entry as a timber claim, and as Martin was the first legal applicant therefor, he should be allowed to enter the same as a homestead.

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#### XI.—TIMBER LANDS.

##### *PREFERRED CLAIMANT—BONA FIDES—CHARACTER OF LAND—BURDEN OF PROOF.*

###### *HUGHES v. TIPTON.*

A timber-land entryman is a preferred claimant against everybody except a prior claimant and the United States. An adverse claim can be initiated only prior to the date of the timber application, and should be filed during the period of publication.

A person who initiates his claim subsequently to the timber application is a preferred claimant if the United States does not pass its title to the first applicant.

Any party may at any time allege illegality in respect of the qualifications or proceedings of the applicant, the bona fides of his application, or the character of the land.

The act of June 3, 1878, does not contemplate entries exclusively on land which is *wholly* unfit for cultivation after the timber has been removed, but upon land which is unfit for *ordinary* agricultural purposes.

The burden of proving the character of the land sought to be entered is upon the timber applicant.

*Secretary Teller to Commissioner McFarland, February 23, 1884.*

SIR: I have considered the case of Minor B. Hughes *v.* William C. Tipton, involving lots 1, 2, 3, and 4 of Sec. 8, T. 26 S., R. 3 W., Roseburg, Oreg., on appeal by Tipton from your decision of June 23, 1883, holding that said tracts are not subject to his entry as timber land.

It appears that Tipton made application for said lots, and for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said section, on October 17, 1882, under the timber-land act of June 3, 1878 (20 Stat., 89). On December 1, 1882, Hughes made homestead entry No. 3982 for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and lots 3, 4, 5, and 6, of said section. Hearing was had in January, 1883, on Hughes's denial of the alleged character of the land, and objection to the issue of patent.

In the case of *Smith v. Martin* (10 Land Owner, 198), it was held by this Department that the timber application does not reserve the land against settlement or homestead entry, and that such settlement or entry is subject to the prior rights of the timber applicant if he furnishes the evidence required by section 3 of said act. But said case is not to be extended beyond this ruling, nor to be construed as deciding that a subsequent settler or entryman has rights superior to those of the timber applicant. It is to be observed that sections 2 and 3 of said act are carefully drawn, and are so closely analogous to similar provisions in the pre-emption and mining laws, that under settled decisions of the Land Department there should be no difficulty in construing them, in so far at least as they apply to the facts in the case now before me. Section 2 provides for an oath similar, and with similar penalties for false swearing, to that prescribed in section 2262, Rev. Stat., and in general it may be said that the applicant, having taken said oath, and furnished the proofs required by section 3 to the satisfaction of the local officers, is as fully entitled to enter the land as a pre-empter who has taken the oath and furnished the proofs required of him. Hence the timber application initiates a valid claim to the land, in the same manner as does the pre-emption declaratory statement; and the applicant under it, in like manner as the pre-emptor, has a preferred right against everybody but a prior claimant and the United States. This is the full force and effect of the provision in section 1 of said act, which declares that "nothing herein contained shall defeat or impair any bona fide claim under any law of the United States;" said clause could not be interpreted as regarding as bona fide an adverse claim made after patent, and, if so, a claim made subsequently to the timber application is not contemplated; for it is a rule that the patent relates back to the date of the initial act, so as to cut off intervening claimants.

The language of section 3, referring to an "adverse claim" and a "valid claim," is therefore to be understood as referring to a claim to the land initiated prior to the date of the timber application. By a prior claim, founded on settlement or entry, the claimant obtains the right of or to possession, and a subsequent timber application cannot impair or defeat it. The analogy of this section, in respect of both terms and requirements, to section 2325, Rev. Stat., relating to mineral applications and adverse claims, is striking, and supports the proposition that the adverse claim is one based on an alleged prior possessory right. Hence this section contemplates the filing of an adverse claim during the period of publication, which shall prevent the entry until after inquiry into the question of priority of right to the tract. But if said claim on its face shows that it was initiated subsequently to the timber application, it cannot delay the entry, if the applicant duly furnishes the required proofs. A person who initiates his claim subsequently to the timber application gains no right against the applicant or the United States, though he has a preferred right to the land against all the world

besides ; the position he occupies is simply this—that if the United States does not pass its title to the applicant, he has the next best claim to the land.

The proviso to the third section contemplates a protest after entry against the issue of patent, and is similar in terms and purpose to the proviso to section 2325, Rev. Stat. The protestant, to be heard, must allege a “valid claim,” under which the lands are “held by him,” and the issue at the hearing is on the question of priority of right.

Whilst the statute thus provides for a contest by a party in interest, it does not prohibit the appearance at any time of a party not in interest as *amicus curiae*, who alleges illegality in respect of the qualifications or proceedings of the applicant, the bona fides of his application, or the character of the land. Of such character must the claim of Hughes, in the case at bar, be regarded ; for, since his entry was made subsequently to Tipton’s timber application, it gave him no standing as an adverse claimant ; but, as his allegation is that the land is fitted for cultivation, it raises the question of the legality of Tipton’s application, which is the only issue in the case. (*Jones v. Finley*, 10 L. O., 365.)

In *Spithill v. Gowen* (10 Land Owner, 73) it was held by this Department that the act under consideration contemplated the sale as timber land of such tracts only as had “soil unfit for ordinary agricultural purposes, when cleared of timber.” To this ruling I adhere ; and I may remark, in addition to what was said in that case, that the settlement laws unquestionably authorize agricultural claims to land covered by timber, and that this act recognizes them in several instances. For example, “nothing herein shall authorize the sale of the improvements of any bona fide settler,” and the claimant must prove that “the land is unoccupied and without improvements ;” the existence of a valid settlement or improvement is therefore fatal to the timber claim, notwithstanding the land may be non-agricultural. The act evidently discriminates in favor of a bona fide settler, irrespective of the question of the character of the land. Section 4 of the act also provides that “nothing herein contained shall prevent any agriculturist from clearing his land or preparing his farm for tillage,” and it has all the force of a declaration by Congress that timbered lands are subject to agricultural settlement. Hence the character of the soil at date of entry, apart from the character and value of the trees then covering it, is the true test of its status as agricultural land.

In ruling on Tipton’s application, you have held, I observe, that entries under the act of June 3, 1878, “can only be made for land which is *wholly* unfit for cultivation, after the timber has been removed,” and you base the ruling on the case last mentioned. This ruling carries that case beyond its letter and spirit, which go no further than to hold that the soil must be “unfit for *ordinary* agricultural purposes,” in order to subject it to sale as timber land. Such is the correct standard, undoubt-

edly, and the only one which could be properly adopted in view of the law, which institutes a comparison of values by force of the descriptive terms, "valuable *chiefly* for timber, but unfit for cultivation." A similar comparison is made in the mining law between the value of agricultural and mineral land, and its application is not at all difficult in the administration of either law. For instance, if a timber application should cover timbered land whose soil was so thin or so poor, or whose surface was so precipitous, rocky, or broken, as to unfit it for raising crops in the ordinary manner and quantity, it would be valuable chiefly for timber. Or again, if scattered here and there were patches of arable land, but so that they aggregated a less quantity than those parts unfit for cultivation, the tract would be valuable chiefly for timber. But if all or nearly all of a 40-acre tract were arable land, it should be segregated from the quantity applied for, provided there were a settler desirous of taking it. The burden of proof must be on the timber applicant where the issue is on the character of the land; for this law is an exception to the general settlement laws, and the person claiming its benefits must show that his case comes within the exception.

Under the aforesaid rules, the testimony concerning the character of the land covered by Tipton's application is now to be tested. There appears to be no evidence concerning the N.  $\frac{1}{2}$  of the NE  $\frac{1}{4}$ , and the question is as to the character of lots 1, 2, 3, and 4. Much of the testimony concerns the character and marketable value of the timber on said lots, and is therefore irrelevant. Upon the whole, I reach the conclusion that the major part of lots 3 and 4 is agricultural land, as the local officers decided, and that the major part of lots 1 and 2 is rocky, hilly, unfit for cultivation, and chiefly valuable for timber. Consequently Tipton's application should be canceled as to lots 3 and 4.

It is shown by the testimony that Hughes had not settled on the land covered by his homestead, and counsel argue that the award of lots 3 and 4 should not be made to him, for the reason that he has not a valid claim. There is no award by this decision to Hughes, who is heard as *amicus curiae* only, and his homestead claim must be adjudicated on its own merits, when he comes to prove up or to defend his rights in a contest.

Your decision is modified accordingly.

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## XII.—UNSURVEYED LANDS.

### SETTLERS' RIGHTS—FILING OF PLATS—"JUMPING" OF CLAIMS.

*Commissioner McFarland to Messrs. Tice & Lyon, Columbia, Dak., September 29, 1883.*

GENTLEMEN: I am in receipt of your letter of the 19th instant, relative to the rights of settlers on unsurveyed lands. You state that numbers of bona fide settlers are upon lands which have been surveyed in the

field, but that the plats of survey will not be filed in local office before next February; that such settlers have expended all their means in improvements, and are compelled to leave their claims this coming winter or starve. You ask if there is any way in which their claims can be protected from being "jumped" during their absence.

In reply, I have to advise you that settlers on unsurveyed lands are allowed three months from filing of plat of survey in the local land office within which to put their homestead or pre-emption claims of record, and their rights will relate back to date of settlement. If, during the temporary absence of such settler (provided his claim is made of record within the proper time, and no abandonment is shown), another party settles on the land, the claim of the first settler would be considered as the prior one, and if good faith is shown would be protected. This office, however, cannot undertake to prevent the "jumping" of any claim.

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### XIII.—VALENTINE SCRIP.

JOHN FARSON.

Application to locate this scrip on a certain tract in Chicago rejected for reasons given in previous decisions.

*Secretary Teller to Commissioner McFarland, June 8, 1883.*

SIR: I have examined the matter of the application of John Farson to locate Valentine scrip, 210 E., on the addition to fractional Sec. 15, T. 39 N., R. 14 E., 3d P. M., in the city of Chicago, Ill., containing 11.61 acres, as surveyed by Edward Talcott, in 1836, on appeal from your decision of April 19, 1882, rejecting the application.

The township was surveyed in 1821 (approved 1822), and said fractional Sec. 15 was then surveyed and platted—Lake Michigan being its eastern boundary.

Under the grant to the State of Illinois, by act of March 2, 1827 (4 Stat., 234), to aid "in opening a canal to unite the waters of the Illinois River with those of Lake Michigan," said section was approved to said State by President Jackson, May 21, 1830.

The land in question is part of a sand bar lying opposite to Secs. 10 and 15, which appears from the record to have been formed after the survey of 1821, and probably after the transfer of said fractional Sec. 15, to the State. The status of this sand bar in respect to its being public land of the United States has been repeatedly considered in your office and by this Department.

Commissioner Whitecomb, in a letter to the register and receiver, of April 4, 1838, referring to the Talcott survey of this bar, says:

This office has no official knowledge of the existence of any such public land, and has never authorized any survey of the same, it being as

represented an accretion or sand bar formed since the original survey in 1821.

Commissioner Wilson, in a letter dated June 12, 1868, says:

The survey of the accumulated sand in front of said fractional Secs. 10 and 15, being addition to the lands originally surveyed in 1822, and consequently inures to Fort Dearborn Reservation in Sec. 10, and the State of Illinois under canal grant in Sec. 15.

In 1875, George F. Blanchard applied to locate this same 11.61 acres with the same kind of scrip (Valentine scrip, No. 31, E). The location was rejected by your office February 12, 1878.

The Commissioner in his decision says that "the land was not public land, and that the Talcott survey was unauthorized and not binding upon the Government." He further held that the first survey (1821) described fractional "section 15 as bounded on the east by the lake; and there being no evidence showing that such was not the fact so far as relates to section 15, it must be accepted as a fact, and whatever accretions have been made to said section passed to the State with the section under the grant for canal purposes in 1827."

Britton, Gray & Drummond applied to locate Valentine scrip 159, E., on that part of the sand bar lying opposite Sec. 10. On appeal to this Department, my predecessor, Secretary Schurz, in his decision of the case (February 28, 1879) found that there had been a "gradual accretion of land from the lake to the southwest fractional quarter of Sec. 10, between the years 1821 and 1836." He rejected the application to locate for the following reasons, viz:

1. The tract applied for is not public land of the United States.
2. Valentine scrip is not locatable on this class of lands.

In the case of Merrifield *v.* Illinois Central Railroad, decided by me January 22 last, the same piece of land was involved as in the case above cited. I considered fully the question of the legality of the Talcott survey, and held that it was unauthorized and invalid. I further held, upon the merits, that said tract was not "unoccupied and unappropriated public land of the United States," and approved of the decision of Secretary Schurz to that effect in the Valentine Scrip case.

From the cases which I have already referred to, and the opinions which have prevailed respecting the character of this land from the time of Commissioner Whitcomb's letter in 1838 to the present, it would seem that it ought to be understood by this time that the tract in question, including that part of it which lies opposite to Sec. 10, is not public land of the United States, and therefore not the subject of any scrip location whatever.

Your decision rejecting the application to locate in this case is affirmed.

## DIVISION D.—PRIVATE LAND CLAIMS.

### I.—ARIZONA—PRIVATE CLAIMS.

### II.—CALIFORNIA—

1. Private Claims.
2. Cost of Survey.

### III.—COLORADO—

1. Practice.
2. Private Claims.

### IV.—FLORIDA—DELIVERY OF PATENT.

### V.—ILLINOIS—PRIVATE CLAIM.

### VI.—LOUISIANA—

1. Delivery of Patent.
2. Form of Patents.
3. Practice—Appeal.
4. Private Claims.
5. Success on Proceedings.

### VII.—NEW MEXICO—

1. Donations.
2. Practice—Appeal.
3. Preliminary Survey.
4. Private Claims.

### VIII.—OREGON—DONATIONS.

### IX.—SCRIP CASES.

### X.—WASHINGTON TERRITORY—

1. Donations.
2. Missionary Occupancy.

### I.—ARIZONA.

## PRIVATE CLAIMS.

*CLAIM UNDER ACT OF FEBRUARY 5, 1875.*

SAMUEL H. DRACHMAN.

Claims under above act to be initiated by filing same with register and receiver; then to be submitted to General Land Office on the question of twenty years' occupancy; if decided adversely to claimant the land will be open to pre-emption or homestead; the occupant, at date of act, though having settled within less than twenty years, to have prior right.

Register and receiver should act jointly in cases under said act.

*Commissioner McFarland to register and receiver, Tucson, Ariz., July 23,  
1883.*

GENTLEMEN: I am in receipt of the letter of the receiver of October 19, 1882, transmitting the affidavit of Samuel H. Drachman, rel-

ative to his claim No. 1, under the act of February 5, 1875 (18 Stat., p. 305), and recommending that the claimant be permitted to make payment in cash for the land claimed under said act.

In considering said recommendation I have to state that said act provides that claimants thereunder shall file their claims with the register and receiver of the United States Land Office for the district in which the land claimed is situated. This Mr. Drachman has done. His case should now be brought before this office upon the question of occupancy for twenty years prior to February 5, 1875, in the manner pointed out by said act. If this question of occupancy should be finally decided adversely to said Drachman claim, then the land covered thereby will be open to settlement under the provisions of the pre-emption or homestead laws of the United States; the occupant of the land in question at the date of said act of February 5, 1875, who had settled thereon within a period less than said twenty years to have a prior right to homestead the same.

As this case is not yet before this office upon the question of twenty years' occupancy as contemplated by said act, and consequently no final decision upon that question has yet been rendered, it follows that the receiver's recommendation that the claimant be allowed to purchase the land claimed by him at this stage of the proceedings is premature, being sustained neither by the law, nor the facts in the case.

The law contemplates that your action in regard to the claims herein referred to should be joint, and therefore it is expected that you will hereafter abstain from making separate recommendations or suggestions in regard thereto.

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*PROOFS—ACT OF FEBRUARY 5, 1875.*

*SOLOMON WARNER.*

Proof of occupancy should be definite; facts should be required to be proved, and not conclusions of witnesses accepted.

Where proof is not definite and sufficient, register and receiver should summon witnesses and examine them orally, on interrogatories, as per instructions herein given.

*Commissioner McFarland to register and receiver, Tucson, Ariz., July 31, 1883.*

**GENTLEMEN:** I have examined the papers submitted with your separate reports in the case of Solomon Warner, who claims lots 11 and 19 in Sec. 14, T. 14 S., R. 13 E., Pima County, Arizona, under special act of Congress, approved February 5, 1875, entitled "An act to grant title to certain lands in the Territory of Arizona" (18 Stat., p. 305).

These papers have been forwarded here for the purpose of obtaining a patent for said tracts of land by reason of twenty years' occupancy or

possession of said lots prior to February 5, 1875, by said Warner, or those under whom he claims.

The claimant has introduced as proof in this case, to sustain his title to said lot No. 11, an instrument in writing, dated July 1, 1849, signed by José Capistran.

This instrument purports to sell to Jesus Castro lands which were granted him (Capistran) by the supreme government; but does not in any other manner indicate *what* lands were sold, nor is a grant of any land to Capistran found among the papers in this case.

On the 23d day of November, 1874, Jesus Castro and wife by deed conveyed to Dolores Waltemath a tract of land which is so described as to identify the same (as to some of its boundaries) as said lot No. 11, and on the 14th day of December, 1875, this same tract of land was by deed conveyed by Dolores Waltemath and husband to Solomon Warner.

The claimant has also introduced as proof in this case, to sustain his title to said lot No. 19, a deed dated June 7, 1875, from Tomas Elias and wife to Samuel Hughes, and a deed for the same land dated July 7, 1875, from Samuel Hughes and wife to Solomon Warner.

The proofs accompanying these several deeds are the affidavits of different parties. The matters sworn to by these affiants are general in their character, being in substance that said Warner and those under whom he claims have occupied said lands for upwards of twenty years prior to February 5, 1875.

This occupancy or possession should, in my judgment, be shown in a more definite manner. *Facts* should be proved, and not the conclusions of the witnesses testified to.

The joining of these two distinct claims in one action is another embarrassing feature in their adjudication by this office.

Said act of February 5, 1875, authorizes you to summon witnesses, administer oaths, and take testimony.

This provision of law seems to impose upon you the duty of summoning witnesses in these cases, and interrogating them, under oath, in regard to the matters involved.

When the instructions of November 26, 1877, under said act of 1875, were issued, the United States land office was at Florence, a long distance from the lands in question, and, consequently, for the convenience of those claiming thereunder, it was then considered proper to accept proof in the form of an affidavit; but as said lands are now near to your office, and as the affidavits accompanying the proofs in these cases are not deemed sufficiently definite upon those points which are considered material, I hereby modify said instructions, by instructing you to hereafter examine witnesses orally, under oath, and reduce the questions propounded and answers given to writing in all cases where the witnesses are within the jurisdiction of your office.

In order to enable you to adjudicate said claims separately and in ac-

cordance with said instructions as herein modified, I return herewith said deeds and the proofs attached thereto, that you may reopen each case and fix a day when you will, at the office of the register, take testimony relative to the questions to be adjudicated.

After giving the interested parties due notice of the action taken by you pursuant to the modified instructions, you will thereafter be governed in your official action thereon by the provisions of said act of February 5, 1875, and the rules of practice now in force.

In the examination of witnesses as herein indicated you will first establish their *competency to testify* by having them testify as to their age, occupation, place of residence from February 5, 1855, to February 5, 1875; and particularly as to their knowledge of the land involved, and how such knowledge was acquired.

In framing the questions to be asked of each witness the act of 1875, and the instructions issued by this office, pursuant thereto, will be your guide.

Each question should be so worded as to confine, as nearly as possible, the witness to those things within his own knowledge.

You will make a report in each case when you forward here the testimony taken.

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*ACT OF FEBRUARY 5, 1875—LANDS RESERVED.*

**WILLIAM A. McDERMOTT.**

The offer of McDermott to file declaratory statement was properly rejected. The land being claimed by Hughes and others, under said act of 1875, no claim can be initiated thereon while said former claims remain unadjudicated.

*Commissioner McFarland to register and receiver, Tucson, Ariz., January 14, 1884.*

**GENTLEMEN:** I am in receipt of your letter of the 20th ultimo transmitting papers on appeal from your action refusing to allow William A. McDermott to file a declaratory statement under the provisions of the pre-emption act of September 4, 1841, covering the E.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 3, and W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 2, T. 14 S., R. 1 E., in the district of lands subject to sale at your office.

It appears by said papers that you base your refusal to allow said filings upon the grounds that the tracts of land covered by said declaratory statement are reserved by virtue of the provisions of the act of February 5, 1875 (18 Stat., p. 305), by reason of certain claims having been filed pursuant thereto, which have not yet been finally adjudicated and settled, and consequently cannot be now disposed of under said act of 1841.

It is shown by evidence on file here that claims under said act of 1875 were filed February 3, 1876 (covering nearly all the land in question),

by Samuel Hughes, Frentino Cota, Leonardo Romero, Juan José Ortiz, and Francisco Romero.

These claims have not yet been adjudicated and their validity determined.

Said act of 1875, where the title of the claimant is found to be valid, as therein provided, relinquishes the title of the United States to the land claimed and makes a grant of the same to such claimant.

In view of this legislation no claim can be initiated to the land in question, under said act of 1841, while the claims of Hughes and others are in their present condition.

Your action in rejecting said filing is therefore sustained and you will so notify Mr. McDermott, and at the same time advise him of his right of appeal from this ruling to the honorable Secretary of the Interior.

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## II.—CALIFORNIA.

### 1. PRIVATE CLAIMS.

#### *MOTION FOR REHEARING.*

#### RANCHO EL SOBRANTE.

The matters presented not bringing the case within the rules under which rehearings are granted, and no ground being discovered which upon the principles applicable to new trials would justify opening the case, motion denied.

The merits of the decision having been argued at length by counsel, are also considered, and no reason found for dissent from the conclusions reached therein.

*Secretary Teller to Commissioner McFarland, April 4, 1883.*

SIR: The decision in this case upon its merits was rendered by my predecessor on appeal from your office February 23, 1882.

A petition for a rehearing on behalf of said rancho was made and filed on the 17th day of April thereafter.

April 28, 1882, a motion to dismiss the motion for a rehearing was made by counsel for contestants and a printed brief filed.

On the 7th day of March, 1883, an oral argument was made before me in behalf of the petition for a rehearing.

I have considered such argument and the brief submitted therewith. The case presented does not bring it within the rules upon which rehearings are generally granted, nor do I think that any ground is disclosed that, under the rules and the well-established principles relating to new trials, would justify me in opening the case and directing a rehearing.

Counsel for the petition, in his oral argument and brief submitted at that time, dwelt at length upon the merits of my predecessor's decision. I have considered said argument and brief in that respect also, and have taken occasion to examine the briefs and papers laid before my

predecessor at the time of his said decision, and see no reason to dissent from the general conclusions and result reached by him.

The motion for a rehearing is denied.

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*APPLICATION TO REOPEN CASE, ETC.*

RANCHO LAS VIRGENES.

Where the application raises the same question formerly considered, all parties interested having had full opportunity to be heard and produce testimony, and no new matter of law or fact is presented, all having been fully investigated, the case must be held definitely settled and reopening denied.

*Secretary Teller to Commissioner McFarland, July 2, 1883.*

SIR: You transmitted, under date of the 22d instant, for my consideration, the protest of D. M. Vejar and others, claiming to be owners or to have interests in the Rancho Las Virgenes, in Los Angeles County, California, against the approval of the survey of said rancho as directed by Secretary Kirkwood's decision of June 10, 1881, and asking for permission to introduce further evidence in the case. They allege that, in their opinion, the testimony taken at the hearing in December, 1880, as to the location of the point of beginning of the juridical possession of said rancho was either misunderstood by the interpreter or improperly interpreted by him, and that it differently located said point from the location found by my predecessor's decision.

The facts respecting this rancho and the several surveys thereof are minutely detailed in your several reports thereon to this Department. It appears that a survey of the rancho was made in 1875, which was not adopted, and another was made in 1876, both by United States Deputy Surveyor Goldsworthy. The second survey was published and not objected to, and was approved by the surveyor-general in 1877, and returned to your office for appropriate action. In July, 1878, it was set aside by Secretary Schurz, chiefly for its supposed erroneous location of "Cruz de Tapia," the place of beginning of the juridical possession of the original grant of Las Virgenes, and he directed a new survey in accordance with the specific boundaries set forth in the act of juridical possession, commencing at the place referred to as "Cruz de Tapia." In December, 1879, the surveyor-general returned to your office, with his approval, the plat of said new survey and the field-notes thereof, made by United States Deputy Surveyor Minto. Subsequently certain descendants of the confirmee of the lands intended to be embraced in the rancho filed a protest against said survey, representing that it excluded therefrom their settlements and improvements in that it located "Cruz de Tapia" at a different point from where it in fact was, and thereupon, October 22, 1880, Secretary Schurz directed an investigation to be made by the surveyor-general to ascertain its correct location. June 10, 1881, Secretary Kirkwood, in view of the testimony

submitted at said investigation and of all the papers in the case, and concurring in the conclusions reached by you, as stated in your letter of May 13th preceding, located "Cruz de Tapia" at a named point, and directed that the Minto survey be set aside and that a new one be made in accordance with his findings. The survey was made accordingly. Subsequently one Miguel Leonis and others moved for a reopening of the case, which, May 8, 1882, upon consideration of all the facts, I denied, holding that no sufficient reasons were presented for any modification of the instructions upon which the survey was based, or for the survey.

The chief question in all these proceedings involved the correct location of "Cruz de Tapia," the place of beginning of the juridical possession of the original grant of Las Virgenes, and this review of the case shows the earnest efforts of your office and of this Department in that respect, and with what caution conclusions have been reached.

The present proceeding again raises the same question. All the parties in interest have heretofore had full opportunity to submit their views with such testimony as they saw fit. No new matter of law or of fact is presented. The protest and petition set forth the views of the petitioners only, and the facts they allege are not under oath. As all these matters have been heretofore fully investigated and considered, and as I find nothing in the case to justify its reopening, it must be held definitely settled by the former action of this Department. The protest is therefore dismissed; the petition is denied.

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ON MOTION FOR REVIEW OF DECISION BY SECRETARY SCHURZ,  
MARCH 3, 1881.

PUEBLO LANDS OF SAN FRANCISCO.

The right to the Pueblo title and possession rests in the city of San Francisco by judicial confirmation.

The description of the land confirmed being "so much of the extreme upper portion of the peninsula, above ordinary high-watermark, \* \* \* as will contain an area of 4 square leagues; said tract being bounded north and east by the Bay of San Francisco, on the west by the Pacific Ocean," &c., the line intended must be taken to be the line of ordinary high-water mark of the *bay* and the *ocean* proper, crossing the mouths of creeks and estuaries and including the same and the shores thereof, although lying below the line of ordinary high tide.

The decision of Secretary Schurz, making the "Red Line Map" the basis of the survey directed thereby, did not require it to be inflexibly adhered to, but required the tide line of the bay to be followed and not that of the banks of estuaries and streams.

Compliance with former decision directed.

*Secretary Teller to Commissioner McFarland, July 12, 1883.*

SIR: I have considered a motion for review of the decision rendered by Mr. Secretary Schurz, March 3, 1881, in the matter of the survey of the

Pueblo lands of San Francisco, setting aside, as to the particulars named, what is known as the Stratton survey, executed in 1867, and directing a new survey of the line of high-water mark on the Bay of San Francisco, taking as a basis what is designated as the "Red Line" of the original shore, as delineated by authority of an act of the legislature of California, approved March 26, 1851.

The motion for review was duly presented under the permission of the Department in April, 1881, with a request that the matter of argument be left open for the consideration of whatever questions might arise in the further progress of the case, and was formally renewed in September, 1882, by counsel for the parties interested in the approval of the Stratton survey, and after full oral and written argument the whole case has been regularly submitted for my decision.

Having complete jurisdiction of the case, as shown by the authorities cited on page 4 of the former decision—also *Maguire v. Tyler* (1. Bl., 195, and 8 Wall., 650), *Van Reynegan v. Bolton* (95 U. S., 33), *Snyder v. Sickles* (98 U. S., 203), and other cases—I propose to give such direction in the matter as will lead to an intelligent execution of the survey, at the same time limiting the expression of my views to the exact points presented by the pending application.

The right to the Pueblo title and possession rests in the city of San Francisco, by judicial confirmation, sanctioned and ratified by legislative grant. (*Trenouth v. City and County of San Francisco*, 100 U. S., 251.) The case just cited contains not only a clear and concise statement of this particular grant, but of the Mexican custom and law in which such title originated. The acts of Congress referred to are those of July 1, 1864 (13 Stat., 333), and March 8, 1866 (14 Stat., 4), the latter of which released all claims of the United States upon certain trusts, and by direct reference to the decree of the circuit court of the United States rendered May 18, 1865, which specified the boundary calls of the grant.

The descriptive language of the decree is this:

The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east-and-west line drawn so as to include the area aforesaid.

All material questions relating to this boundary are, as I understand the case, now settled, except the single inquiry whether or not in running along the line of ordinary high-water mark of the ocean, and especially of the bay, the main shore or coast line of such body of water, identified by its larger description, shall be followed, cutting across the mouths of streams, estuaries, and creeks which, intersecting the body

of the peninsula, find their entrance into the said ocean or bay; or whether such estuaries as also fall below high tide shall be segregated by following up the tide line on one side and down on the other, so as to map them, as it were, as a part of the sea, and to measure only the land surface thus articulated and segregated, to obtain the area called for by the grant.

My predecessor held that the former was intended by the decree and expressed its true construction. The applicants for review adhere to and insist upon the latter interpretation.

Mission Creek, so called, running into Mission Bay, an interior part or portion of the Bay of San Francisco, presents the principal locality of the controversy; although several other streams are also affected by the tidal flow, and strips of land along their banks are, or were in 1846, submerged by the ordinary high tides. All these lands are now re-claimed, and covered by the streets, blocks, and buildings of the city. It is sufficient for this case to fix the meaning of the decree as to Mission Creek; for, if that be excluded as a boundary, all the other streams and lesser channels will, by the same rule, fall within the exclusion.

It is broadly contended that the controlling words of the decree are those first occurring, viz, "embracing so much \* \* \* above ordinary high water mark \* \* \* as will contain an area of four square leagues;" that this is descriptive of the lands with reference to every part and parcel of the same wherever situated, and draws to itself every subsequent mention of boundary, so as to compel us to treat all the waters below high tide in any part of the peninsula as forming "arms of the sea," which must be considered as a part of the sea named for boundary, and "meandered" out for quantity, in obtaining the area which governs the location of the south line of the grant. Others concede that possibly the fact of navigability of the estuary may have some bearing, but claim that if the stream was navigable it necessarily formed a part of the bay called for, and its high-tide line must be taken in surveying out the land.

To my mind both these views are extreme, and at variance with the intent and language of the decree. These first words of description are of the land as "a tract," a "portion of the peninsula" referred to as a whole, by reference to its situation "above ordinary high water" of the surrounding ocean and bay; description of the land as such "peninsula," and only intended to set out the location and situs of the grant, lying there as a portion of country within well-known natural water boundaries and rising above *their* ordinary lines of high tide. This peninsula was confirmed as a tract granted for municipal purposes, for the uses of a prospective and growing city, which at date of confirmation had already achieved more than its early promise. Manifestly, such a grant must take whatever is inland with respect to the bodies of water surrounding it—whatever might or should attach to its municipal uses—and, if traversed by a water course, everything not strictly

belonging to the public easement, to the *jus publicum* as recognized by the law of nations, would naturally fall within the municipal right. To change or limit this natural and persuasive presumption of intent, words of clear and unmistakable import must be used; not words which may reasonably find full interpretation in the opposite view.

Now, when we look at the calls for boundary there is no ambiguity, no doubtful phraseology: "Said tract being *bounded* on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean." The "tract" *bounds* upon the "*bay*" and "*ocean*," not upon estuaries, creeks, and streams intersecting such tract, even though they be navigable, and technically termed "arms of the sea."

I have examined the full list of authorities cited and brought to my attention at the argument and subsequently, and have no question to raise respecting them in a case to which they apply. Those on which great stress is laid are Hunt's Law of Boundaries, 16, 17; 8th Alabama, 1 to 24; 16 Peters, 251, 266, 267; 6 Cowan, 518, 540; 2 Wallace, 590; 94 U. S., 324. In all these cases the arm of the sea, or the stream itself, was the given boundary, and the only thing decided was that the title reached only to high-water mark; all beyond that resting in the rights of riparian proprietorship, subject to the public easement.

But, as before stated, this is another case. Here the boundary is not the stream, but the bay; consequently the "ordinary high-water mark" must be the high-water mark of the shore as pertaining to the sea, and not the high-water mark of the bank as pertaining to a river or stream. So that, although Mission Creek is alleged to have been as well a tidal inflow as an outlet for the inland waters, it nevertheless falls within banks instead of resting upon shores, and must be considered an inland water for all purposes, being far within the rule laid down in United States *v.* Grush (5 Mason, 290), and clearly covered by the late case of United States *v.* Steam Vessels (No. 141, October term, 1882).

To the foregoing may be added the rule long since established by the United States Coast Survey, as communicated by the Superintendent under date of 8th ultimo, in response to my request for information on the subject. I subjoin his letter:

U. S. COAST AND GEODETIC SURVEY OFFICE,  
Washington, June 8, 1883.

SIR: In further illustration of the statement made by this office under date of June 5, in answer to your letter dated May 31, 1883, concerning the practice of this office in defining the inner boundaries or outlines of bays when the same are interrupted by the mouths of estuaries, rivers, or creeks, I submit the following additional statement:

This office has long since had occasion to adopt definite rules in that respect for the purpose of making estimates for projected work and giving account of work done.

The rule adopted is to draw the line between high-water mark of the nearest points of land on each side of the interruption in continuation of the general outline.

Thus, making use of familiar illustrations on the Atlantic coast, the

general coast line is measured from Point Judith to Montauk Point ; from Coney Island to Sandy Hook ; from Cape May to Cape Henlopen ; from Cape Charles to Cape Henry. On the Pacific coast from Point Lobos to Point Bonita (San Francisco entrance), &c.

Descending to smaller features: In Long Island Sound the limits of the sound are defined by measuring across the mouth of the Thames River from high-water at Eastern Point to Quinipeag Rocks; across the mouth of the Connecticut River from high-water mark at Griswold's Point (Lyme) to Lynde's Point (Saybrook); in Delaware Bay, across Mahon's River between the opposite points of marshes. By the same rule we define the limits of Mission Bay, near San Francisco, by drawing the line across Mission Creek over the projecting points of marsh on each side.

It appears needless to multiply illustrations, and I trust that I have succeeded in setting forth the rule and practice of this office.

Very respectfully, yours,

J. E. HILGARD,  
*Superintendent.*

Hon. HENRY M. TELLER,

*Secretary of the Interior, Washington, D. C.*

From the foregoing it will be seen that although no suggestion was made to him as to localities, the inquiry being in the most general terms, the superintendent has instanced this very case as illustrative of the accepted rule. It can hardly be claimed, therefore, that a call for San Francisco Bay, being a larger description than Mission Bay, will demand the inclusion of an estuary of the latter which by the ordinary rules of boundary has been excluded from other designation than that of a mere creek flowing into the lesser bay, but actually considered as forming no portion of such bay designated as a distinctive body of water.

Let it be supposed for further illustration that instead of penetrating the peninsula for a short distance, Mission Creek had held by the same course and width, within its own banks, entirely across the land and connected as a channel with the Pacific Ocean on the west. Would it in such case be claimed that this channel formed, as an arm of the sea, one of the boundary calls of the decree? Manifestly, not; but the line of the shore would be followed around the peninsula, cutting both mouths, in continuation of the general course of the high-water boundary of the entire tract. And if this be so, it must follow that the lesser incident of an intersecting channel, within such banks on the one side cannot operate to require its notice as a boundary, and an exclusion of its area from the quantity of the grant.

I am aware that I have extended the consideration of this point to an unusual length; but in view of its importance and of the time and labor expended in its discussion, as well as of the misapprehension which it seems to me must exist in the minds of counsel who have appeared in support of the Stratton survey, I have thus sought to set at rest the conflicting theories concerning it. To me it is plain that the confirmation extends to the high-water mark of the shore of the bay, leaving

entirely out of the intention of the decree any reference whatever to the inland channels of the streams intersecting the granted peninsula; that the adjudication of the boundary goes to the settlement of the rights of the city, not only by relation as of the date of filing of the petition with the Board of Land Commissioners, but that it goes to "the title of the claimant as it existed upon the acquisition of the country" (*Beard v. Federy*, 3 Wall., 478). This adjudication necessarily postpones the State, even in the exercise of her tide-water sovereignty, to the rights of these claimants under the city; and but for the public character of the works made by or under State authority to improve the public easements and water front of the city, which works have also been cooperated in by the city herself, the title might probably be held to extend through riparian proprietorship to the present line and shores of the bay.

But, fortunately, there is no need to extend this question to that limit. The one thing for this Department is to find such shore line of high water as it existed in 1846. To this end my predecessor directed that the "Red Line Map" be made the basis of the survey. I do not regard this as commanding an inflexible adherence to such map, but construe it as intending to require that the former shore of the bay be followed, and not the banks of estuaries and streams. If at any point the red line traverses the land above the tide line, manifestly the tide line must be the boundary. So, also, where the line may chance to lie beyond the shore out in the water of the bay, the tide line must still govern. But following such tide line in its general course along the shore as it then existed, it must cross the mouths of these estuaries, including Mission Creek, at the points where the banks of the stream came down to the bay, though such banks may have been composed of marsh lands and were subject to tidal overflow as banks of the streams.

It is objected that this creek was from 140 to 270 feet in width, and navigable. So, many streams are miles in width navigable, and below high tide for many miles from their mouths; but they are not excluded from the area of tracts of land bounded by the shores of the superior bodies of water into which they flow at various angles. My predecessor intended simply to direct that Mission Creek be not made an exception to this general rule.

It is alleged that the same was declared navigable by act of the State legislature March 31, 1854. I am unable to perceive in this fact any support for the theory that it was regarded as a part of the bay. The language of the statute is that "the creek known as Mission Creek in the county of San Francisco, from its mouth as far as the tide flows, shall be declared a navigable stream." It is designated as a creek, described as within the county, referred to as having a mouth, and declared to be a stream. By sections 2 and 3 of the same act it is again identified as a creek.

This statute in itself shows the opinion of the State legislature to

have been according to the actual fact; not that this creek formed a part of the Bay of San Francisco, and a boundary of the peninsula, but that it was an inland stream within the body of the county; and the court of sessions was expressly authorized by the act to license bridges and ferries across such stream, provided navigation should not be thereby impeded. Had this been deemed a body of water instead of a stream, its mouth would have been denominated an entrance, and all the descriptive terms would have corresponded to the proper appellation of a bay, gulf, or sound, as the case might be. I cannot conceive how a claimant under the State can set up a construction so plainly at variance with what was obviously the legislative understanding in defining this water as a stream, known as a creek, and made subject to bridging and ferriage, with a saving only of the easement attaching to other navigable streams.

I might here dismiss this review, without alluding to the partial execution of the order of my predecessor; to the liberties taken with his instructions by the late surveyor-general; and to the repeated efforts of various parties to force the Department to an acquiescence in the subsequent proceedings had and reported. I have only to say that I do not look with favor upon an attempt to carry into effect by inference and evasive construction the execution of a survey so manifestly at variance with both the letter and spirit of the directions of the former head of this Department.

It is said that great interests are involved, calling for intervention or such recognition as to incline me to listen to appeals of various property owners under title granted by the State of California. I am not unaffected by proper considerations, where large and material interests must suffer from official action, yet being but the minister of the law, cannot yield my convictions of duty to favor such interests, however or in whomsoever vested. But here are opposing interests, each clamoring for interposition. I can but execute the decree of the authorities confirming the grant, construing whatever of doubt it may present according to my best individual and official judgment.

If the claimants under the State have a valid title, it is the duty of the Department to recognize that fact, no matter how great the injury to those holding under the Pueblo title. The latter have occupied and improved the lands in controversy by the erection of fine and valuable buildings. They have become the homes of a large number of persons of small means, who acquired their title through the Pueblo title, and who for years lived in ignorance of any adverse claims. The claimants under the State rely upon their naked legal rights, and demand their recognition by the Department, without reference to the hardships such recognition will cause to those bona fide purchasers under the Pueblo title. As before stated, it is my duty to recognize the legal rights of the State claimants if clearly established; but it is also my duty to require sufficient and convincing proofs of such rights be-

fore rendering a decision that will disturb titles, and deprive the occupants of their lands, their homes, and their places of business. This Department can and ought to take cognizance of the fact that long before the claimants had made a pretense of ownership the occupants were claiming the lands under the Pueblo title, and by their money expended in improving them the same became valuable, and their acquisition desirable to claimants.

For a nominal sum they now hope to acquire property worth millions of dollars, rendered thus valuable by the money and labor of those whom they now seek to despoil.

Before lending my aid to enforce naked legal rights of this character the proofs must be made exceedingly clear and conclusive. But, fortunately, in this case I have no difficulty in determining that the claim of the parties holding under the State is not only without legal right, but subversive of equity and justice; and I cannot permit myself, with the authority of the Department committed to my charge, to assist a claim based upon such considerations in overthrowing the settled rights of the community, appropriating their property and their very homes in the manner which would result from a modification of the decision already made.

On the other hand, if the parties holding the State title have made improvements under such title they are not without their remedy, inasmuch as the city is but the trustee of such occupants, who may at a nominal figure secure a title from the city authorities to the premises so occupied.

Leaving in force the decision of August 2, 1882, as to the eastern boundary of the Presidio military reservation, a review of which was declined October 26, 1882, I also direct a substantial adherence to my predecessor's decision of March 3, 1881, a review of which is sought by the present application, which motion for review is accordingly overruled. In executing the survey the suggestions herein expressed will be carried into effect.

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#### APPLICATION FOR SPECIAL FINDING OF FACTS.

#### PUEBLO LANDS OF SAN FRANCISCO.

Requests of applicants for findings replied to *seriatim*. (See Replies.)

Suggestion to Commissioner to advise surveyor-general that he is expected and directed to make the survey in accordance with the decisions relating thereto within twenty days from receipt of order, and without delay return it for approval.

*Secretary Teller to Commissioner McFarland, October 18, 1883.*

On the 3d day of March, 1881, the then Secretary of the Interior, after a careful examination of the law and facts, decided the case relating to the matter of the survey of the pueblo lands of San Francisco, and di-

rected a survey of said lands to be made, taking as the basis for such survey what is designated as the "red-line map" of the original shore, as determined by authority of an act of the legislature of California, approved March 26, 1851.

In the month of April following a motion for review was presented, with the permission of the Department, by the parties who contend for the Stratton survey.

After a very careful examination of the law and facts in this case, on the 12th of July last, I adhered to the views expressed by my predecessor in his opinion of March 3, 1881. Just before the signing of my decision of July 12, 1883, the counsel for the claimants under the State applied to have certain facts found, for the purpose, as they declared, of enabling them to maintain their cause in the courts. In my decision of July 12 I endeavored to state explicitly on what ground I understood my predecessor had rested his decision, and to express my adherence to the same views. Since such decision the claimants under State title insist that the findings of fact in the several decisions in the case are not sufficiently explicit to enable the court to determine what are the facts on which these decisions are based, and again renew their request for special finding. On the 14th of August last the Assistant Secretary, acting in my stead, directed a stay of proceedings until otherwise directed. This was for the purpose of allowing time to consider the request of the parties for special findings. Such request for special finding included—

First. We ask that the decree of the court of the 18th of May, 1865, by which the pueblo lands were confirmed to the city of San Francisco shall be fully found and set forth.

This was done, as will be seen from an examination of the decisions.

Second. We wish the fact to appear that the red-line map existed before the red line was drawn upon it and before the act of the legislature was passed in 1851, which brought the red line into existence.

That the red-line map, so called, did exist before the red line was drawn on it was doubtless proved by the testimony.

The act of March 26, 1851, referred in terms to an existing survey and a "map or plat of the same now [then] on record in the office of recorder of the county. (Hittell, sec. 4227.)

Third. We wish the fact to appear that the red line was made as indicating the front and inner boundaries of the beach and water lots, leased by the State to the city of San Francisco for ninety-nine years, and was not made for the purpose of marking the line of ordinary high water.

As the red line was not adopted as the actual line of survey by my predecessor, but was required to be taken as the "basis of a survey," and as in my order I distinctly directed the surveyor-general to make his survey on the basis of the red line, and not by it, using it only as the means of determining the shore line at high-water mark and indicating

the general line of the shore at the time the red line was put on the map, I am of the opinion that the second and third requests are immaterial, and I decline to find on them further than I have already done, except to say that as the red line marked both the inner and the outer boundary of the water lots claimed by the State and leased to the city, the fact would seem to be that all parts of it stood alike in relation to the State title as a boundary, and its inner portions were as controlling and material touching the State claim as the outer boundaries of the said lots on the newly adopted shore line. The boundaries were continuous, and were described by a single line extending around the tract at various angles, by reference to an already completed survey and map, so far as related to the blocks and streets, and running as to other portions by ship's channel and the line of high water mark. It was a statutory boundary, all the courses and distances of which were prescribed by the act, and extended from the point of beginning, at the intersection of the line of Simmons street and the southern boundary line of the city, to the intersection of the described lines of Jefferson and Larkin streets and "to the natural high-water mark" on the western boundary line of the city. The course is then fixed by description "thence along the line of said high-water mark to its point of intersection with the southern boundary line of said city," being the identical inner line which I am asked to find "was not made for the purpose of marking the line of ordinary high water."

In view of this law of the State I am not required to find as a fact what was its purpose, that being a matter to be judicially determined from the language of the act itself. I could not, therefore, find as requested, even if the question became material to the decision of the case before me.

Fourth. That what is known as the red line drawn upon what is known as the red-line map was not the result of any survey, but was simply traced by Eddy without making actual survey.

This is not at all material to the question at issue, and I decline to find specially on that point.

Fifth. That to follow the red line marked by this William M. Eddy will carry the line of the survey, made in execution of the said decree of the 18th of May, 1865, at certain places [designating them] out into the deep sea, and at other places over high lands and rocky hills.

There is some proof to sustain this request, but it is not at all material, inasmuch as the red line is not to be followed by the survey in all respects, but only to be taken as the basis of such survey; and I therefore refuse to find further on that point than I have done.

Sixth. That on the 7th of July, 1846, Mission Creek was at its mouth 275 feet wide, with an average width of 140 feet; that it extended up a mile and a quarter from the mouth or the place where the red line crosses it; that throughout its entire length the daily tide regularly ebbed and flowed; that the same was navigated by sloops and small schooners and other craft; and that said creek was not an outlet for

fresh water, except the surface drainage of the adjacent hills, during the rainy season; that it was declared a navigable stream March 31, 1851, by an act of the legislature of the State of California, and that its depth, at low tide, at the mouth where the red line crosses it was three (3) feet and at high tide about nine (9).

It was conceded by the decision that Mission Creek was as well a tidal inflow as an outlet for the inland waters, and it was recited that it was of a certain claimed width and navigable; also, that it had been by act of the State legislature declared a navigable stream. I decline to find further as to the exact amount of outflowing water or the exact distance from its mouth to which the tide reached. The whole decision sets out my deliberate judgment that notwithstanding the admitted facts it was not in law excluded from the grant.

Seventh. That all this land described in the last paragraph as Mission Creek was covered by the daily tides of the sea or bay.

Whether the waters of the bay at any time covered over all the lands now claimed by the State is a matter of some doubt; but it is undoubtedly true that when the creek was swollen by rains the tide did increase the volume of the water in said creek and overflow the banks thereof to some extent, but I am not satisfied that it did to the extent claimed by the counsel for claimants. But whether the tide did so flow or not over the lands claimed under the State title is immaterial in the consideration of this case, as Mission Creek does not, and never did, constitute any portion of the bay of San Francisco, the boundary of the pueblo on the north and east, and a survey will not be correctly made that follows the windings and meanderings of said creek so as to exclude from the pueblo the lands in said creek.

Eighth. That this land so within Mission Creek is excluded from the lands of the State and given to the pueblo lands of the city by the decision in this case.

This has been fully answered in the answer to the sixth request.

Ninth. Find, as a matter of fact, from the testimony, that other portions of the disputed lands which, by the decision in this case, are given to the city as pueblo lands, were below that part of the shore of the bay to which the waves ordinarily reached when the tide is at its highest, and in this finding designate the portions of the shore which were in July, 1846, so covered by the ordinary reach of the waves when the tide is at its highest.

I do not find as a fact the statement made in this request. None of the lands included in the pueblo by the decision of March, 1881, or July 12, 1883, are below "ordinary high-water mark of the bay of San Francisco," which is the boundary on the north and east.

Tenth. Find the fact that on the — day of —, 1867, Stratton made the survey known as the Stratton survey, and designate in this finding of fact where the line as established by Stratton falls, finding also the history of that survey, as to its return to the Land Office, &c.; and that it was confirmed according to the facts disclosed by the record.

Eleventh. Find the fact that the surveyor-general, Wagner, on the

— day of —, 1881, made a return to the Land Office, with his approval, a survey of this line, and find where, as a matter of fact, that line falls upon the earth's surface, and trace its position with Stratton's lines and with the line you approve in this case.

The action of Stratton and Wagner is immaterial in the consideration of this case, unless such action had been approved by the Department, and I decline to find as requested in the tenth and eleventh requests.

Twelfth. Find as a fact that this survey is one which is to be made and executed under the act of Congress of July 1, 1864. Thirteenth Statutes, 332.

This is admitted, and the decisions already made assume as matter of law that such is the requirement of the statutes.

Thirteenth. Find as matters of fact all the steps that were taken in this case, taking an appeal to the Secretary in regard to the boundary of the Pueblo lands, and also what acts on the part of the city of San Francisco were done in resistance or dismissal of the appeal.

An answer admitting the foregoing to be true is not the finding of facts material to the determination of the cause, but the recital of what the files ought to show, if true; and such finding would not be higher evidence than the files of the Department; and it is immaterial what the city of San Francisco has done in relation to such appeal. I therefore refuse to find as to that.

The counsel representing the claimants under State title contend that these findings are necessary to enable them to go into court and fully protect the interests of their clients. Counsel appear to have lost sight of the fact that my decision was based on a motion to vacate the order made by my predecessor on the 3d day of March, 1881. I declined to accede to the request, and left the original action as it stood, and as the surveyor-general's survey must be approved by me before it becomes final, and as there had been some difficulty heretofore in having this survey promptly made according to the direction of my predecessor, I took occasion to give my views somewhat fully by way of direction to the Land Office. I find no difficulty in determining what my predecessor did direct, and the survey could readily have been made, in accordance therewith. I have, both in my decision of July 12 and in this, endeavored to make it clear what my views are on this question, and just how the survey should be made, and suggest that you inform the surveyor-general that he is expected to make the surveys in accordance therewith, and that he be directed to make such survey within twenty days after he receives this order, and that he without delay return the survey for approval.

*CONSTRUCTION—DESCRIPTION—LOCALITY—EXTENT.***PUBLIC LANDS OF SAN JOSÉ.**

Construction of decree of confirmation as to description of boundary.

Examination of facts relating to locality and extent of portion of claim in question.

*Commissioner McFarland to surveyor-general, San Francisco, December 12, 1883.*

SIR: I have examined and considered the case in the matter of the survey of the pueblo lands of the city of San José, in which, by my direction, in accordance with instruction from the Department, investigation was had before your office, and reported, with the testimony taken therein, by U. S. Surveyor-General Wagner, under date of May 26, 1882, the case pending being upon the survey made by U. S. Deputy Surveyor Thompson in July, 1866, and U. S. Deputy Surveyor Hermann in October, 1879, approved by Surveyor-General Wagner April 2, 1881, and returned to this office with his letter of that date.

The correctness of the survey is contested in reference to a triangular piece of land lying on the western limits of the pueblo, bounded on the northwest by the patented rancho Los Coches, south by the patented rancho San Juan Bautista, and east by the Guadalupe River, and containing some 250 acres, which is included in the survey, but is claimed to be public land of the United States by parties seeking an interest therein; the contest being between the city of San José, claiming said parcel as rightfully a part of the pueblo lands, and the United States, objecting to the survey in respect to said triangular parcel. The remainder of the location, as made by the survey, is uncontested.

The following is the description of the western boundary line of the pueblo lands, in the decree of the United States district court confirming the same to the city:

Commencing at the embarcadero, where the preceding line terminated, the description proceeds:

Thence up the river Guadalupe to its source, and thence running with a line corresponding with the course of said river, as near as may be, and which is nearly from southeast to northwest, and having reference to monuments of stone formerly placed on this line, the last of which, and the termination of this line, was placed on the apex of a little hill which is at the foot of a mountain called Parage de los Capitanillos, including part of the oak grove now or formerly at this place, and including all of the willow grove now or formerly at the source of said river.

By the decree reference is directed to be had, in making the survey—to the survey and map of the boundaries of said pueblo made by the commissioners Castro, Gulnac, and Salvio Pacheo in March, 1838, and to the survey of Joseph Arguello, under date of 24th day of July, 1801, signed also by Friar Martin de Landata and José Miguel Osuna, and to the documents and depositions in the cause, as to the ancient boundaries of said pueblo of San José.

And the confirmation is made subject to sundry reservations and deductions, among which is the rancho Juan Bautista, which lies contiguous to the source of the Guadalupe River, and a portion of which is included within the surveyed boundaries of the pueblo lands.

It is objected to the survey on the part of the United States that it departs from the described line, in that it includes the triangular piece of land aforesaid lying west of the Guadalupe River; while in behalf of the city of San José it is asserted that said parcel belongs to the city by virtue of the closing clause of the description, it being, as alleged, the site of part of the willow grove at the source of the river referred to in the decree and intended to be included in the confirmation.

The questions presented for decision are, first, as to the construction of the description in the decree; and second, as to the identification of the location of the willow grove referred to by the decree.

It is strenuously and forcibly contended by counsel on the part of the United States, in effect, that the words "including part of the oak grove now or formerly at this place" (the termination of the described line), "and including all of the willow grove now or formerly at the source of said river," are but an addition to the designation of the line described; the same as if saying, this designated line, along the river to its source and continuing on the course of the river, as near as may be, to the apex of the little hill, includes part of the oak grove at the place of its termination, and all of the willow grove at the source of the river.

In opposition to this view it is apparent that the clause referred to added nothing to the force or distinctive delineation of the line as described. Running first along the river to its source and then by the same course to the apex of the little hill, and being thus definitely marked by prominent, permanent, natural objects, the addition was valueless as a feature of description, as regards either certainty or durability, the groves mentioned being indefinite as land marks, and liable to almost certain change and probable obliteration, while the river and the hill possessed absolute definiteness, and, in nature, the permanence of the earth itself.

To admit of the construction contended for, it must appear that the willow grove at the source of the river was *wholly* on the east side of the line described; and this leads to the inquiry as to the locality and extent of the grove indicated by the description.

The testimony taken on the investigation mentioned is voluminous, that of the witnesses examined orally covering over four hundred pages, and there being besides a large number of exhibits. That which relates to the source of the river and the location, character, and extent of the willow grove is in some degree conflicting, owing, probably, chiefly to difference in the times to which the statements of witnesses relate and intermediate changes that have occurred.

I have carefully read the testimony, but do not deem it necessary to quote from it in detail. The important parts bearing upon the ques-

tions in issue are very fully referred to in the briefs of the respective counsel. In my judgment the weight of evidence establishes the following facts:

That the source of the Guadalupe River indicated in the description was formed by the flow of a number of springs rising and uniting in a piece of marshy ground some 50 or 60 chains south from the southeast corner of the triangular tract in question, which is called in the testimony the Bird place; there being other springs below, some of them on the Bird tract, which contribute to the water-supply of the river, these all being regarded by some of the witnesses as the source of the river.

That there were, at and about the source of the river first above indicated, growing willows, constituting a thicket or wood, called in the description a grove, which extended down the river, particularly on the west bank, along and below the Bird place, and across it to the Los Gatos Creek, substantially covering the triangular parcel, and reaching beyond its limits in several directions and known as "El Sausal," or The Willows. Along the Guadalupe on the north part, where the land was not too marshy, it was thick and dense undergrowth, interspersed with trees, willows predominating; along the Los Gatos the willows were smaller and apparently of more recent origin, but with evidence, in stumps remaining, from which much of the newer willows had sprouted, of an earlier and larger growth.

That the prevailing character of the tract in question was that of low wet land, subject to overflow, such as in that locality naturally produces willows; some of it marsh or swamp, with slightly higher land towards the Los Gatos, and occasional natural openings where the ground was too marshy to admit of any natural growth except swamp grass, tules, and like productions, and possibly some, or one, on drier land, where Bird first made his settlement (though it is not clear that this opening was not the result of clearing the land, which was in progress from the commencement of Bird's occupancy), but none of these openings of sufficient extent to break the continuity of the woods or grove.

There is some evidence that the place called "El Abra," which is alleged to have been a natural opening, and situated mainly on the Narvaez or San Juan Bautista tract, extended north partly across the Bird tract and separated the willows on the Guadalupe from those on the Los Gatos, on the southern part of the last named tract, leaving the grove in the shape of a V, the point being north of Bird's house; but there is also testimony that the willows extended from the Los Gatos across to the Guadalupe, south of Bird's house, without break or opening.

There is evidence that a break in the willows existed, separating those around the source of the river (the marshy place above mentioned) from those below, including those on the Bird place, the thicket at the

source of the river being distinct from that known as the Sausal of San José; but there is also a large amount of testimony that the willows extended from some distance above the place designated as the source of the river down around that locality and along the west bank, substantially covering the Bird tract as above described, without break or opening sufficient to destroy the continuity of the willow growth.

Survey of the pueblo lands of San José was made by United States Deputy Surveyor George H. Thompson in July, 1866. That survey included the triangular parcel now in question. On April 9, 1868, the surveyor-general was directed by this office to amend that survey so as to exclude from its limits and area three small parcels of land considered to lie outside of the boundaries as confirmed. In executing that direction United States Deputy Surveyor Hermann, with the approval of the surveyor-general, excluded the aforesaid triangular parcel (which was not one of the three indicated by the direction), on the theory that it was also excluded by the confirmation.

On a careful re-examination of the case in this office it was held that the language of the decree of confirmation was plain and unambiguous; and while making the Guadalupe River from a given point to its source a boundary, it further provided for including all the willow grove at its source; that therefore the river boundary must yield sufficiently to include that portion of said grove lying west of it at that point; it being also considered that this was in accordance with the decision of this office of April 9, 1868; and thereupon the Hermann survey was directed to be amended so as to include the tract now in question. This was done by the present Thompson and Hermann survey, and afterwards the investigation before mentioned was had.

Upon the testimony returned and herein summarized, and with reference also to the documents referred to in the decree of confirmation, I am unable to find reason to differ from the former conclusions of this office; and hold that the land in question was a part of the willow grove at the source of the Guadalupe River; that it was included in the confirmation to the mayor and common council of the city of San José, and that the survey under consideration should be approved.

You will notify the parties in interest, or the attorneys representing them, residing in California, of this decision; and advise this office of the date and manner of giving such notice.

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#### PUEBLO LANDS OF SAN JOSÉ.

Examination of facts and proceedings, and affirmance of Commissioner's decision.

*Secretary Teller to Commissioner McFarland, May 13, 1884.*

SIR: I have considered the appeals by the United States and by Alexander H. Moore from your decision of December 12, 1883, approv-

ing the survey of the pueblo lands of the city of San José, Cal., made by United States Deputy Surveyor Thompson in July, 1866.

This survey includes a tract called the "Bird tract," because purchased by one Bird from the city authorities of San José as part of the pueblo lands. Bird's title passed into the hands of the Odd Fellows' Bank of San Francisco, and William A. Meloy is authorized by the Attorney-General to prosecute this appeal, as special counsel in behalf of the United States.

It appears also that in January, 1879, Moore filed Valentine scrip on the tract in question, claiming it to be public land. He appealed to this Department from your office decision of July 3, 1880, directing an amendment of the Hermann survey of the tract (below mentioned), which excluded the tract therefrom. But, December 16, 1880, Secretary Schurz dismissed his appeal for want of interest, under the rule laid down in the case of the Corte Madera del Presidio private land claim (Copp, July, 1879), and this ruling was reaffirmed by my immediate predecessor June 13, 1881, on Moore's further appeal from another decision of your office. For like reasons Moore's present appeal is dismissed, and the case will be considered as between the United States and the city of San José only.

The claim of this pueblo was confirmed by the Board of United States Land Commissioners in February, 1856, and by United States district court in November, 1859. Appeal from this court to the Supreme Court having failed for want of prosecution, the latter court directed execution of the decree of the district court.

The survey of the pueblo lands, made by United States Deputy Thompson in July, 1866, in supposed conformity with the decree, includes the tract in question. It was duly published, without objection, and approved by the surveyor-general, but is now contested in respect to a triangular parcel of the land embracing about two hundred and fifty acres upon the western limits of the pueblo and bounded (as you describe it) on the northwest by the patented Rancho Los Coches, south by the patented rancho San Juan Bautista, and east by the Guadalupe River. The decree confirming the land to the city of San José, after commencing the boundary at the embarcadero, where the preceding line terminated, describes it as follows:

Thence up the river Guadalupe to its source, and thence running with a line corresponding with the course of said river, as near as may be, and which is nearly from southeast to northwest, and having reference to monuments of stone formerly placed on this line, the last of which, and the termination of this line, was placed on the apex of a little hill, which is at the foot of a mountain called "Parage de los Capitancilos," including part of the oak grove now or formerly at this place; and including all the willow grove now or formerly at the source of said river.

The decree also directs reference, in making the survey, to the survey and map of the boundaries of said pueblo, made by Commissioner Castro and another in March, 1838, and to the survey of Arguello July

24, 1801, signed also by Friar Martin de Laudata and another, and to the documents and depositions in the cause, as to the ancient boundaries of said pueblo; and the confirmation is made subject to sundry reservations and deductions, among which is the rancho San Juan Bautista, which lies contiguous to the source of the Guadalupe River, and a portion of which is included within the surveyed boundaries of the pueblo lands.

This Thompson survey was approved by the Commissioner of your office, April 9, 1868, except that he ordered an amendment to exclude three specified tracts, which he thought outside the confirmed boundaries, neither of which was the triangular tract now in question. No action appears to have been taken on this instruction until October, 1879, when Deputy Surveyor Hermann undertook compliance therewith, and in so doing excluded from his survey not only the specified tracts but also the triangular tract; whereupon, July 3, 1880, your office, expressing the opinion that the decree was clear and unambiguous, and provided for inclusion within the survey of all the willow grove at the source of the Guadalupe River, and that the river must sufficiently yield so as to include that portion of the willow grove lying west of it at that point, and that such was the construction placed upon the decree by the decision of April 9, 1868, which, in the absence of appeal, had become final, and hence that the triangular tract was improperly excluded from this (Hermann's) survey, directed its amendment so as to include the same. Like instructions were given December 20, 1880, with the further direction that if the survey conformed in other respects with the instructions of April 9, 1868, it be approved by the surveyor-general and that the usual return be made as the basis for patent.

Sundry proceedings followed, resulting in an order from Secretary Schurz, June 17, 1881, for your re-examination of the whole matter of the survey and the location of the willow grove or triangular tract. You thereupon ordered an investigation, which was held in May, 1882, and your present decision is founded upon the facts thus elicited.

The United States objects that the survey includes the triangular tract, while the city of San José claims that it is within the decree of confirmation, and is properly included in the survey.

Your decision sustains the claim of the city and approves the survey.

I do not deem it necessary here to discuss the facts in detail, so clearly and fully stated in your decision, or the reasons upon which your decision is based, because from the former actions and rulings of your office, and from my examination of the testimony, and the several exhibits and papers in the case, and from a careful consideration of the arguments in the case—both oral and in writing—I concur in your conclusions, and a further statement would be reiteration only. I therefore affirm your decision.

*SURVEY—PATENT—CONFIRMATION—JURISDICTION.***PETER SHERREBACK CLAIM.**

The act of March 3, 1851, made ample provision for the survey and patenting of private land claims; but the right to demand survey only inheres in cases of final confirmation.

The district court having vacated its decree of confirmation and no final decree having been obtained, no action can be taken by the Department without ignoring the order of the court setting aside the confirmation and granting a new trial.

There is no such affirmative showing in the records of the court as would, of necessity, imply a want of jurisdiction, and, in the absence of such showing, jurisdiction must be presumed.

*Secretary Teller to Commissioner McFarland, February 19, 1884.*

**SIR:** I have examined the case presented by the appeal from your decision of April 18, 1883, in which you refused to order a survey of the Peter Sherreback claim.

It appears that the application for the confirmation of this claim, which is situated in the pueblo of San Francisco, Cal., made to the Board of Land Commissioners, was denied; that on appeal from this decision to the United States district court for the northern district of California, before Hon. Ogden Hoffman, judge of said court, title was confirmed to the claimant for 800 varas square by decree of December 5, 1859; that in the same court, Hon. M. Hall McAllister, United States circuit judge, presiding, an order was made, June 2, 1860, upon the application of the attorney for the United States, setting aside and vacating the decree of confirmation, and granting a new hearing, at which either party was at liberty to present further proof; that a motion to reinstate the vacated decree was overruled in said court by Judge Hoffman August 28, 1860; that on June 20 and July 14 and 30, 1862, orders were made in said court extending the time for taking evidence in said case. The order of July 14 was made on the motion of claimant's counsel, but it does not appear from the minutes of the record furnished on whose motion the other orders were made.

There is nothing in the case to show that any evidence was furnished by either party to the record, or that any new hearing was had in pursuance of the order made June 2, 1860.

Thus the matter stood until October 21, 1882, when application was made to the United States surveyor-general for the State of California for a survey of the claim under the decree of December 5, 1859, alleging that the order setting aside said decree was void. This application for survey was referred to your office, and having been denied by you, comes now on appeal to this Department.

It is alleged in support of the application that the order setting aside the decree of confirmation was not made by the judge of said court, nor by a circuit judge lawfully holding court in said district court, and was

granted upon a petition filed after the close of the term at which said decree was rendered, "and the court had no jurisdiction of said cause," and that patent should issue under section 2447 of the Revised Statutes.

If the application was granted, patent could not issue under the statute relied upon by the claimants, as said section 2447 only provides for the issuance of a patent where a claim to land has been confirmed by law, "and in which no provision is made by the confirmatory statute for the issue of a patent."

The act of March 3, 1851 (9 Stat., 631), provides that—

For all claims finally confirmed by the said commissioners, or by the said district or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same.

It will be seen from the statute last quoted that ample provision for the survey and issuance of patent in case of private claims is made by law, but that the right to demand such survey only inheres in the claimant from the time when a final decree of confirmation is obtained.

In this case no such final decree was obtained, and no action can be taken by the Department under the proceedings had before the Board of Commissioners and in the district court, unless the order setting aside the decree of confirmation and granting a new trial is ignored.

The claimant, having failed in the court to obtain an order reinstating the decree of confirmation and vacating the order setting the same aside, abandons the right allowed by the court to proceed with the proofs, and after a lapse of twenty years applies for a privilege which in effect calls upon the Department to grant a right denied by the court.

The general rule that the judgment of a court cannot be attacked in a collateral proceeding would seem to effectually dispose of the argument adduced on behalf of the application. It is proper to add, however, that there is no such affirmative showing in the record of the court proceedings as would of necessity imply a want of jurisdiction; and in the absence of such showing the jurisdiction of the court must be conclusively presumed.

Your decision is therefore affirmed.

**OFFICIAL SURVEY—BOUNDRARIES—MEASUREMENTS—QUANTITY.****RANCHO BUENA VISTA.**

Survey of a private claim, approved by the surveyor-general, becomes the official survey, and must be proceeded on in determining the location.

Permanent measurements and natural objects named as boundaries control mention of courses, distances, and quantity.

Where confirmation of a private land claim was "to the extent of one-half of a square league of land, a little more or less \* \* \* bounded and described as follows," the boundaries designated will control the location.

*Commissioner McFarland to surveyor-general, San Francisco, May 27, 1884.*

SIR: Upon examination of the case, in the matter of the survey of the California private land claim, Rancho Buena Vista, Jesus Machado confirmee, it appears that an Indian named Felipe, a native of the Mission San Luis Rey, now in San Diego County, petitioned the Mexican governor, Pio Pico, on the 14th of April, 1845, for the grant of a piece of land which he had had in possession since 1836, estimated as of half a league in length and the same in breadth.

The petition was referred to the administration of the mission, which made a report favoring the grant, and on the 17th of June, 1845, an informal grant was made by the governor for the land asked for, and after its approval by the committee on vacant lands of the assembly, a formal grant was issued to the petitioner, dated July 8, 1845, for "the mentioned land"—"of the extent of half a square league," not describing it by boundaries, but directing juridical possession to be given.

This proceeding took place on the 4th of August, 1845. The measurement was commenced "at one of the boundaries of the garden of the Indian Felipe," at the northwest corner of the tract measured; from thence they measured east 2,500 varas "to the boundary of Don Lorenzo Soto; then in a south course 2,500 varas, ending "at a small peak, where stand two rocks joined together"; thence on a course west, 2,500 varas, "to a small red hill"; thence north 2,500 varas, "which ended upon a hill where there stands a large rock."

The claim was presented to the Board of Land Commissioners, in the name of Jesus Machado, claiming as purchaser of the Mexican title, on the 24th of February, 1853, and was confirmed by the Board, May 16, 1853, by the boundaries designated in the act of juridical possession.

On appeal from the decree of the Board to the United States district court for the southern district of California, the court, on the 1st day of February, 1856, delivered its opinion affirming said decree; but neglected to enter and sign a decree of affirmance. Appeal, however, was taken from the district to the Supreme Court of the United States, and was afterwards dismissed by direction of the Attorney-General of the United States; and upon such dismissal, on the 24th of February, 1857, a decree was made by said district court, rendering the confirmation

final, and allowing the claimant to proceed thereon as upon a final decree.

Afterwards, the jurisdiction, records, and pending matters of the district court for said southern district, having been by law transferred to the United States district court for the district of California, said last-mentioned court, on the 14th of April, 1879, made and entered a decree, as of the 1st day of February 1856, affirming in all things the decree of the Board of Land Commissioners, and confirming to the claimant the tract in question.

"To the extent of one half of a square league of land, a little more or less, being the same land which is situated in the county of San Diego known by the name of Buena Vista, and bounded and described as follows :

"Commencing at the northwest corner of the garden of the Indian Felipe and running east two thousand and five hundred varas to the boundary line of Lorenzo Soto ; thence running south two thousand five hundred varas to a small peak, where stand two rocks joined together ; thence running west two thousand five hundred varas to a small red hill ; thence running north two thousand five hundred varas to the place of beginning, on a hill where there is a rock ; containing in all one-half of a square league. Reference for further description to be had to the original grant and to the translation of the original record of juridical possession."

A survey of the confirmed claim was made by United States Deputy Surveyor J. C. Hays, in September, 1858. It locates the tract by rectangular lines ; the side lines being 165 chains in length and varying 19 $\frac{1}{2}$  degrees from a north and south line, and the end lines 134.49 chains in length, with corresponding variation from an east and west line, giving an area of 2,219 $\frac{8}{100}$  acres,  $\frac{2}{100}$  of an acre less than half a league.

This survey was approved by Surveyor-General Manderville, October 19, 1858, and thus became the official survey of the claim ; but it seems to have been mislaid and not recognized as such until the attention of this office was called to it by Surveyor-General Wagner, in a letter of December 29, 1881. In the mean time a survey had been made by United States Deputy Surveyor Max Strobel in September, 1868 ; and another by United States Deputy Surveyor Goldsworthy in 1875, made in connection with the subdivision of the township. The Strobel survey was made under direction of Surveyor-General Day, and was approved by him March 25, 1870.

June 3, 1882, this office directed the surveyor-general to transmit for inspection a tracing of the Hays survey ; and it being found on examination to have been approved by Surveyor-General Manderville, as above, you were instructed by letter of this office of April 9, 1883, to publish the Hays survey as required by the act of July 1, 1864 (13 Stat., 332), and thereupon to make the usual return to this office. Your letter of April 29 ultimo and accompanying papers show compliance with this instruction, and bring the Hays survey before me for examination.

Neither the plat nor the descriptive notes of Hays's survey identify

any of the boundaries named in the decree of confirmation, except the "small red hill," a mound on the top of which he makes his southwest corner. The surveys and examinations subsequently made show that, taking the location of this corner as being correctly made and described, his survey would not be greatly inaccurate.

He has, however, connected his survey with the township line between ranges 3 and 4 west, which appears to have been the only line of the public surveys which then intersected the tract surveyed, but, as shown by the subsequent surveys, the connection as made is grossly erroneous, inasmuch as it throws the platted tract more than a mile too far east upon the plats of the public surveys.

The survey of Strobel does not identify the boundaries designated in the confirmation, except that at the northwest corner, the description of which in his field notes corresponds with that in the confirmation, namely, "on a hill where there is a rock"—"big rock," the field notes have it.

It is stated in one of your two letters of April 29 ultimo that a survey of the Buena Vista Rancho was made by United States Deputy Surveyor William Minto in 1882. This survey has not been returned nor before reported to this office, and it does not appear under what circumstances it was executed; but the sketch which you forward shows it to correspond, nearly, as to the southwest corner with that of Hays (his erroneous connection with the public surveys being corrected, as shown on said sketch), and, as to the northwest corner, with that corner as located by Strobel. The north and south lines differ somewhat in measurement with those of Hays and Strobel, but give, apparently, about the same area, and correspond in outline more nearly with the survey of Goldsworthy.

Permanent monuments and natural objects named as boundaries in ordinary conveyances control mention of courses, distances, and quantity (Greenleaf's Ev., Vol. 1, p. 301, note 2, quoting 19 Johns, 449), and this rule applies to confirmations like that in question, unless the intention to limit the quantity within the boundaries is clearly shown.

The claim in the present case was confirmed by the boundaries set forth in the decree, being the same designated in the act of juridical possession, and was for the land included within said boundaries. The clause following the specification of boundaries—"containing in all one-half of a square league of land"—is clearly an estimate merely, and not intended as a limitation of quantity within the boundaries. The measurements mentioned are only the estimated distances between the boundaries forming the corners of the tract. This is manifest from the declaration in the confirmatory clause of the decree, "that the said claim be, and the same is hereby, confirmed to the extent of one-half of a square league of land, *a little more or less, \* \* \* bounded and described as follows.*"

The Hays survey is rejected for the erroneous connections in its plat

and descriptive notes, and for the further reason that it identifies and conforms to but one of the boundary calls—that which is made the southwest corner—and a new survey is hereby directed to be made to conform to the described boundaries as nearly as practicable. It should adopt the northwest corner as located by Strobel, "on a hill where is a big rock"; the southwest corner, as described by Hays and located by Minto, on top of a red hill; and it would seem that the southeast corner, "a small peak, where stand two rocks joined together," might be found and identified by the description thereof given.

The northeast corner boundary, as described in the juridical possession and confirmation, "the boundary line of Lorenzo Soto," may not, at present, be definitely ascertainable from monuments or marks upon the ground. The grant of Los Vallecitos de San Marcos, which was confirmed to Soto for two square leagues, had larger exterior boundaries; but the boundary on the west was not definitely described. By the final location of the two leagues tract within the exterior boundaries its nearest point to the Rancho Buena Vista, as surveyed, is some  $2\frac{1}{2}$  miles south from the northeast corner, and about three-fourths of a mile southeast from the southeast corner. The northwest corner of the tract of Buena Vista in question being ascertained, the northeast corner, in the absence of original landmarks or monuments, can be at least approximately established by measuring from said northwest corner, upon the proper course, the prescribed distance.

It is important, as you suggest, that the public surveys should be properly corrected with the lines of the private claim; but the location of the latter must first be finally determined.

You are therefore instructed to cause a plat of said Rancho Buena Vista to be compiled, or, if necessary, a new survey of the same made upon the ground, conforming the lines thereof to the northwest and southwest corners above indicated; the southeast corner to be ascertained and located from the description given, "a small peak where are two rocks joined together," as nearly as practicable, and the northeast corner, in the absence of original marks or monuments from which its location can be identified, to be determined by measurement, on the proper course, from the northwest corner, a distance equivalent to the 2,500 varas specified in the confirmation.

If the survey of Deputy Minto was made under authority of your office and with the requisite formalities and details, and conforms substantially to the conditions herein prescribed, it may be taken or followed in preparing the survey here directed.

You will please give notice to the parties interested, or their attorneys, of this decision, informing them also of their right of appeal, and advise this office of the date and manner of service of said notice; and, if appeal be not taken within the time allowed by the rules, prepare and forward the survey herein directed to this office as soon as practicable. If found correct you will be authorized to contract for connecting the lines of the public surveys therewith.

**RANCHO BUENA VISTA.**

Further instructions as to location of corners. Survey to be made to conform to the boundaries designated in the decree of confirmation.

*Commissioner McFarland to surveyor-general, San Francisco, July 1, 1884.*

SIR: In reply to the request contained in your letter of the 13th instant for further instructions in the matter of the survey of the Rancho Buena Vista, I have to say: That, referring to my decision of May 27, last, you will see that it was therein held that the claim was confirmed by the boundaries set forth in the decree, being the same described in the act of juridical possession, and that the survey must be made *to conform to said boundaries* as nearly as practicable. This was the paramount direction. The accompanying suggestions were merely intended to aid in identifying and determining the location of the boundaries; and as to the survey of Deputy Minto, that it might be taken or followed for the purpose of lessening the labor and facilitating the preparation of the new survey, in so far as it conformed to the boundaries prescribed.

It appeared upon the examination of the case that the surveys of Hays and Minto agreed very nearly as to the southwest corner boundary, describing it as "on the top of a red hill"; "a small red hill" being the boundary prescribed in the confirmation. It also appeared from the field-notes of Strobel's survey that he located his northwest corner "on a hill where is a big rock," the confirmation designating the boundary as "on a hill where there is a rock." The diagram of Minto's survey also agreed substantially with that of Strobel as to the location of the northwest corner.

It now appears from Minto's field-notes and the "Diagram R," both transmitted with your letter of the 13th ultimo aforesaid, that Strobel's description of the northwest corner, as located by him, was erroneous; that instead of being "on a hill where is a big rock," it is 20 chains southwesterly from that point. The adoption, therefore, of Strobel's corner as the northwest corner of the survey to be made was not correct, owing to the false premises upon which it was predicated; and the direction as to the location of said corner is accordingly modified.

Referring to Diagram R aforesaid, it would seem from the descriptions thereon that the northwest corner should be located at the point marked "E," the southwest corner at "B," the northeast corner probably at "F" (the probability being strengthened by the statement accompanying, that within the angle formed by the corner so located "is land once cultivated by the Indian Felipo," and the additional accompanying statement that Strobel found here "a mound of rocks known for many years as a corner of Buena Vista Rancho"), and the southeast possibly at "C." The description of the latter point—"top of hill, big rock"—does not well correspond with that of the confirmation, "a small

peak where stand two rocks joined together," though, from the general features of the survey, located near where the true corner should be looked for.

My decision of May 27 last aforesaid is modified as above as to the northwest corner. The statements on Diagram R as to the northwest corner obviate the necessity of resorting to measurement, as suggested in said decision, to ascertain the location of said corner, and thereby the points "D" and "G" of said diagram are eliminated from consideration.

In executing the survey you will be governed by the boundaries designated in the decree of confirmation, adopting the suggestions herein as far as they are found to correctly indicate the corner boundaries on the ground. Notify the parties in interest of said decision as herein modified, and make return as directed in said decision.

## 2. COST OF SURVEY.

*ACT OF JULY 31, 1876—COST OF SURVEY.*

*RANCHO SANTIAGO DE SANTA ANA.*

The only provision of law relating to payment by claimants for surveys of private land claims is found in the act of July 31, 1876. Only the proper costs of survey and platting are chargeable.

*Acting Commissioner Harrison to surveyor-general, San Francisco, March 10, 1884.*

SIR: I have received your letter of February 25 ultimo, with modified bill of costs in the matter of the survey of the Rancho Santiago de Santa Ana, and have considered your explanation of the several items charged therein, which items are as follows:

No. 1, January 7, 1879, to William Minto, for explanation .....	\$54 50
No. 2, October 13, 1879, to Los Angeles Weekly Journal, advertising.....	9 75
No. 3, October 13, 1879, to Los Angeles Herald, advertising .....	12 00
No. 4, October 21, 1879, to Santa Ana Herald, advertising .....	5 00
No. 5, October 23, 1879, to J. A. Forbes, expenses in conducting examinations .....	54 75
No. 6, October 25, 1879, to S. C. Houghton, reporter's fees in examination .....	201 60
No. 7, July 12, 1881, to William Minto, for examination .....	221 50
No. 8, October 3, 1883, to original calculation and platting .....	200 00
No. 9, October 3, 1883, to duplicate .....	50 00
No. 10, October 3, 1883, to descriptive notes .....	50 00
No. 11, October 3, 1883, to Wm. Minto, for survey .....	430 50
	1,289 60

The following is a brief history of the proceedings in the case during the time embraced in said bill, as far as relates to the question of the costs required to be paid by the claimants:

The plat, field-notes, &c., of the survey of the claim, executed by United States Deputy Surveyor Hancock, were returned to this office by the surveyor-general under date of January 4, 1879, and the matter of location was pending here for consideration and decision; Britton and Gray, esqs., representing the grant claimants, and Hon. Montgomery Blair the conflicting Rancho Las Bolsas.

On examination of the case it was found that the location of certain of the boundaries was so imperfectly indicated that an examination on the ground, the taking of testimony, and a further report were necessary to the due execution of the law relating to the survey and location of private claims in California.

Notice to the parties and investigation by the surveyor-general were accordingly directed by my letter of July 3, 1880, under the first section of the act of July 1, 1864 (13 Stat., 332). This was done upon my own motion, from the necessity of the case, for the purpose expressed. The attorneys for the claimants did not move in it.

My action was sustained by the Department against the motion of Mr. Blair praying the Department to interpose its supervisory authority and arrest the proceeding.

The investigation was had, testimony taken, and an examination made upon the ground by United States Deputy Surveyor Minto, under direction of the surveyor-general; and the testimony, exhibits, and report of the deputy returned to this office by the surveyor-general as the result of the investigation directed as aforesaid.

Upon the case as then presented and the briefs and arguments of the counsel thereupon my decision was made directing a new survey of the claim. This decision was affirmed on appeal by the honorable Secretary of the Interior. His decision was communicated to the surveyor-general, and in due time the new survey was made and returned in accordance therewith, was duly approved, and patent prepared for issue thereon.

The claimants are required to pay the costs of said survey before patent can be issued to them, but object to the items in said bill Nos. 1 to 7, inclusive, as not being legally chargeable against them in the premises.

The law applicable to the case is found in the act of July 31, 1876 (19 Stat., 121), which requires—

That an accurate account shall be kept by each surveyor-general of the cost of surveying and platting every private land claim, to be reported to the General Land Office, with the map of such claim; and that a patent shall not issue, nor shall any copy of such survey be furnished, for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the party or parties in interest, or by any other party.

This, I believe, is the only provision of law applicable to the subject,

and I am not aware of any usage or practice having reference to private claims in any way supplementing the statute.

The language of the act is unequivocal and does not admit of construction, and, if parties can be required to pay expenses beyond the cost of survey and platting, it must be by some implication or for some reason outside of the language and purport of the act.

The first item in the bill of costs, No. 1, \$54.50, for examination by Deputy Surveyor Minto, was incurred by direction of Surveyor-General Wagner to aid him in forming his opinion and reporting satisfactorily upon the Hancock survey. That survey was made in 1857, long before any law was passed requiring parties to private claims to pay the costs of survey. I do not see that it has any relation to the making of the present survey, or the costs thereof.

The items Nos. 2 to 7, inclusive, all relate to the investigation preceding the present survey. Notice was published, a substitute to act for the surveyor-general was appointed, a reporter employed, and an examination directed by the surveyor-general as a part of the investigation made on the ground by Deputy Surveyor Minto. All this expense was certainly no part of the "cost of survey and platting" of the survey *to be thereafter made* if a new or modified survey should be ordered. And suppose, as the result of the investigation, that the Hancock survey had been approved, what would have been the status of these charges as regards the obligation of the claimants to pay them?

The investigation, as to its probable effect upon the decision, having resulted favorably for the claimants, it might seem equitable and just, as between them and the Government, which has no interest in the case, that they should pay the expense; but their *legal obligation* is no greater than it would have been if the result had been unfavorable to them.

There are many expenses attending the adjudication, confirmation, and location of private claims of this character, all being for the benefit of the claimants, which the Government rightfully pays by reason of its treaty obligations to recognize and protect the rights of individuals in such claims. To fulfill its obligations, do justice to interested parties, and at the same time protect its own interests in the public domain, it was necessary to provide for ascertaining and determining the validity, locality, and extent of alleged claims, the payment of the necessary expenses of the proceedings being incidental to the discharge of the obligation.

The Government has, therefore, without questioning, paid all these expenses; and it has been only since the act of May 30, 1862 (12 Stat., 409; Rev. Stat., 2400), repealed March 3, 1875 (18 Stat., 384), and substantially re-enacted by the statute of July 31, 1876, aforesaid, that Congress has required the party in interest, after his claim has been determined and located, to pay the cost of marking it upon the ground and preparing the plat of survey, to be made the record evidence of the extent of his right.

I am clearly of opinion that the requirement for payment of expenses cannot be extended beyond the terms of the statute referred to, and in the present case that the patent should be delivered to the proper party on payment of the items Nos. 8, 9, 10, and 11 in the bill of costs aforesaid, amounting to \$730.50, and you are hereby instructed accordingly.

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### III.—COLORADO.

#### 1. PRACTICE.

##### *APPEAL—TIME—NOTICE—INTERLOCUTORY AND FINAL ORDER.*

###### *MRS. LEANN S. KING v. THOMAS LEITENSDORFER.*

Where notice of decision is served by the General Land Office on the attorneys resident in Washington, and also by the local office on party residing at a distance, or on the attorney residing in vicinity of the party, time for appeal will commence to run from date of latter service.

When the decision adjudicates and finally disposes of the question presented, though not determining the case in which it is raised, it does not come within the rule applicable to matters merely interlocutory and resting in discretion, and is subject to appeal.

*Commissioner McFarland to register and receiver, Pueblo, Colo., November 16, 1883.*

GENTLEMEN: Under date of June 27, 1883, my decision was communicated to you from this office, denying the motion by Wells, Smith & Macon, esqs., of Denver, Colo., and Britton & Gray, esqs., of this city, in behalf of Mrs. Leann S. King, to be substituted in place of Thomas Leitensdorfer (a derivative claimant under the Vigil and St. Vrain grant) and allowed in his stead to prosecute the appeal taken by him to this office from the decision of the register and receiver rejecting his claim; and you were instructed to notify the parties in interest, or their attorneys residing in Colorado, of said decision, and inform them of their right to appeal under the rules.

On the same day notice of said decision was given from this office by mail to Britton & Gray, esqs., and R. H. Bradford, esq., the attorneys resident here of Mrs. King and Leitensdorfer, respectively.

On the 6th of July, 1883, as I am advised by you, a copy of my decision aforesaid was mailed by you to Wells, Smith & Macon, esqs., the Colorado attorneys of Mrs. King.

On the 31st of August, 1883, notice of appeal from said decision, and specification of errors, bearing date August 29, was received by this office from Messrs. Britton & Gray for Mrs. King, with admission of service of copy thereof on Mr. Bradford, attorney for Leitensdorfer, dated August 30.

On September 29, 1883, a motion was filed in this office by Mr. Brad-

ford (with admission of service thereof by Messrs. Britton & Gray) to dismiss said appeal on the grounds following:

1st. The appeal was not filed in time.

2d. The order of the Commissioner appealed from is interlocutory, concerning matter resting in his discretion; and hence may be excepted to, not appealed from.

On the 3d of October, ultimo, Messrs. Britton & Gray filed an answer to said motion, and on the 9th ultimo Mr. Bradford filed a reply thereto.

I have carefully considered the case, and the matters presented by the counsel for and against the motion, and conclude—

First, that as regards the time of filing, the appeal may be sustained; though counting from the time of giving notice to the resident attorneys, from this office, it was four days too late. But reckoning from the date of giving notice by you to the attorneys of the moving party residing in Colorado, the filing was several days within the time allowed by the rules.

The question, therefore, is as to which notice should be regarded as fixing the limit within which the appeal should have been made.

By the letter of the rules applicable generally to attorneys, notice to one attorney is notice to all on the same side of the case and to the parties represented by them. But the object of the notice and the allowance of time, as relating to appeals under the rules applicable thereto, being to give parties opportunity to ascertain the particulars of decisions, to consult counsel, and determine upon their course of action in the premises, a reasonable liberality would seem to be proper and desirable. Such has been the view heretofore taken by this office.

The case of Moore, cited by the counsel for the appellant from 7 Copp's L. O., 188, is not entirely in point, for the reason that it does not appear that earlier notice than that given to the party from the local land office had been given to the attorney of the party resident here. The point, however, is decided that as affecting the additional time allowed, where notice is given from the local office, it is immaterial whether the appeal be returned through the same channel or not.

The exercise of a reasonable liberality in the application of the rules limiting the right of appeal is also recognized.

The case of Roach *v.* Myers & Cole (Land Decisions, July, 1881, to June, 1883, p. 471) comes much nearer the case under consideration.

Notice of the decision of this office was given to the resident counsel June 27, 1881, under which the time to appeal expired August 26. Appeal was filed by the resident attorneys here September 1, but the local officers were instructed by the closing paragraph of the decision, as in this case, to notify the parties in interest, and it was held that—

When notice of decision is given by the local officers, ten days additional to the time allowed by Rule 86 are allowed for the transmission of notice and return of the appeal through the mails, thus allowing the party seventy days from date of their notice within which to file his appeal.

The decision proceeded:

There may be some question as to when, in case of notice being given both to a party's attorney resident in this city and to himself through the local office, the time commences to run, whether from date of notice to himself or to his attorney. In such a case I am of opinion that the rules should be liberally construed that the party in interest may have every opportunity to secure his right of appeal; and consequently that the time allowed for that purpose should be computed as commencing to run from the date of service of notice upon the party himself.

The motion to dismiss the appeal was accordingly overruled.

In the present case the notice from the local office was served on the Colorado attorneys of the party, and not on the party herself, and in that it differs from the case above. The reason of that decision, however, holds good in this case. The object of the notice being to give the *party* effectual notice would certainly be better accomplished by notice to her attorneys in her vicinity than to her counsel a thousand miles distant. A fairly liberal construction will therefore adopt the notice to the former as determining the limit of the time for appeal rather than the earlier notice given for the information of the attorneys resident here.

But the moving counsel, through his firm, has furnished a precedent still nearer in point. In the case of John W. Lowe and others, heirs, &c., notice of a decision of this office of April 27, 1883, was given from this office, by mail, to Drummond & Bradford, esqs., the resident attorneys of one of the parties, on the 28th of April. The time for appeal under that notice expired *June 28*.

With the decision the usual instruction was given to the surveyor-general at Tallahassee, Fla., to notify the parties in interest or their attorneys thereof; and notice was given by him to the attorneys of both parties May 1.

Messrs. Drummond & Bradford appealed from the decision, their notice of appeal bearing date July 4, six days after the time to appeal, under the notice given to them here, had expired; and as indicating clearly that they availed themselves of the time afforded by the later notice, they sent their appeal to the office of the surveyor-general at Tallahassee, whence it was transmitted to this office and received and filed here July 30.

The appeal was allowed and in due course transmitted to the Department for decision.

The first ground of motion is held not well taken.

Second, the cases cited by the moving counsel hold that when an order is interlocutory, and matter resting in discretion, appeal will not lie.

The decision in the case cited by the counsel opposing holds, in effect, that where the decree disposes of the matter in question, though not conclusive of the case, it is subject to appeal.

There is no doubt about the rule; the question is as to its application to the decision in the present case.

The status of the Leitensdorfer claim, to which the decision appealed from has relation, is fully set forth in said decision. It is seen thereby that there is really no case involving said claim before this office; at least none in which it can take any affirmative action.

The effect of the President's order, made upon the opinion of the Attorney-General that appeal from the decision of the register and receiver rejecting Leitensdorfer's claim did not lie to this office, was and has continuously been so held to suspend proceedings here in the case.

The application decided against was by Mrs. King, *a party dehors the record*, against Leitensdorfer, *a party to the record*, to oust him from the case, and to be permitted to take his place. The counsel now moving to dismiss, facetiously but not inappropriately, calls the proceeding "a knot on the trunk of the case," &c. It is certainly a side, or, more properly, an *outside* issue; not between parties to the case.

An interlocutory decision would seem to be one relating to, or having some bearing upon, the issue between the parties to the case. The decision in question has no such relation or bearing. The issue in the case involves the validity of the Leitensdorfer claim. The decision appealed from simply denies the motion of Mrs. King to be substituted in place of Leitensdorfer as prosecutor of the claim.

The denial of Mrs. King's motion, besides being in an issue outside of that between the parties to the case, was a determination of her claim as presented. It was no less final because of the intimation given that in a possibly future different state of the case it might be again presented. A renewal must in any event be equivalent to a new application, not dependent upon suggestions contained in the former decision.

I cannot see that the matter submitted for my decision rested in discretion more than in any case where judgment is invoked regarding the claimed and contested rights of parties, upon facts presented, and the law applicable to the same.

The second ground of motion is overruled, and the motion to dismiss the appeal denied.

The motion papers will be forwarded with the appeal to the Department.

Affirmed by Secretary, Sept. 15, 1884.

**2. PRIVATE CLAIMS.*****MOTION FOR SUBSTITUTION.*****MRS. LEANN S. KING v. THOMAS LEITENSDORFER.**

Motion by Mrs. King to be substituted in place of Leitensdorfer in his appeal from decision of register and receiver rejecting his claim to land under the Vigil and St. Vrain grants; she having, by judgment and sale under execution in her favor against him, become the purchaser, as alleged, of the land claimed.

To recognize the right of substitution in such case would inaugurate a practice inconvenient at best; successive demands therefore might be made, in each of which modes of transfer and title of parties must be adjudicated, matters belonging properly to the courts.

The ownership of the whole interest claimed cannot be determined from the proofs presented.

The judgment under which the interest in question is claimed to have passed to the mover is pending on writ of error in the higher court; its reversal would divest her of such interest.

The object of the motion is to strengthen the position of the mover as claimant and aid her in demands upon the settlers on the land claimed; but if her judgment should be reversed or Leitensdorfer's claim finally rejected, they would lose whatever they had paid in compromises.

The order of the President, referred to, is still in force, and under it the General Land Office has no jurisdiction of the appeal in question which was abrogated by it; and to assume to set aside a party to the record and substitute another would be manifestly unwarranted.

Motion denied.

*Commissioner McFarland to register and receiver, Pueblo, Colo., June 27, 1883.*

GENTLEMEN: On the 24th of February last an application under date of February 9 last was filed in this office by Wells, Smith & Macon, esqs., of Denver, Colo., and Britton & Gray, esqs., of this city, in behalf of Mrs. Leann S. King, administratrix of John Q. A. King, deceased, relating to the claim of Thomas Leitensdorfer, under the Vigil and St. Vrain grant in Colorado, in which they ask that Mrs. King be substituted in place of Leitensdorfer in the appeal taken by him to this office from the decision of the register and receiver rejecting his claim, and that she be allowed from henceforth to control the proceedings therein, or else to appear and prosecute the same and control the proceedings, in his name, as the appellant; she having, as claimed, by judgment in the district court of the second judicial district of Colorado for the county of Arapahoe, against Leitensdorfer and one John Hallum, and sale under execution thereon, acquired all the interest of Leitensdorfer in the land forming the subject of his claim.

Before proceeding in the matter of said application I required the resident attorneys of Mrs. King to give notice of their motion to R. H. Bradford, esq., the resident attorney of Leitensdorfer of record as such attorney in the matter of his claim. Notice was accordingly given,

pursuant to which Mr. Bradford appeared, and the motion was argued orally before me on the 19th of June, instant.

In support of the motion a certified copy of the judgment roll of the Colorado court and of the sheriff's deed to Mrs. King are produced, the same having been filed with her application. They show that the land was, in form, sold and conveyed to Mrs. King in entirety. The attorneys of Mrs. King also produce and file, on the argument, certified copies of depositions of Mrs. Josephine Farnsworth and John Hallum, taken in the suit of Leitensdorfer against Craig *et al.*, in the circuit court of the United States, and a certificate of the clerk of the supreme court of Colorado that no appeal is pending in said county, in any suit by Leann S. King *v.* Thomas Leitensdorfer; but said certificate also shows that a writ of error has been sued out of said supreme court in favor of Leitensdorfer against Mrs. King to review the judgment of the district court for Arapahoe County.

The introduction of said deposition appears to be to show that the whole interest in the land was in Leitensdorfer and Hallum and passed to Mrs. King by the sheriff's deed. The certificate aforesaid shows that up to March 17, 1883, no steps were taken to review said judgment nor by the plaintiff in error to bring the writ of error to a hearing; that the April term of the supreme court of Colorado adjourned on the 18th day of May last, and that the next regular term thereof is appointed to be held on the first Tuesday of December next; from which it may be inferred that some months at least must elapse before said writ of error can be brought to a decision.

On the part of Leitensdorfer a deed is produced from John Hallum to Mrs. Farnsworth, bearing date before the issuing of the attachment in the suit of Mrs. King *v.* Leitensdorfer and Hallum, which purports to convey an undivided twelfth part in the Leitensdorfer claim, without condition or reservation. The deed also recites that one-half of the Leitensdorfer location had been, before then, conveyed by the party of the first to the party of the second part, and that the deed then given equalized the interest of each in said location. Also a printed copy of Abstract of record and assignment of errors in the case of Leann S. King, defendant in error, *v.* Thomas Leitensdorfer, plaintiff in error.

It is objected on the part of Mrs. King that under the 102d Rule of Practice, Leitensdorfer has no right to intervene and appear on the motion, he not having first disclosed on oath the nature of his interest.

In addition to the matters thus presented, it is proper to refer to the status of the case of Leitensdorfer as it appears in the record, so far as it has necessary connection with the questions to be determined.

Several of the derivative claimants under Vigil and St. Vrain, Leitensdorfer being one, appealed from the decisions of the register and receiver upon their claims. This office entertained the appeal against objection by Craig, one of said claimants, and on appeal to the Department its decision was sustained.

Craig then made application to the President, who, upon the opinion of the Attorney-General that the decisions of the register and receiver in those cases were final, directed that evidence of title, upon the award to Craig, should be issued to him, notwithstanding the appeal therefrom, which was accordingly done. This being regarded as an authoritative denial of the jurisdiction of this office and the Department over said appeals, no action has since been taken by either in regard to them.

Afterwards, in a suit by Leitensdorfer against Craig, to set aside the award to the latter, the United States circuit court for the district of Colorado, held, in opposition to the opinion of the Attorney-General, that the decisions of the register and receiver upon the derivative claims aforesaid were subject to appeal to this office. The decree in which this decision is embraced has been taken on appeal to the Supreme Court of the United States, and is pending undecided.

Having fully considered the matters presented, I come to the following conclusion:

First. That Rule 102 does not apply to the case under consideration, at least to Leitensdorfer's side of it. He does not appear as an intervenor, but is an original party to the record in the matter of his claim. This motion is merely a proceeding in the same matter, in which he appears under notice from the attorneys of Mrs. King. The requirement that his attorney should have notice was in recognition of his character as party to the record and consequent right to appear and defend his interest against which the motion is directed. Mrs. King might with greater propriety be regarded as an intervenor.

Second. To direct substitution of parties in cases like the present would inaugurate a practice inconvenient at its best, and one likely to affect injuriously the interest of litigants. If Mrs. King may be substituted as party to the record, so might her vendees and a succession of vendees to any extent. It would require this office to adjudicate in each case the question of title and the validity of transfers, whether by voluntary or compulsory conveyance; a matter belonging properly to the courts, and as to which it may well be doubted whether this office has any authority of law to act.

Third. The ownership of the Leitensdorfer claim cannot be determined from the evidence produced. In form, Mrs. King was the purchaser of the whole interest. But, in the deposition of Mrs. Farnsworth, introduced on the part of the motion, in which she deposed that she held nine-sixteenths of the claim in trust for Leitensdorfer, she also deposed that Hallum conveyed a small interest therein to John F. Darby, which interest she bought in her own right and then held in her own right; and the deed introduced on the part of Leitensdorfer shows conveyance by Hallum to Mrs. Farnsworth, without reserve or condition, after the date of said deposition, of an undivided twelfth interest in the claim. It therefore appears that, under the judgment, if it shall be maintained, Mrs. King does not hold the entire interest.

Fourth. But, if the judgment should be reversed on the writ of error pending in the supreme court of Colorado, Mrs. King would be divested of whatever right she derived under the sheriff's sale and deed; and the interest would remain in the former holders as if the judgment had never been rendered. The rule of law in such cases being that "the party in whose favor a judgment was rendered must, on its reversal, make restitution of all things in his control which he has acquired thereby. If lands have been set off to plaintiff under execution, or if he has purchased real or personal estate, the defendant, on the reversal of the judgment, becomes entitled to such real and personal property," &c. (Freeman on Execution, sec. 347).

Fifth. The object of the present motion is to strengthen the position of Mrs. King as claimant and owner, and thereby aid her in demands upon the settlers on the land covered by the claim and in negotiating sales and compromises with them. One argument in support of the motion to show the necessity of granting it has been that it may be long before the legal status of the claim and the right of parties regarding it are determined. The moving party is anxious to realize upon the land claimed as soon as possible, without waiting the eventual determination of the rights of the parties. But if either the judgment of Mrs. King in the State court or the decree in favor of Leitendorfer in the United States court should be reversed, the settlers would be losers of whatever they had paid. I am not inclined to facilitate such a result.

Finally, the order of the President is still in force. This office has no jurisdiction to act in reference to the appeals which were abrogated by it; and to assume at this stage of the case under consideration to set aside the party to the record and substitute another in his place would be manifestly unwarranted.

For the reasons here stated, the motion is denied; without, however, passing upon the merits, which would be considered should it be renewed after the rights of the parties and the legal status of the case as regards the appeal have been judicially determined.

You will notify the parties in interest, or their attorneys, residing in Colorado, of this decision, and inform them of their right to appeal under the rules. The attorneys resident here will be notified from this office.

*RELINQUISHMENT.—UNDIVIDED INTEREST.***EDWARD WHITEFORD—APPLICATION TO FILE PRE-EMPTION ON REJECTED DERIVATIVE CLAIM UNDER VIGIL AND ST. VRAIN GRANT.**

Whiteford sought to make entry on part of section 14, T. 33 S., R. 64 W., as being part of claim of Alfred Bent, on relinquishment of interest by Bent's heirs by Thompson, their guardian, and purchaser of their right on sale under judicial proceedings.

Before the register and receiver the claim of Alfred Bent was represented by a diagram showing the sections and parts of sections constituting the location thereof, which did not include said section 14.

In the proceedings for the sale of the interest of the heirs of Bent it is described as an undivided one thirty-sixth part of the Vigil and St. Vrain grant.

If the claim is regarded as definite and located as claimed before the register and receiver, section 14 not being included, the relinquishment of Thompson would be without effect; and if unlocated and undivided, as represented in the proceedings under which he claims, the relinquishment of a one thirty-sixth part would have but slightly greater validity.

For the general reasons set forth, and those specially applicable to the case, the relinquishment should not be accepted as ground for allowing the entry proposed.

*Commissioner McFarland to register and receiver, Pueblo, Colo., January 22, 1884.*

**GENTLEMEN:** Referring to the register's letter to this office of November 6, 1883, and accompanying papers, it appears thereby that Edward Whiteford made application at your office to file pre-emption declaratory statement, dated October 30, 1883, on the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 14, T. 33 S., R. 64 W., and tendered the fees therefor, and presented certain papers having relation to the rejected derivative claim of the heirs of Alfred Bent, under the Vigil and St. Vrain grant, including a relinquishment by George W. Thompson, the alleged owner of said claim, to the United States, of the land above mentioned, describing it therein as "being a portion of said derivative claim."

The register's letter being apparently submitted for instructions in the premises, I have to say: that though relinquishments by the claimants have been accepted as sufficient to justify the allowance of entries upon lands included within some of said rejected claims, further consideration of the subject has led me to doubt the utility and propriety of continuing to permit entries upon such relinquishments.

Said rejected claims have at present no legal standing. The order of the President founded upon the opinion of the Attorney-General, that the decision of the register and receiver by which said claims were rejected were final, is still in force; and though it has been held to the contrary by the United States circuit court, which would leave the appeals taken from the decision of the register and receiver to this office open for consideration, the decree of the circuit court has been superseded by appeal to the United States Supreme Court, and is pending

therein undecided. If the decree of the circuit court shall be reversed, or if affirmed and the appeals from the decisions of the register and receiver on appeal here affirmed, the claimants will be left without right or title, and their relinquishments without force or value.

But it may be said, in view of the possibilities here suggested, that in the happening of either of those contingencies, the land will be, and be held to have been all along the property of the United States, and the acceptance of relinquishments as authorizing entries, though the parties relinquishing have no title, can do no harm. It might, however, and undoubtedly would, by ostensibly recognizing their claim of ownership, enable the claimants, through the anxieties of settlers, to dispose of their alleged titles for valuable considerations, to the loss of the settlers paying the same; a result I do not feel willing to promote. I think the interests of the public and of individual citizens will be best promoted by leaving the lands subject to these claims to the reservation prescribed by law, until they shall be finally adjudicated and their locality and extent determined.

In case the decree of the circuit court shall be affirmed, the whole matter of said derivative claims may be opened for readjudication upon the suspended but pending appeals from the decisions of the register and receiver, or otherwise. It is, therefore, impossible to judge at this time what may be the final location of the claims that may be allowed, or of the validity and effect of relinquishments made in the present state of the case.

This general view of the subject is applicable alike to all of the rejected claims; and in some respects to all of the derivative claims under Vigil and St. Vrain.

In the case of the heirs of Alfred Bent, it appears by the record that the claim was presented to the register and receiver as being for one-eighteenth part interest in the Vigil and St. Vrain grant; and said interest was claimed to have become severed and located, in part, at least, upon certain specified subdivisions of the public surveys, one of which was said Sec. 14, of T. 33 S., R. 64 W. of the sixth principal meridian, by the settlement, improvement, and occupancy by said Alfred Bent of the land forming said subdivisions.

The testimony, however, shows that the claimants filed a diagram before the register and receiver (which was made Exhibit No. 5), and claimed by it the following as their location: "The E.  $\frac{1}{2}$  of Sec. 22, E.  $\frac{1}{2}$  Sec. 32, E.  $\frac{1}{2}$  Sec. 29, and all of Secs. 23, 24, 25, 26, 27, 28, 33, 34, 35, and 36, all in T. 33 S., R. 64 W. of the sixth principal meridian, in Las Animas County, Colorado Territory"; and in their appeal from the register and receiver they describe their claim as consisting of the same whole sections and the W.  $\frac{1}{2}$  of Secs. 22, 32, and 29, instead of the E  $\frac{1}{2}$  of those sections as platted on the diagram, probably by mistake of the draftsman.

The location as shown by the diagram and claimed in the appeal

seems to modify and, in effect, to amend the claim as originally presented in the petition to the register and receiver. *It does not include said section 14 upon which Mr. Whiteford seeks to make entry;* and makes other changes in the land specified as claimed.

The register and receiver in their decision rejecting the claim treat it as undivided and unlocated, and make this one ground of its rejection.

Accompanying the register's letter aforesaid are certified proceedings in the district court, third judicial district, Colorado, showing petition by said George W. Thompson as guardian for the three heirs of Alfred Bent, who are represented as minors, for authority to sell their interest in the Vigil and St. Vrain grant, which is described by the boundaries designated in the original grant; an order of the court granting the authority asked for; sale of the interest of the heirs to William A. Burnett, and conveyance to him of the same; order of the court approving the sale, and deed from Burnett to said George W. Thompson of the interest aforesaid.

In these proceedings the interest of the heirs of Alfred Bent in the grant to Vigil and St. Vrain is described as an undivided one thirty-sixth part thereof (instead of one-eighteenth as set forth in the original petition to the register and receiver), and a specific location of said interest (as shown by the diagram referred to and claimed in the appeal from the register and receiver) is not mentioned or alluded to.

If the claim is to be regarded as defined and located, as claimed before the register and receiver and in the appeal, said section 14 is not included in it, and Mr. Thompson's relinquishment (even if relinquishments were to be accepted in such cases) would therefore be without effect; and if unlocated and undivided, as represented in the proceeding under which Mr. Thompson claims the ownership, the relinquishment of a one-thirty-sixth interest would have but slightly greater validity.

For the general reasons set forth herein, as well as for those specially applicable to the case under consideration, the relinquishment of Mr. Thompson should not be accepted as ground for allowing the filing applied for by Mr. Whiteford, and you will be governed accordingly in your action relating thereto.

You will give notice to the parties interested of this decision and of their right of appeal, and advise this office of the receipt hereof, and of the date and manner of giving such notice.

*APPLICATION TO FILE PRE-EMPTION WITHIN LIMITS OF LEITENS-DORFER CLAIM UNDER VIGIL AND ST. VRAIN GRANT.***MANUEL ABRITA.**

Since the United States circuit court has decreed adversely to the opinion of the Attorney-General holding the rejection of Leitensdorfer's claim by the register and receiver not appealable, (upon which opinion the President's order was issued, by which the appeal from the register and receiver was suspended), and since the decree of the circuit court is pending on appeal in the United States Supreme Court, the claim of Leitensdorfer has not been finally determined, and the land was not subject to entry.

*Commissioner McFarland to register and receiver, Pueblo, Colo., April 16, 1884.*

GENTLEMEN: I have considered the matter of the appeal of Manuel Abrita from the decision of your office rejecting his application to file a pre-emption claim on the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 7, T. 33 S., R. 63 W., transmitted to this office with the register's letter of March 5 ultimo, accompanied by the declaratory statement of the appellant, dated February 18, 1884, with the certificate of the register indorsed thereon, certifying that the same had been presented to him February 19, 1884, and the fee for filing thereof tendered, but that said application was rejected for the reason that the land in question was included within the limits of the claim of Thomas Leitensdorfer.

The claim referred to is one of the derivative claims, under the Vigil and St. Vrain grant, which were rejected by the register and receiver upon their examination of said claims, from which decisions of rejection appeals were taken to this office. Action was, however, suspended upon said appeals by an order of the President, founded upon an opinion of the Attorney-General, that the decisions of the register and receiver in those cases were final. But subsequently a decision of the United States circuit court was made in the case of *Leitensdorfer v. Craig et al.*, which would leave said appeals in force and open for adjudication; said decision, however, has been taken on appeal to the Supreme Court of the United States, and the appeal therefrom is now pending. If the decree of the circuit court shall be affirmed, the appeal from the decisions aforesaid of the register and receiver now suspended will be open for examination and decision here and by the Department.

It will be seen from the foregoing statement that the claim of Leitensdorfer has not been finally determined, and as the land offered for is included within the limits of said claim, it was not at the date of the appellant's application subject to entry or disposal. The decision appealed from is therefore affirmed.

You will give notice of this decision to the party interested, and inform him of his right of appeal, and advise this office of the date and manner of giving such notice.

## IV.—FLORIDA.

*DELIVERY OF PATENT—CONTEST—APPEAL.*

## HEIRS OF JOHN LOWE.

The delivery of patent having been subject of contest before the surveyor-general, on rendering his decision he should have withheld patent during the time allowed for appeal; but thereby no serious injury has resulted to any party having rights in the premises.

Delivery of patent by the United States is not essential. Title by such patent is title by record. No misdirection of the title is alleged. A certified copy from the record is evidence equally with the original.

As the showing of right in the parties appealing can only be made in the judicial tribunals, this department will not interfere with the possession of the patent by the parties to whom it was delivered.

*Secretary Teller to Commissioner McFarland, February 29, 1884.*

SIR: I have considered the case presented by the appeal of Messrs. Drummond & Bradford from your decision of April 27, 1883, refusing to direct the United States surveyor-general of Florida to demand the return of the patent issued upon the claim of John Lowe, deceased, for 6,000 and 10,000 acres of land in Florida, and delivered to C. R. King, as attorney for the heirs of John Lowe.

It appears that title to these lands was confirmed to John W. Lowe, one of the heirs, "on behalf of himself and the other heirs and legal representatives of said deceased," by the decree of the superior court for the district of East Florida, July 16 1840, and that said decree was affirmed by the Supreme Court of the United States at the January term, 1842.

Patent was issued June 30, 1882, to "John W. Lowe, and the other heirs and legal representatives of John Lowe, deceased, their heirs and assigns," and July 7, 1882, the said patent was transmitted by your office to the United States surveyor-general of Florida "for delivery to the person legally entitled to its custody." July 26, 1882, the surveyor-general delivered said patent to C. R. King, of Lake City, Fla., as the accredited attorney of part of said heirs.

The claimant, John Lowe, died in 1825, and letters of administration were issued June 3, 1881.

It is urged by Messrs. Drummond & Bradford, counsel for said administrator and part of the heirs, that the patent should have been delivered to said administrator, or his attorney, as the person legally entitled to the custody of the same; that the delivery of the patent to the said C. R. King, before his right to receive the same could be tested by appeal to your office and this Department, was in violation of the rules of practice governing such matters; and that the surveyor-general should be instructed to recover said patent and deliver it to the administrator.

From an examination of the case it appears that two parties were organized among the heirs for the purpose of securing the evidence of their ancestor's title to these lands, Mr. C. R. King representing one of such parties, and Messrs Drummond & Bradford the remainder of the heirs and the administrator.

When the surveyor-general received the patent and your instructions relative to its delivery he did not determine to whom such instrument shculd be delivered until after a showing had been made by both the parties claiming its custody; but when he did come to a conclusion in the matter, he at once delivered the patent.

No misdirection of the title is alleged as resulting from the issuance of the patent. The only question presented is, whether the Department will now take the desired action looking toward a recovery of the patent from the party having its custody, for the purpose of placing it in the hands of the other party.

You very properly found that, a hearing having been had before the surveyor-general to settle the question at issue, he should, after having reached a conclusion, have allowed time for appeal as provided in Rule 44 of the rules of practice, and during such time should have held the patent in his possession; but while this is so, no serious injury has resulted to any party having rights under the instrument.

In *United States v. Schurz* (102 U. S., 378) it was held that "title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not, as in a conveyance by a private person, essential to pass the title." A certified copy of such record is by law made evidence equally with the original document. It was an open question which of the opposing parties claiming to represent the title was entitled to the delivery. If either obtained wrongful possession he might be compelled by action to surrender it to the proper grantee. Even had the question comé before me I might have erred, being as liable to do so as the surveyor-general. Certainty could only have been reached by requiring the parties to stipulate or to interplead for possession, and this Department would probably (or at least possibly) have awaited such suit. Nothing less than suit upon demand for the return of the instrument would now be effectual for its recovery, and such suit could be maintained only upon allegation and proof that the present holder has no right to its custody, which I have not decided, and which the surveyor-general has by his decision negatived.

As the showing of right in the parties now appealing can only in the present condition of the matter be sucessfully made in the judicial tribunals, and can best be made by direct action between the parties without intervention here, your decision is affirmed and the appeal dismissed.

**V.—LOUISIANA.****1. DELIVERY OF PATENT.*****DELIVERY OF PATENT—INSTRUCTIONS.***

JAMES AND DENNIS QUINNILTY.

In case of contest for delivery of patent, register and receiver to make and notify parties of decision, allowing usual time for appeal, etc.

*Acting Commissioner Harrison to register and receiver Natchitoches, La., October 5, 1883.*

GENTLEMEN: I am in receipt of your letter of the 7th ultimo, relative to delivery of the patent in the name of *James and Dennis Quinnilty*, for 5,876.74 acres, issued July 9, 1883, and transmitted to you on the 19th of the same month.

Henry Safford, esq., is the attorney of record who prosecuted the case before this office and the Department. He also filed affidavits showing the extent of his interest in the claim, &c.

Mr. William H. Boult, it appears, seeks the custody of the patent upon the ground that he is the owner of *eleven-twelfths* of said claim under a tax sale.

You express the opinion that it is not clear that Mr. Boult owns that amount of said claim through his tax title; and you request a decision by this office "as to who is the party legally entitled to the patent."

I return herewith the papers transmitted, with the direction that you make a formal decision in the case from the evidence before you, of which you will notify all parties in interest and allow the usual time for an appeal.

In case all parties acquiesce, or no appeal is taken within the time allowed by the Rules of Practice, you will deliver the patent accordingly.

If an appeal is taken within the prescribed time, you will transmit the case in due course of business, and hold the patent subject to the final action of this office or the Department in the matter.

## A. STONER.

Persons claiming delivery of patents should be required to furnish unbroken chain of title, showing to whom the lands inure; and, if agents or representatives, to connect themselves with patentees.

Patents should be delivered, 1st, to person to whom issued; 2d, to party claiming under original grantee and showing right by unbroken chain of title; and, 3d, to party presenting duly executed power of attorney from person entitled to delivery as above.

*Acting Commissioner Harrison to register and receiver, New Orleans, La., June 4, 1884.*

GENTLEMEN: I am in receipt of your letter of the 21st ultimo, in regard to the delivery of certain patents for Louisiana private land claims or donations to A. Stoner, esq., of Stony Point, La., as attorney for present parties in interest.

I transmit herewith a copy of an affidavit executed by Mr. Stoner December 31, 1879, and deposited here, setting forth that he is the lawful agent of the parties claiming the tracts of land for which patents were desired, and application duly made therefor by Mr. Stoner through your office.

This was considered sufficient, coming from a reputable attorney, to call the cases up for action, and they have been adjudicated from time to time, and the patents sent to you for delivery to the persons "*legally entitled to their custody.*"

I have to advise you that, as a matter of ordinary precaution, persons setting up claims to the custody of patents when the same are ready for delivery should be required to furnish unbroken chains of title, showing to whom the lands involved inure; and, if agents or representatives, to connect themselves with the patentees by the usual methods in a satisfactory manner.

You should invariably deliver private land claim patents transmitted to you from this office to one of the three following parties, preference being given in the order named, viz:

First. The party in whose favor the patent is issued (taking his receipt therefor).

Second. The party claiming under the original grantee or confirmees, as shown by an unbroken chain of title; a properly certified abstract of title to be filed by you for future reference.

Third. The party who shall file in your office a duly executed power of attorney from the patentee or his legal representatives, authorizing such attorney to receive the patent applied for.

No deviation from these rules should be made by you in the future in the delivery of patents of the character referred to, unless you receive specific instructions from this office to depart therefrom.

Where two or more parties assert their claims to the custody of the

same patent (as not infrequently occurs, especially before surveyors-general), a formal decision in the premises should be rendered by you, and the usual time for an appeal to this office allowed; after which the conduct of the case will be governed by the rules of practice in vogue.

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## 2. FORM OF PATENT.

### PARISH CHURCH, PARISH OF ASCENSION.

The confirmatory act must govern in the issue of the patent, and the modification suggested cannot be made.

*Commissioner McFarland to surveyor-general, New Orleans, La., June 20, 1884.*

SIR: The register of the United States land office at New Orleans, La., under date of September 13, 1883, transmitted to this office a plat of survey of the claim entered under No. 391 of the old board of commissioners for the eastern district of New Orleans Territory, with an affidavit of the parish priest, and a letter from Edward Hickey, of New Orleans.

Mr. Hickey, in his letter, has taken exceptions to your style of designating the confirmees in the plat of survey, and desires that the same be amended by substituting the word "people" for the word "inhabitants."

This claim was presented to the board of land commissioners for the eastern district of Orleans by Isidore Blanchard, for the parish church of the parish of Ascension, claiming a tract of land, which had been used as a glebe for many years.

It was confirmed by a special act of Congress, approved March 3, 1857 (11 Stat., p. 517), entitled "An act for the relief of the inhabitants of the parish of Ascension, State of Louisiana."

The confirmatory act must govern this office in the issue of the patent, and I must decline to suggest any amendment of the plat of survey; and the patent, when issued, will be "to the inhabitants of the parish of Ascension, to and for the uses and purposes for which the same has been heretofore held and used," with the stipulation contained in the proviso to said act. This will protect the interests of all persons.

You will please give Mr. Hickey notice of this decision, and allow him the usual time, as provided by the rules of practice, for appeal to the honorable Secretary of the Interior. If at the expiration of the time for appeal no appeal is taken you will report the matter to this office, and the case will be further considered.

**3. PRACTICE—APPEAL.*****MOTION TO DISMISS APPEAL.*****JAMES AND DENNIS QUINNILTY.**

Where the intention to appeal is clearly expressed in a paper filed in time, which contains a statement of grounds of appeal and declaration that in due time argument will be filed, &c., it should be regarded as sufficient notice of appeal.

*Commissioner McFarland to register and receiver, Natchitoches, La., May 1, 1884.*

**GENTLEMEN:** In the matter of the claim of James and Dennis Quinnility, in which you were instructed to deliver the patent to the party legally entitled thereto, the delivery was contested before you by Henry Safford, A. H. Boult, and the heirs of E. L. Hyams, the latter appearing by E. E. Buckner and Watkins & Scarborough, their attorneys.

You rendered your decision in the case, as presented, October 26, 1883, awarding the possession of the patent to Mr. Safford; upon which decision Mr. Boult and the Hyams heirs petitioned for a rehearing, the said heirs presenting certain documentary evidence in support of their claim.

The petition for rehearing was opposed by Mr. Safford, who also produced documentary evidence on his part.

December 4, 1883, you rendered a decision reversing that of October 26, 1883, and deciding to hold the patent until the proper judicial tribunal decides as to who is the owner of the land and entitled to the patent.

December 31, 1883, Mr. Safford presented to and filed with you a paper in the following terms:

NATCHITOCHES, December 28, 1883.

REGISTER AND RECEIVER, U. S. L. O.,

*Natchitoches, La.:*

**GENTLEMEN:** I desire to appeal to the honorable Commissioner of the General Land Office from your action in the matter of the contest respecting the delivery of the patent to Sec. 37, T. 11, R. 10, 5,876.74 acres, in this district, known as the private land claim of James and Dennis Quinnility, as announced in your note of 4th instant, on the ground—

That said action is contrary to the law and the evidence; is, indeed, no decision, but a mere announcement of refusal to decide.

In due time I shall prepare a statement and argument in the case, which I will forward to the Commissioner through your office.

I should sooner have acted but for absence, and, since my return, sickness.

Respectfully, your obedient servant,

HENRY SAFFORD,

*For Self, Safford & Sampayrac, Heirs of David Vawter et al.*

Under date of January 23, 1884, Mr. Safford presented to you a paper addressed to this office, with the following caption:

In the matter of an appeal taken by me, 28th ultimo, from the action of the register and receiver in the matter of the contest for the delivery of the patent issued July 9, 1883, to Sec. 37, T. 11, R. 10, 5,876.74 acres, and known as the claim of James and Dennis Quinnilt.

With the register's letter of February 12, 1884, this paper and the several papers and documents forming the record in the case were transmitted to this office in the usual manner of transmitting a case on appeal.

Following this, February 18, 1884, the register forwarded from your office a motion by Messrs. Buckner, Watkins, and Scarborough, for the heirs of E. L. Hyams, to dismiss said appeal, on the ground stated—that it was not taken within the thirty days allowed by Rule 44 of the Rules of Practice; the movers, it seems, regarding the paper filed by Mr. Safford, dated December 28, 1883, as merely a notification of his intention to appeal. With said motion was also forwarded a statement signed by the register, certifying that said paper, dated December 28, 1883, and the brief above mentioned, dated January 23, 1884, were the only papers filed by Mr. Safford relating to an appeal, and that the paper of December 28 was understood by him, the register, to be merely a notification of intention to appeal.

The question presented by this statement of the case is upon the motion to dismiss the appeal from your decision upon the rehearing, on the ground aforesaid, namely, that no appeal was taken in time.

The decision was rendered, and Mr. Safford had notice thereof December 4, 1883. His brief, presented to you to be forwarded to this office, was not intended, and does not purport, to be an appeal.

If an appeal was taken it was by the paper dated December 28, and filed with you December 31, 1883, which was within the time allowed by the rules. This paper the movers to dismiss characterize as only a notice of intention to appeal, and the register certifies that he so understood it. In this I think they were equally in error.

There was no necessity for filing notice of intention to appeal. No such proceeding is required or known in the practice. The paper filed is not a notice of intention; indeed, says nothing about intention. The language says:

\* I desire to appeal \* \* \* from your action, \* \* \* on the ground, &c. In due time I will prepare a statement and argument in the case, which I will forward to the Commissioner through your office.

Among the synonyms of the verb *desire* are ask, beg, request, solicit, &c. If the language had been "I ask to appeal," "I beg, or beg leave, to appeal," it would hardly have been taken as anything else than the assertion and exercise of the rights of appeal; and the expression used being equivalent to either of the above, less direct, to be sure, but more courteous and deferential to the officials addressed than "I ap-

peal," but in substance the same, especially taken in connection with the statement of the grounds of appeal, or "points of exception," as required by the rule, and the further statement that in due time *an argument* in the case would be presented, *to be forwarded to this office*, the paper in question should, I think, have been regarded as an appeal from the decision to which it refers.

I therefore hold that the appeal was well taken, and deny the motion for dismissal.

You will give notice of this decision to the parties interested, and inform them of their right of appeal, and advise this office of the date and manner of giving said notice.

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#### 4. PRIVATE CLAIMS.

##### RIO HONDO PRIVATE CLAIM—STATE SELECTION.

WILLIAM V. SMITH.

State swamp selections found to be within the limits of the private claim, having been approved subject to all valid objections, the State took no land by the approval that was not found to be free from the private claim on its final adjudication.

*Commissioner McFarland to register and receiver, New Orleans, La., June 6, 1883.*

GENTLEMEN: The Rio Hondo claim of William V. Smith, No. 278, third class, in the report of the register and receiver of the southwestern land district, Louisiana, dated at Opelousas, November 1, 1824 (Am. State Papers, Green's ed., vo<sup>l</sup>. 4, pp. 74 and 78), was confirmed by the act of Congress approved May 24, 1828 (6 Stat., p. 382).

Upon an examination of our files and records, the certificate showing the joint location of the aforesaid claim by a former register and receiver is not found.

Now comes A. J. Perkins, by his attorney, J. L. Bradford, esq., of New Orleans, La., claiming, as the legal representative of the confirmees, lots 1, 2, 3, 4, and 5 of Sec. 36; lots 7, 8, 9, 10, and 15, Sec. 35, in T. 9 S., R. 9 W.; lots 1, 2, and 3, Sec. 1, and lots 1 and 8 of Sec. 2, in T. 10 S., R. 9 W., southwestern district of Louisiana, as the lands embraced in said claim, containing, according to the official surveys, 21.22 acres in excess of the confirmation. The party in interest, through his said attorney, has surrendered the *east half of lot one* of said section 36, T. 9 S., R. 9 W., thus reducing the area of the lands claimed to 632.76 acres, or 7.24 acres less than the amount confirmed.

Six of the subdivisions mentioned, viz, lots 1, 2, and 3, Sec. 36; lot 15, Sec. 35; and lots 1 and 8, Sec. 2, were selected by the State as swamp and overflowed lands under the act of March 2, 1849, and the selections were approved by the Secretary of the Interior May 5, 1852.

Upon the old jacket inclosing the survey of the Smith claim, executed by Thomas Bilbo, United States deputy surveyor, in the year 1837, and on file in the case, is indorsed, "Rio Hondo claim, No. 278, Wm. Smith, located 13th December, 1832; final certificate issued same day." This indorsement is in the plain and familiar handwriting seen upon papers relating to other Rio Hondo claims contiguous and in the vicinity of the Smith claim, which were located the same month and year, and was evidently made by the same person; and I have no doubt that such a location of the claim in question as was contemplated by law was made.

The State selections herein referred to were approved subject to all valid objections; and, consequently, the State took nothing by said approval unless, after the final adjudication of the claim under consideration, it should be found that some of these selections were not required to satisfy said confirmation. See decision of this office dated January 25, 1881, in the case of the Rio Hondo claim, No. 252, of Dempsey Isles.

You will notify all parties in interest, including the commissioner of State lands, Louisiana, of the purport of this decision, and thereafter be governed by the Rules of Practice now in force in case of an appeal.

In case an appeal is not taken within the time allowed, you will so report; and also transmit here a joint certificate of relocation, to complete the record in this case, similar in form to the certificate of relocation issued in the *Isles case*.

In transmitting the relocation certificate you will forward it through the United States surveyor-general, Louisiana, that he may prepare and transmit here a plat and descriptive notes of said claim in accordance with the relocation certificate, showing the lands as now claimed, using care to *exclude* the east half of said Sec. 36, T. 9 S., R. 9 W., southwestern district, Louisiana, which has been surrendered.

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*PRINCIPLE OF RES JUDICATA APPLIED.*

*HEIRS OF ANTONIO GRASS.*

Where a claim was for 3,000 arpents, and held to have been confirmed for 1,280 acres only, and application for satisfaction of balance by issue of certificates of location rejected by surveyor-general, appeal taken therefrom and withdrawn; on subsequent application to General Land Office for issuance of certificates, claim held *res judicata* by decision of surveyor-general, and application denied.

*Acting Secretary Joslyn to Commissioner McFarland, October 17, 1883.*

SIR: I have considered the appeal of E. R. Mason, esq., as attorney for the heirs of Antonio Grass, deceased, from your decision of October 19, 1880, rejecting their application for the issuance of certificates of location, or indemnity scrip, under the third section of the act of Con-

gress approved June 2, 1858 (11 Stat., 294), for the unsatisfied portion of the Louisiana private donation claim of said Grass.

It appears that the claim of Grass was for 3,000 arpents of land situated in Baton Rouge, La., which his heirs claim was confirmed to him by the act of May 8, 1822 (3 Stat., 707). After an elaborate review of the several acts of Congress in respect to such claims, and of the facts in the case, you held (affirming the opinion of the surveyor-general of Louisiana) that the claim was confirmed for 1,280 acres only, and that, it having been satisfied to that extent, the heirs have no further claim upon the Government. Without reference to this question, the case must be disposed of upon another ground.

It appears that an application for certificates upon this same claim was made to the surveyor-general of Louisiana in July, 1872, and by him rejected February 12, 1877. Thereupon J. L. Bradford, esq., attorney for the heirs, appealed from said ruling, but subsequently (August 10) addressed the surveyor-general, stating that, "in preparing an argument upon my appeal, I am convinced that you are right, and that the United States have not yet recognized the title for a greater quantity" than 1,280 acres, and "I now beg leave thus to withdraw my appeal." The same was accordingly dismissed by your office August 31 following. This withdrawal left in force the ruling of the surveyor-general, which thereby became final. The claim must therefore be held *res judicata*, and the present application be, for that reason, denied.

I make this technical ruling with less hesitation from the fact that, in addition to the withdrawal of Mr. Bradford, a well-known practitioner before this Department, W. C. Hill, esq., and M. D. Brainard, esq., respectable attorneys of this city, who were retained for the claimants, have, in turn, after examination of the papers in the case, also withdrawn from it, thus inducing the belief that it is without merit.

I affirm your rejection of the claim.

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#### APPEARANCE OF PARTIES—SURVEY OF CLAIM.

#### HEIRS OF BERNARD GENOIS.

When the character in which parties in interest appear is meagerly described, and their appearance recognized, the regularity not being apparent, on objection thereto, amendment will be allowed, the only probable result of dismissal being their application *de novo*.

The location by survey is to be governed by the facts shown as to boundaries, which are set forth and considered, and amendments of survey directed.

*Commissioner McFarland to surveyor-general, New Orleans, La., November 12, 1883.*

SIR: In the matter of the claim of the heirs of Bernard Genois, now before me, it appears by the files and record in the case that under date

of May 5, 1882, E. R. Mason, esq., as attorney for the heirs of Genois, applied to your predecessor in office for an official survey of the claim confirmed to their ancestor by act of Congress, as the same was reported in the American State Papers.

Said application was communicated to this office with your predecessor's letter of May 17, 1882, and under date of May 29, 1882, your office was instructed to make the survey.

June 20, 1882, M. D. Brainard, esq., of this city, as attorney for the New Orleans, Spanish Fort and Lake Railroad Company, filed in this office objections to the execution of the survey, and asked that the order therefor be revoked, which, in consideration of the matters urged in said objections, was done, by letter to your office of July 6, 1882.

Under date of July 20, 1882, Mr. Mason replied to the objections aforesaid and renewed his application for survey of the claim; and upon re-examination of the case, and especially in view of the confirmation of the claim, it appeared that the claimants were entitled to a survey thereof. The order of July 6 was accordingly revoked, and your office was instructed to make the survey applied for "according to the confirmation, as nearly as possible," &c.

Under said instructions a survey of the claim was made by W. D. Duke, deputy surveyor, and approved by Surveyor-General Gla, January 23, 1883.

The survey having been returned to this office, on the 19th of March, 1883, Mr. Brainard, in behalf of the New Orleans and Northeastern Railroad Company, filed in this office an application, with sundry documents and maps, asking to have said survey rejected:

First. Because the application for this survey was not made in good faith or on behalf of any one having an interest in the Genois claim.

Second. Because the field work of the survey of this claim by Deputy Surveyor Duke was not correctly executed, and the Genois claim is not located in conformity with the calls of the concession.

Third. Because the survey executed by Deputy Surveyor Duke locates the Genois claim in part upon lands held by the New Orleans and Northeastern Railroad Company under a fee-simple title derived from the United States more than fifty years ago, and is, therefore, clearly illegal, to the extent of said conflict.

The first above objection, as far as relates to the form of appearance, is well taken, Mr. Mason having appeared and made the application for survey, in behalf of "the heirs of Bernard Genois," it being shown by a deed introduced by the contestants, and also by the affidavit of Estelle Genois, one of the parties represented, that Bernard Genois, the confirmee, conveyed the claim to his son Jean Baptiste Genois, and that it now belongs to the three daughters of the latter, Estelle, Camilla, and Celestine Genois, who hold as his heirs (not as the heirs of Bernard Genois), and as grantees of their brother, Joseph, jr., and, it is presumed, also as heirs of their brother Bernard (as they claim to be

the owners in entirety, and it is stated in said affidavit that they are the only surviving heirs of Jean Baptiste Genois).

The application was therefore irregular; but the irregularity not then appearing, it was recognized and the survey ordered; and the only probable result to be gained by now setting aside the present proceedings would be an application for a survey *de novo*. The confirmed claim is entitled to be located by survey without especial regard to the application, and its proper location cannot be regarded as cause of complaint. The patent will issue in the name of the confirmee, and can only result to the benefit of whoever may be *legally* entitled to the land confirmed. The attorney for the claimant will therefore be allowed to amend his proceeding so as to correctly represent the true character in which his clients claim the land.

The second and third objections put in issue the correctness of the survey made by Duke, alleging that the claim, as located thereby, wrongfully conflicts with the right of the New Orleans and Northeastern Railroad Company by including land held by it under title long since derived from the United States.

The land in question is in T. 12 S., R. 11 E., and situated near the south shore of Lake Pontchartrain on the left (west) bank of the Bayou Saint John, which empties into the lake. It is north of and adjacent to the city of New Orleans, and appears to be within the jurisdiction of the city government.

The claim of Bernard Genois was favorably reported by the register of the eastern district of Louisiana, January 6, 1821; was included in a list of claims communicated to Congress by the Secretary of the Treasury, January 1, 1823, and confirmed by act of Congress of February 28, 1823 (3 Stat., 727).

The register's report of the claim is as follows:

No. 7. Bernard Genois claims in virtue of a grant made to a person under whom he claims by the Baron de Carondelet, dated the 29th November, 1793, a tract of land situated in the county of Orleans, adjoining Fort Saint John, having two arpents in front with forty arpents in depth, as appears more fully by the figurative plan annexed.

The claimant produced the original grant, as stated in his notice, made to Felicite Destrehan, a free woman of color, by the Baron de Carondelet, and also written evidence of his title, under her, by purchase. I am therefore of opinion that his claim ought to be confirmed. (Am. State Papers, Gales & Seaton's ed., vol. 3, p. 579, R. No. 7.)

The "figurative plan" mentioned in the report is not in the record of the case before me; at least, no plan is identified as that referred to by the register.

The land now claimed by the New Orleans and Northeastern Railroad Company is a part of the former Fort Saint John military reservation, which was not a reserve by act of Congress, or Executive order, but having been held by the former Governments, and at the time of the transfer of title and jurisdiction to the United States occupied for

military purposes, it did not result to the public domain, but to special governmental use, and was taken possession of and for a time occupied by the military authorities of the United States.

Under the act of Congress of March 3, 1819 (3 Stat., 520), authorizing the Secretary of War to sell and convey such military sites belonging to the United States as had or should become useless for military purposes, Secretary Cass, on the 31st of August, 1831, sold and conveyed to Harvey Elkins, his heirs and assigns, the following-described tract:

Beginning on the west side of the Bayou Saint John at a point where the northern boundary line of the Genois tract strikes it, and running thence with the said northern boundary line of said Genois's land west until it intersects the low-water mark of Lake Pontchartrain, thence in an easterly direction along the lake shore, with the line of low-water mark, until it strikes the packets (pickets?) on the west side of Bayou Saint John, thence up and with the west bank of the bayou to the beginning, containing thirty-seven arpents, more or less.

It is seen by reference to the report of the register, which is made the basis of the confirmation of the Bernard Genois claim, and to the deed from the Secretary of War to Harvey Elkins, both above set forth, that said claim is described as "adjoining Fort Saint John," and that the land sold to Elkins was bounded on the south by "the northern boundary line of Genois' land." It is therefore impossible that the two tracts, properly located by their described boundaries, should conflict with each other. The all-important point, then, to be ascertained and determined is the true location of the interboundary line—a matter rendered somewhat difficult by the entire absence in the descriptions of reference to any natural or permanent landmarks.

Several surveys illustrative, or partially so, of the tracts in question have from time to time been made, and are present in the files of the case; one said to have been by the surveyor Lafon in 1805; another by the same in 1808; one by Bringier in 1830; one by Celles in 1865; one introduced by the contestants of Duke's survey, made by the surveyor Grandjeau, subscribed by him February 14, 1883, and accompanied by his affidavit of same date, and others.

In 1871 and 1872 United States Deputy Surveyor Sulakowski, under instructions from the surveyor-general, surveyed the private claims in the township. The claims which come under consideration here are represented on the plat compiled from Deputy Sulakowski's field notes, as section 112, designated as claimed by Alexander Milne; section 114, by J. B. Genois; section 190, by Tamboury and Millandon; and 191, "claimed by Genois" (neither the Christian name nor initials being given). The claim of Bernard Genois (f 2 arpents front by 40 arpents in depth is not represented on the township plat. The land constituting it appears to be embraced in section 112 of that plat, claimed by Alexander Milne and marked "O. B. 17."

This claim, O. B. 17, is included in the report of the old Board of Commissioners for the eastern district of Orleans Territory, which was

communicated to Congress by the Secretary of the Treasury January 9, 1812, with recommendation for its confirmation, and described in the report as "situated on the Bayou Saint John, on the left side thereof, \* \* \* containing 17 arpents, 29 toises in front" (one toise short of 18 arpents) "by 40 arpents in depth; bounded on the upper side" (south) "by land of widow Durocher, and on the lower" (north) "by land of Peter Palao." (Am. State Papers, Gales & Seaton's ed., vol. 2, p. 301, No. 17.)

It appears by the report here referred to that 15 arpents 29 toises front of the land constituting the Milne claim was conceded by the French Government to Bartholomew Roberts in 1766, and 2 arpents front thereof by the Spanish Government to *John B. Blaise*, 20 April, 1771, section 112, as represented on the plat of Sulakowski's survey, measures, by the scale of said plat, a small fraction less than 20 arpents front; an excess of 2 arpents front over the quantity recommended for confirmation to Milne, and the exact quantity called for by the confirmation to Bernard Genois. These 2 arpents undoubtedly constitute the Bernard Genois claim.

The claim of J. B. Genois has a front of 120 feet on Bayou Saint John and a depth of 3 arpents. It was favorably reported by the register and receiver of the southeastern district of Louisiana September 5, 1833, sent to Congress by the Secretary of the Treasury January 31, 1834, and confirmed by the act of March 3, 1835 (4 Stats., 780). It is described in the report of the register and receiver as "part of a tract of land originally granted by the Spanish Government in due form to *Blaise* alias *Bellegar* on the 20th day of April, 1771."

It is represented on the Sulakowski map as section 114, and located thereon between the Bernard Genois, 2 arpents and the Fort Saint John tract, which, as above shown, bounded each other. It could not, therefore, be properly located between them.

It is shown by the report of the old Board of Commissioners in the case of the Milne claim, above quoted, and by the plat of the Lafon survey of 1805, which appears to be a survey of the last-mentioned claim, that the Blaise or Bellegar tract, of which the J. B. Genois claim (as shown by the register's and receiver's report thereof) was a part, was the lower (northern) 2 arpents of the 17 arpents and 29 toises constituting the Alexander Milne claim.

The same is also shown by the deed of Juan Torregrosa and Emelia Blaisse, his wife, March 10, 1804, to Jose Monson, and by a deed from Monson March 15, 1823, of the same tract, to Charles and Joseph Gencis. The land conveyed is described in the first above-mentioned deed, as follows:

A piece of land situated on San Juan Bayou, consisting of one hundred and twenty feet front and three arpents deep \* \* \* adjoining on one side the land of Felicite Destrehan, a free mulatto woman, and on the other, our own land, which I, the second with the larger portion, inherited from Juan Beautiste Blaisse, my deceased father.

Referring to the report of the register upon the claim of Bernard Genois, it is seen that the claim originated in a grant to Felicite Destrehan. It was sold by Destrehan to Pedro Palao, as appears by the minutes of Lafon's survey of 1808, and lies next below (north) of the Blaise 2 arpents of the Milne tract, as shown by the plat of the Lafon survey of 1805.

The Blaise tract lying above (south) of the Bernard Genois claim, the J. B. Genois claim being a part of the former, could not lie on the north side of the latter, as Sulakowski has located it. That location is undoubtedly erroneous. It should be on the south instead of the north side, and taken out of the north two arpents of the Milne claim (the Blaise tract), instead of off the Fort Saint John tract. It is so represented on the survey of Grandjean above mentioned.

A compromise deed is in the case, by which Joseph Genois, jr., and Bernard Genois (by his attorney) conveyed to the New Orleans Canal Navigation Company the front, on Bayou Saint John, of both the Bernard Genois and the J. B. Genois claims, the description in which conflicts with the above in making the two arpents the *upper* and the 120 feet the *lower* parcel; but this was clearly a mistake in the draft of the deed, as the sketch or plat annexed thereto, which is referred to in, and made part of, the instrument, shows the reverse, the larger parcel being located below (north) and the smaller above (south of it) on the bayou.

Section 190 of Sulakowski's survey, designated thereon as "claimed by Tamboury and Millandon," represents part of the land conveyed to Harvey Elkins by the Secretary of War on the sale of the Fort Saint John tract.

Section 191 of Sulakowski's survey, designated as "claimed by Genois, no confirmation found 2.27 acres," is placed by said survey between sections 114 and 190. There is no confirmation, recommendation, report, nor entry found to warrant its recognition; certainly nothing to justify the position given it on the township plat.

In his survey of the Bernard Genois claim, now to be considered, Deputy Surveyor Duke commenced upon the basis of the Celles survey of 1865, represented to him by ex-City Surveyor W. H. Bell to be correct, but (as he says in his minutes), "after making good progress with the survey," he "was informed that a prior survey could be found if sought for, and having been made in 1805."

He, thereupon, "after making diligent and careful research, came across a survey of Lafon made in the year 1808," and concluding "that Celles' survey was vague," and "that Lafon had precedence," &c., he commenced his work anew, professedly following Lafon, with the result of locating the lines of the claim, as shown by the sketch accompanying his field-notes, about three-fourths of a chain at the southwest corner, and about a chain and one-third at the front, farther north than their location by Celles.

It is alleged by the contestants of Duke's survey that though claim-

ing to follow Lafon he has not done so, inasmuch as in measuring the front width he made his starting point on the north side of Bayou Noir, while Lafon measured from the south side.

In the Lafon survey of 1805, he unquestionably measured the front of the two arpents which constituted the Blaise portion of the Milne tract from the south side of the Bayou Noir, the north line of the two arpents thus ascertained constituting the south line of the Bernard Genois claim, the claim, however, not being included in that survey; but Duke ostensibly followed the Lafon survey of 1808, which gives no measurement, either on the plat or in the minutes, from Bayou Noir.

Duke in his survey first ran a line "commencing at the springing on east angle of the segmental redoubt" (old fort) southerly along the Bayou Saint John, by various courses and distances, crossing Bayou Noir, "to the north end of the slip or ways of a shipyard"; and after ascertaining the course of the Bayou Noir, returned to the point of beginning at "the east angle of the redoubt," from which he ran on a course S.  $79\frac{1}{2}$ ° E. 26 links to the Bayou Saint John, and from a post on said line 5 links from the bayou run S. 3° E. 4.12 chains to a post set, as stated in his minutes, "for the boundary or dividing line of the Fort Saint John and Bernard Genois property—being the correct starting point and northeast corner of his claim."

This post is the controlling point in the Duke survey, and he apparently makes it so arbitrarily. There is no satisfactory reason given for stopping his measurement at that particular place and making it a corner of the claim. The Lafon survey of 1808, which he professedly follows, gives no figures showing distances, either on the plat or in the minutes, upon which the measurement from the east angle of the old redoubt to the post thus made the controlling corner can be predicated.

The Lafon survey of 1805 shows neither the Genois claim nor the fort tract. It makes the southeast corner of the lower 2 arpents of the Milne claim (the north line of which would be the south line of the Bernard Genois claim) on the south side of the Bayou Noir; but even if that point was correctly located in its day, the uncertainty of its precise location and the changes alleged to have since taken place in the width of the bayou, &c., destroy its value as a point to control the boundaries of the Genois claim.

Before commencing his survey Deputy Surveyor Duke, according to his minutes, "made a careful examination of the Fort Saint John and its surroundings with the inhabitants" (whose names, thirty and upward, he appends), and after interviewing Mr. Robert Gage, "the most intelligent in the neighborhood," took his deposition, which he also annexed to his minutes; and upon the information thus obtained he proceeded to make his first survey, corresponding with that of Celles.

The plat of the fort property made by Brignier, State surveyor-general, in 1830, bounds the tract on the south by a "ditch," separating it from the Bernard Genois claim.

The Celles survey, made in 1865, which was also a survey of the fort property, bounds it on the south by a line on the south side of a ditch or bayou.

The sketch or plat annexed to the deed of compromise between Joseph, jr., and Bernard Genois (sons of Bernard Genois), and the New Orleans Canal and Navigation Company, dated May 27, 1853, shows the Genois 2 arpents bounded on the north by Millandon's Canal.

Robert Gage, United States light-house keeper at the mouth of Bayou Saint John, who was interviewed by Duke and certified by him in his minutes as being "the most intelligent in the neighborhood," in his affidavit before mentioned deposed to an old ditch some 300 or 400 feet south from the fort, which was afterwards dredged out in the manner described, and to fence posts standing on the south bank of the north branch of Horse Shoe Bayou, at the confluence of the Bayou Saint John, and constituting a portion of the fence established by Millandon, and that the fence so established was the boundary between Elkins (to whom the fort property was sold) and Genois.

The Surveyor Grandjean, who seems to have had the capacity and every opportunity to know the situation, in his affidavit introduced by the contestants says, on page 6:

At various times in 1872, 1873, 1874, and 1875, I surveyed in and around Spanish Fort property, and remember well a certain ditch 5 to 6 feet wide on the north side of an old picket fence which was considered by all as the southern limit of the fort. To the best of my recollection the south edge of that ditch is identical with the south edge of the canal dug in 1874 and 1875 by the New Orleans Canal and Navigation Company, with their own dredge boat, partly for account of the C. S. C. P. & L. R. R., and partly for account of the city of New Orleans. The location of the above-mentioned fence is now south of the north branch of the canal built for the accommodation of pleasure boats and termed by Duke "Horse Shoe Bayou."

On the plat accompanying Grandjean's affidavit, however, in laying off from the south side of the Bayou Noir, the two lower arpents of the Milne tract and the two arpents of the Genois claim, one-half or more of the width of the north branch of the Horse Shoe Bayou is included in the latter claim. The point at which this line from Bayou Noir terminates he makes, by the measurement of Bringier, as shown on his sketch, 269 French feet (equal to 4.35 chains United States measure) from the first angle in the east wall of the old fort, counting from the segmental redoubt, and measured on a line perpendicular to the southern limit of the fort property, and finds by measurement on the ground that it falls 24 feet 4 inches within the north branch of the canal.

I am satisfied from the several items of evidence here referred to, upon full examination of the case, that this is as near the correct boundary as can now be determined. The Millandon Canal was much narrower than the present Horse Shoe Bayou. It was at the south limit

of the fort tract, and the boundary indicated by the fence established by Millandon was on its south side.

The New Orleans Canal and Navigation Company, for the purpose of constructing a canal called the Horse Shoe Bayou, purchased the front of the Genois claim, and dredged out the Millandon Canal on the adjoining property; but in enlarging the same it is obvious that the company would make extension upon its own land, purchased expressly for the purpose. The result was that the line between the two tracts fell within the enlarged canal, substantially as shown on the plat of Grandjean above referred to.

The survey made by United States Deputy Surveyor Duke is, therefore, not approved, and is directed to be amended so as to fix the boundary line of the Genois claim on the north, to coincide with the south side of the Millandon ditch or canal, and the line of the old fence thereon, as above indicated, and as near as the same can be ascertained; the course the same as by the present survey; the south line to be run parallel with and at 2 arpents distance from the same.

You will notify the parties, or their attorneys, residing in Louisiana, of this decision, advising this office of the time and manner of giving such notice; and if appeal be not taken within the time allowed by the rules, proceed as soon as practicable to amend the survey as above directed.

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## 5. SUCCESSION PROCEEDINGS.

### *SUCCESSION PROCEEDINGS—REQUISITES.*

#### *DAVID DEVOR.*

Claimant died about 1856; succession opened in 1872; and without proof as to heirs, former proceedings, or want of them, sale of claim was ordered.

On application by purchaser at such sale for satisfaction by issue of certificates of location—held, that the proofs and proceedings were insufficient to warrant sale and effect transfer of title, and application denied.

*Secretary Teller to Commissioner McFarland, October 31, 1883.*

SIR: I have considered the appeal of J. F. Ellis, esq., from your action of October 4, 1882, approving that of the surveyor general of Louisiana, declining to issue certificates of location pursuant to the provisions of the act of June 2, 1858 (11 Stat., 294), in satisfaction of the claim of David Devor, deceased.

It appears that such claim is designated as No. 142 of class 3 in the report of the register and receiver at Opelousas, La., dated December 30, 1815, to wit:

David Devor claims 800 superficial arpens of land, viz., 20 arpens front by 40 deep, situated on Bayou Bushley, parish of Catahoula; claimed under a requette by the claimant, approved the 19th September, 1802,

by V. Layssard, then commandant. The request accompanies the notice. (See Duff Green's edition American State Papers, Vol. 3, p. 162.)

Said claim was confirmed by the act of February 5, 1825 (4 Stat., 81).

It further appears that Devor, the confirmee, resided in Catahoula Parish, Louisiana, where he died some time about the year 1856, it is alleged.

The petition of C. J. Boatner, district attorney *pro tempore*, of said parish and State, respectively, represents that David Devor departed this life in said parish many years since, leaving some property consisting of an old deferred private unlocated land claim against the United States; \* \* \* that said property should be inventoried, appraised, and sold according to law, and that petitioner is entitled under the civil code to the administration of [said estate, the same] being less than \$500 in value. Wherefore, he prays that he be ordered to take charge of said estate, that a commission issue to T. O. Findley, recorder, to make an inventory of said estate; and that the property inventoried be sold according to law to pay debts; and that an attorney be appointed to represent the absent heirs of said estate, if any there be; and that a commission [issue] to petitioner to sell according to law the property belonging to said estate.

D. J. WEDGE,  
*Attorney.*

The order of the parish judge is as follows :

This petition considered, it is ordered that C. J. Boatner, parish attorney, take charge of said estate and administer the same according to law; that a commission issue to T. O. Findley, recorder, to make an inventory and appraisement of the property thereof, assisted by experts by him appointed; that R. G. Smith, esq., is hereby appointed to represent the absent heirs of said estate. It is further ordered that after legal delays and advertisement, that the property appertaining to said estate be sold for the purpose of paying debts and settling the same; the property to be sold for cash, provided it brings its appraised value; if not, to be immediately reoffered and sold on twelve months' credit for what it will bring; and that a commission issue to C. J. Boatner, administrator, to sell said property this 21st day of September, 1872.

H. B. TALIAFERRO,  
*Parish Judge.*

Service of petition and citation waived, and I accept the appointment of attorney for absent heirs this 21st day of September, 1872.

R. G. SMITH,  
*Attorney for Absent Heirs.*

The *procès verbal* touching the succession sale shows that the claim in question was sold (pursuant to the terms of a posted advertisement, there being no newspaper in the parish) at the court-house door at public sale October 4, 1872, to J. F. Ellis for \$40 cash.

The record fails to disclose the exact date of Devor's decease, whether he left heirs, what disposition, if any, was made of his estate, or whether he left an estate exceeding \$500 in value, which was duly inventoried according to law at the time of his death; that the heirs have renounced the succession; that appraisers were appointed or the assets appraised,

except the bald statement of the administrator that \$40 was equal to the appraised value of said property.

The sale was made under date of October 4, 1872, and the vendee applied January 17, 1882, to the surveyor-general of Louisiana for scrip in satisfaction of the claim as aforesaid, but he declined to issue the same, and you approved his action. Under the laws of Louisiana, succession is opened by death or the usual presumption thereof arising from prolonged absence; and succession inures to the heir, who is called to the inheritance by law, by testamentary institution or otherwise. There are three species of heirs corresponding with the different kinds of succession, to wit, testamaniary or instituted heirs, legal heirs, or heirs of the blood, and irregular heirs, and such heirs are entitled to the succession according to their respective legal status.

Under the rulings of the Department, the purchaser of a confirmed claim becomes, *ipso facto*, the legal representative of the confirmee, and as such is entitled to the scrip issued in satisfaction of the same.

It was held, however, by this Department, February 28, 1880, in the case of Joshua Garrett (7 Copp, 55), to wit: It is, I think, a reasonable presumption, that in the case of death succession was acquired by the party entitled thereto, and that the estate was duly administered. If so, it should be satisfactorily shown by what authority succession is reopened. If the estate was not administered that fact should be made to appear; also the facts in relation to heirs or the absence of heirs. It will be observed that the petition before recited, upon which the order of sale was based, is silent upon all these points.

Joshua Garrett may have sold his claim in his life-time, or it may have descended to his heir, or it may have been appraised with his assets many years ago and sold, or the estate may have been duly administered and the claim in question against the United States excluded from the assets by the party authorized by law to administer the estate; if the latter, it should be shown by what authority the estate seeks to revive the claim in question.

The Government should not only be satisfied that the proceedings relating to the sale of the assets are in all respects regular, but that the assets were subject to sale, and to this end the applicant should show all the facts relating to the death of the confirmee, the facts relative to heirs, the facts relative to the administration of the estate; and, if formerly administered, by whom and by what authority the succession is reopened; and if not administered, by what authority successions is opened many years after the death of the confirmee; also that the claim was a legal one at the time of his death, and was so regarded by his representatives. If there are no heirs that fact should be shown.

The petition states that administration is necessary to pay debts. If there were debts which ought to have been paid, and no administration of the estate was had at the time of Garrett's death, then it may have been lawful for a creditor of the estate to file the petition; but if there were no debts nor heirs I know of no reason why the Government should be called upon to satisfy this large claim, although confirmed to a person who has procured administration of the estate and bid in the claim, paying therefor just enough to pay the expenses of administration.

The title to this claim, if title it can be called, seems to have been

obtained in the manner above indicated ; and, if so, certificates should not issue in satisfaction thereof, for by so doing the fraud on the United States and on the heirs, if any such there be, would be consummated.

\* \* \* \* \*

The Department does not propose to question the validity of the title to property obtained by means of a succession sale, but it has a right to be satisfied that said property or claim against the Government was properly subject to sale and sold upon a proper application.

Although the record in this case is not quite so meager perhaps as that may have been in the case cited, the former nevertheless discovers the same patent material defects that are indicated in the foregoing citation from the latter case.

I see no reason, therefore, to justify a departure from such precedent, and your action is accordingly approved.

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## VI.—NEW MEXICO.

### 1. DONATIONS.

#### *QUALIFICATIONS—SETTLEMENT—CANCELLATION.*

##### **LOVETO VIGIL.**

Settlement May 1, 1876. Proof that claimant never made improvements, and had not attained the age to entitle him to donation.

The claim having been invalid in its inception is held for cancellation.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., April 13, 1883.*

**GENTLEMEN:** I have considered the donation claim of Loveto Vigil, certificate No. 254, issued September 12, 1881, upon notification No. 382, filed in your office on the same day and date, for the NE.  $\frac{1}{4}$  Sec. 31, T. 19 N., R. 32 E.

Vigil states in his notification that he took possession of and settled upon the land May 1, 1876.

In the final papers both the party and his witnesses swear that the residence and cultivation required by law commenced on the last-mentioned date, and continued until September 10, 1881.

Before you, on March 27, 1882, Pedro L. Pinard executed affidavits as preliminary to contesting this claim, and preferring charges seriously affecting the good faith of the donee.

Pinard swears (and his statements are corroborated by Mateo Lujan) that Vigil "never made any improvements of any kind or name whatever" on the land claimed; that he had not attained the necessary age to entitle him to a donation, &c.

Whatever the real facts may be upon these points, a hearing as requested is not needed to clear the record in this case.

Settlement and cultivation were not begun within the legal period, according to the honorable Secretary's decision of November 23, 1882, in the case of "Juan Rafael Garcia."

The land is within the limits of the Atlantic and Pacific Railroad, but any discussion of the claim of the railroad is unnecessary in this connection.

The donation claim being *invalid in its inception*, is hereby held for cancellation; and you will so notify the party in interest, allowing him the usual time within which to appeal from this decision, after which you will report, in due course of business, what action, if any, has been taken in the premises.

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#### *INVALID SETTLEMENT—CANCELLATION.*

##### **FERNANDO QUINTANA.**

The settlement not having been initiated within the time required by law, is invalid, and claim held for cancellation.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., April 20, 1883.*

**GENTLEMEN:** On October 16 last, you transmitted the application of Fernando Quintana for amendment in description of his donation claim No. 252, notification No. 111, for the SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and lots 2 and 3 Sec. 10, T. 13 N., of R. 24 E.

The party furnishes two supplemental affidavits, the statements in which are corroborated by the testimony of witnesses; by which it appears that his improvements are actually upon the SE.  $\frac{1}{4}$  Sec. 30, 14 N., 24 E., as ascertained by a private survey; that the erroneous description of the land was the fault of the district land officers, &c.

All the proof furnished shows that settlement and cultivation were begun by the settler on January 12, 1877, and continued until July 14, 1881.

The claim, therefore, is *invalid* because it was not initiated within the time required by law; and it is hereby held for cancellation, with the right of appeal within the usual time; at the expiration of which you will report what action, if any, has been taken by the party in interest.

The office tract book shows the SE.  $\frac{1}{4}$  Sec. 30, 14 N., 24 E., to be vacant public land, so far as the regular returns have been received here and posted.

You may therefore advise Mr. Quintana, that when his *donation claim* is canceled, he may apply to enter the same land under either the pre-emption or homestead laws, if he possesses the legal qualifications so to do.

*INVALID SETTLEMENT—RE-ENTRY ALLOWED.*

JOHN HARRISON.

Under Department decision of November 23, 1882, in case of Juan Rafael Garcia, claimant cannot perfect his claim, settlement having begun in 1882; notification to be canceled.

If claimant has made *bona fide* improvements on the land he should have opportunity to make pre-emption or homestead entry thereof.

*Commissioner McFarland to register and receiver, Santa Fé, New Mex., April 23, 1883.*

GENTLEMEN: I am in receipt of your letter of September 4 last, inclosing a notification (not numbered) filed in your office on the same date by John Harrison, as initiatory of a donation claim under the act of July 22, 1854.

The party claims the NE.  $\frac{1}{4}$  Sec. 24, T. 10 N., of R. 13 E., and alleges "settlement made February 3, 1882."

Under the Department decision of November 23 last, in the case of "Juan Rafael Garcia," Harrison cannot of course perfect a *donation* founded upon settlement begun in the year 1882; and you will therefore cancel the notification (herewith returned) and any record thereof which has been made on your tract or plat books.

You will also advise the party of the action taken; and if he has *bona fide* improvements on the land described, an opportunity should be afforded him to enter the same under either the pre-emption or homestead laws, if no valid objection to such a course appears when he applies to make entry.

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*SETTLEMENT—BONA FIDES—CANCELLATION.*

MANUEL CASADAS.

Whatever the bona fides as to occupancy may be, the settlement not having been commenced on or before January 1, 1858, is invalid, and claim held for cancellation.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., May 8, 1883.*

GENTLEMEN: I have considered the donation claim of Manuel Casadas, final certificate No. 39, issued at your office April 8, 1878, upon notification No. 109, for the NW.  $\frac{1}{4}$  Sec. 9, T. 4 N., of R. 24 E.

All the papers in the case show that Casadas commenced settlement and cultivation on the land described March 1, 1872, and continued the same for five years.

It appears that Theodoro Casadas y Bruabides filed homestead application No. 228 on August 20, 1876, for the same land. His final proof

was perfected September 8, 1882, and final certificate No. 772 was issued in the case October 12, 1882.

Whatever the facts may be as to the bona fide occupancy of the land by these parties, the donation claim of Manuel Casadas is *invalid* upon the face of the papers, for the reason that settlement and cultivation were not begun on or before January 1, 1858.

The claim is therefore hereby held for cancellation, with the right of appeal within the usual period.

You will so notify the party, and at the proper time report what action, if any, has been taken in the premises.

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*CANCELLATION—RE-ENTRY.*

RICHARD P. STRONG.

Homestead entry allowed to donation claimant after cancellation of his donation claim as invalid for want of commencement of settlement within the time required by law.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., June 16, 1883.*

GENTLEMEN: The donation claim of Richard P. Strong, certificate No. 269, notification No. 388, was held for cancellation, per office letter dated April 3 last, for the reason that settlement and cultivation upon the land claimed were not commenced within the time required by law.

By letter "C," of this date, I have allowed the settler to apply to enter the tracts involved (N.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , and lots 3 and 4, Sec. 34, T. 23 N., R. 18 E.), under the provisions of the homestead laws.

Therefore, and in accordance with the settler's request, the donation claim No. 269 has been *canceled* upon our files and records, and you will make proper annotations upon your records, advising Mr. Strong of the full action taken in his case.

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*ACTUAL AND CLAIMED RESIDENCE.*

JAMES M. GIDDINGS.

Where settlement by donation claimant is satisfactorily shown to have commenced in 1853, though only claimed from 1863, the notification may be amended.

*Commissioner McFarland to register and receiver, Santa Fe, N. Mex., June 18, 1883.*

GENTLEMEN: I have examined the donation claim of James M. Giddings, final certificate No. 61, issued at your office April 16, 1878, upon notification No. 19, for the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 8 N., of R. 22 E.

This is, no doubt, a meritorious case, as it appears by the settler's affidavit of the 7th ultimo, and the statements of persons known to this office, that the party removed to what is now the Territory of New Mexico, in the year 1835. He is now in the seventy-third year of his age, and states that he begun settlement on the land described May 10, 1853, and has maintained the same as his legal residence ever since, when not driven away by the Apaches and other hostiles.

The notification in this case will suffice, although residence is only claimed from April 1, 1863, which Mr. Giddings supposed was sufficient under the law; but you will supply him on receipt of this with a form of "settler's affidavit" (No. 2), and two of the latest forms of "proof," in order that the regular papers in this claim may be perfected, as far as possible, and thereafter submitted to the honorable Secretary of the Interior for consideration.

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***RELINQUISHMENT—RESIDENCE—RE-ENTRY.***

**PEDRO LUCERO Y LABATO.**

Claimant having made relinquishment of donation claim and applied to enter it under homestead law, the claim is canceled.

In cases of bona fide residence by donation claimants, they should have opportunity to save their improvements.

*Commissioner McFarland to register, and receiver, Santa Fé, N. Mex.,  
July 5, 1883.*

GENTLEMEN: I am in receipt of your letter of the 18th ultimo, inclosing duplicate donation certificate No. 320, issued at your office January 23, 1882, upon notification No. 442, to Pedro Lucero y Labato, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 2, T. 8 N., R. 21 E.

Upon said duplicate the settler has executed a relinquishment of all his right and title in the donation claim, and requests to be permitted to enter the same land under the homestead laws.

The claim has therefore this day been *canceled* upon the files and records of this office, and you will make proper annotations upon your records, advising the party of the action taken.

Labato's request to make a homestead entry will be made the subject of a further communication.

In cases of this character, where donation claims are canceled upon voluntary relinquishment, you will permit no person to initiate a claim of any sort to the tracts involved until you have been advised by this office whether the requests of donees to re-enter such lands under the homestead or pre-emption laws have been favorably considered.

Where there have been bona fide residence and cultivation by donation settlers they should have an opportunity to save their improvements, if it is found that they have not exhausted their rights under other public-land laws.

*CANCELLATION—RE-ENTRY.***NELQUINDOS FISHER.**

Though the claimant may have the necessary qualifications as donee, as to age, residence in Territory, &c., and have completed four years' residence and made valuable improvements on the land, settlement, not having been commenced within the time required by law, is invalid.

But if qualified as an entryman, and not having exhausted his rights as such, he may be allowed to apply to re-enter, under homestead or pre-emption laws, after cancellation of his donation claim.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., December 12, 1883.*

DECEMBER 12, 1883.

GENTLEMEN: I am in receipt of your letter of October 5 last, inclosing sworn statements by J. M. Reynolds and others relative to the donation claim in the name of Nelquindos (or Melquindos) Fisher, notification No. 191, upon which certificate No. 83 was issued at your office on March 30, 1880, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 25, T. 31 N., R. 27 E.

It appears from the proof furnished by the settler and his witnesses that he took possession of the described land February 1, 1875, and resided upon and cultivated the same continuously from that date until March 30, 1880, and "that the improvements on his claim consist of four houses, stable, corral, chicken-house, and 40 acres of cultivated land, and ditch for irrigating one-half mile long."

The claim is, however, *invalid* under the Department decision of November 23, 1882, in the analogous case of Juan Rafael Garcia (as residence and cultivation were not begun on or before January 1, 1858), and it is therefore hereby held for cancellation, subject to the right of appeal from this decision to the honorable Secretary of the Interior, within the usual time.

You will so notify Mr. Fisher, and be governed thereafter by the rules of practice in force.

The donee has not voluntarily relinquished his claim to the land described, and the proof furnished shows that he was born in Taos County, New Mexico, in the year 1828; that he was a resident there prior to the 1st day of January, 1853, and was "above the age of 21 years on the 22d day of July, 1854." Also, that he completed four years' residence upon and cultivation of said land.

If, therefore, he possesses the legal qualifications of an entryman, and has not exhausted his rights, he must be allowed to *apply* to re-enter said land under the provisions of the pre-emption or homestead laws after his donation claim has been actually *canceled* and cleared from the record.

It is alleged by J. M. Reynolds and others that Fisher was not qualified to initiate a donation claim, because he is not at this time more

than forty years of age. Furthermore, that he has abandoned the land in question.

Upon such *ex parte* statements I cannot deny to Mr. Fisher privileges which have been accorded to other donation claimants whose entries have been set aside under the Department decision of November 23, 1882.

If, on account of alleged total abandonment of the land, fraud in initiating the claim, or false testimony by the settler and his witnesses, any person desires to contest Fisher's *preference right* to re-enter the land, to show, in fact, that he has no equities in the case, or possessory rights which should be protected under the Department decision referred to, a regular hearing should be had in the matter before you, with due notice to all concerned, after the donation claim No. 83 has been canceled; and you will so notify the parties who executed said affidavits, viz, James M. Reynolds and John Hendelong, of Capulin, and Michael Devoy of Catalpa, Colfax County, New Mexico.

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**SETTLEMENT—HOMESTEAD—PRE-EMPTION.**

**ROMAN A. BACA.**

The settler has made pre-emption and homestead entries on tracts adjoining his donation claim, and, as represented, improved the whole.

The pre-emption entry having been patented, and the homestead suspended for conflict with the A. & P. Railroad grant, the claimant has exhausted his pre-emption and homestead rights, unless his homestead entry should fail.

The donation claim is also within the railroad limits and is invalid, settlement not having been made within the time required by law, and is held for cancellation.

*Acting Commissioner Harrison to register and receiver, Santa Fé, N. Mex., May 5, 1884.*

**GENTLEMEN:** The donation claim of Roman A. Baca, notification No. 28, upon which certificate No. 2 was issued at your office February 3, 1875, embraces the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 13 N., R. 8 W.; 80 acres.

By office decision dated December 10, 1875, the claim was held for cancellation, for the reason that the proof of continuous residence upon the identical land described was unsatisfactory. The settler appealed from said decision, but subsequently withdrew his appeal, and there the case seems to have rested.

The settler has also made a pre-emption entry and a homestead entry upon contiguous tracts; which lands, in connection with those claimed as a donation, "constitute one farm, on all of which he claims to have valuable improvements, and every acre of the three entries under cultivation," as reported to this office by Register Davis, under date of August 31, 1880.

The pre-emption entry has been patented (Santa Fé cash, No. 164) and the homestead entry is suspended on account of its being within the limits of the Atlantic and Pacific Railroad grant.

The donation claim is clearly invalid in its inception, and must be cleared from the record. The proof by Baca and his witnesses shows that settlement and cultivation were not begun until November 1, 1863, instead of on or before January 1, 1858, which is the latest date upon which settlement could legally commence under the Department decision of November 23, 1882, in the case of Juan Rafael Garcia.

The claim is therefore again held for cancellation for the reason last stated, and with the usual rights of appeal, and you will so notify Mr. Baca.

He has exhausted his homestead and pre-emption rights (unless his homestead entry should fail), and the land embraced in the donation is within the limits of the Atlantic and Pacific Railroad.

After the donation is canceled, therefore, if the settler conceives that there is any method by which he can legally acquire the land and save his improvements, under any law relating to the public domain, or through concurrent action of the railroad company and this office, he should submit his proposition in the matter before any further adverse right intervenes.

At the proper time you will report what action, if any, has been taken in the premises.

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## 2. PRACTICE—APPEAL.

### *SURVEYOR-GENERAL'S REPORT—APPEAL—REHEARING.*

#### *TOWN OF ALBUQUERQUE.*

Appeal does not lie from report of surveyor-general for New Mexico, to Congress, upon a private land claim.

The appeal is ineffective for want of notice to the opposite party.

The grounds alleged for rehearing do not sustain the motion for rehearing.

The motion for rehearing is informal and invalid for want of notice to the opposing party, and of the affidavits required by Rule 78.

Appeal from report and from decision denying rehearing dismissed.

*Commissioner McFarland to surveyor-general, Santa Fé, N. Mex., July 10, 1883.*

SIR: In the matter of the private land claim of the town of Albuquerque, in New Mexico, No. 130, now before me, the following proceedings are shown by the record to have been had:

On the 25th of July, 1881, Breeden & Hazeldine, esq's, of Albuquerque, attorneys in behalf of Ambrosio Armijo and nine others, named and designated as "president" and "commissioners," and (as expressed in their application) "divers other parties, not here named, as property-owners at this time in the town of Albuquerque and its vicinity," filed

their petition before you, under the eighth section of the act of Congress of July 22, 1854 (10 Stat., 308), praying that the claim, consisting of 4 square Spanish leagues, having for its center the flag-staff and adobe monument in the middle of the plaza, or public square, in the town of Albuquerque, might be investigated by you and recommended to Congress for confirmation.

Under date of September 5, 1882, you made report of your examination of the case, setting forth the testimony produced, with your opinion holding the claim to be valid and recommending its confirmation by Congress to the inhabitants of the town.

Afterwards (the date of filing not shown) De Witt Stearns and Thomas G. Douglas, claiming to be honorably discharged soldiers of the United States, presented their petition to you, stating that they had filed their declarations with the register at Santa Fé of their intention to enter, under the homestead laws, two specified sections (being part of the lands embraced within the limits of the private claim), which declarations, they say, were rejected by the register for the reason that the Commissioner of the General Land Office had withdrawn the land from entry pending the adjudication of the private claim.

They state in objection to your report, in substance:

That the hearing in the case of the private claim was *ex parte*, only the petitioners therein being represented.

That there are facts relating to the private claim, in addition to those introduced, which should be brought before you, to wit:

That all, or nearly all, of the two quarter-sections which they sought to enter are situated above the acequias, and have never been used for cultivation or grazing, being sand-hills not productive of anything, and, up to within two years, regarded as of no value.

That about two years before, when there was a prospect that said land would soon have a value, several persons who are among the petitioners for the private claim who had never before claimed beyond the acequias went upon the sand-hills, staked off the ground, and claimed to hold it by virtue of assignments under the Spanish grant.

That there never was a grant from Spain to the town of Albuquerque of the dimensions and location set forth, as is made manifest by applying the laws of Spain relied upon by the petitioners for the private claim, for the reason that it would conflict with other towns or settlements situated less than five leagues away, and therefore within the prohibition contained in law VI of Spain, cited by the original petitioners; and they specify the town of Pajarita and other settlements and grants as being within the prescribed distance.

That, as shown by the exhibits accompanying the original petition, the lands in and about Albuquerque were held by Spanish grants from the Crown to individuals in severalty, and that, by the Spanish law, lands granted in severalty, when once abandoned, reverted to the Crown.

That the claimants to those lands in the original petition hold by titles showing the proper metes and bounds and such as the present laws recognize and the courts are competent to protect.

That the two quarter-sections referred to were at the date of the treaty of Guadalupe-Hidalgo unoccupied and abandoned, and became the property of the United States and ought to be subject to the petitioners' entry.

That the prayer of the original petition is indefinite, asking for title to an indefinite number of persons, and if granted will only complicate the titles to all the lands in the tract.

And thereupon they ask that the case be reopened and reheard before you, and that it may be decided by you to disallow the petition of the original petitioners on the ground that they are sufficiently protected in their vested rights by the present laws; and that you recommend to this office and to Congress that the two quarter-sections referred to are part of the public domain and subject to the claim and entry sought to be made by them.

On the 15th of December, 1882, you rendered your decision reviewing the several allegations and arguments advanced, and denying the prayer of the petition.

And under date of December 18, 1882, Messers. Stearns and Douglas presented to you a petition in which they "pray an appeal" to this office from your opinion and recommendation upon the original petition in the case of the private claim, and also from your decision rejecting their application for a rehearing.

A transcript of the record in triplicate, embracing the foregoing proceedings, was transmitted by you to this office with your letter of February 28, 1883.

Under date of March 12, 1883, John J. Johnson, esq., of this city, as attorney for Stearns and Douglas, filed in this office additional objections "against the opinion and report of the surveyor-general" which have relation, as above purports, to your decision upon the private claim.

One of said objections only, your "denying them" (the objectors) "the right to prove that said lands were uncultivated and uninhabited," has reference to your decision denying their petition for a rehearing.

Two principal matters are thus presented for consideration—the appeal from your conclusion and recommendation approving the private claim, and the appeal from your decision denying a rehearing.

First. The eighth section of the act of July 22, 1854, which authorizes and directs the proceedings before the surveyor-general in cases of land claims in New Mexico under grants from Spain or Mexico, makes it his duty, "under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands, under the laws, usages, and customs of Spain and Mexico \* \* \*. He shall make a full report on all such claims as

originated before the cession of the territory to the United States \* \* \*, with his decision as to the validity or invalidity of each of the same \* \* \*, which report shall be laid before Congress for such action thereon as may be just and proper," &c.

I am not aware that an appeal from the report of the surveyor-general in any of the numerous cases reported under this act has ever before been attempted. A direct decision of this office or the Department as to the right of appeal cannot therefore be referred to; but the language of the statute is plain, and precludes the idea of such an appeal. The surveyor-general is required to ascertain the particulars indicated and make a full report thereof, *which report* is the matter to be laid before Congress for such action *thereon* as may be just and proper. Congress has called for no other action or expression from any one, and has reserved to itself the final decision upon the claim as reported. By prescribing specifically that the basis of its action shall be the report of the surveyor-general, it has negatived the supposition that such report can be subject to revision, modification, or rejection by any power or authority short of its own. It has authorized no intermediate tribunal or agent to act in the premises.

The proceeding for appeal is not accompanied by proof of service on the opposite party, as required by the rules.

Second. The rules provide that rehearings "will be allowed in accordance with legal principles applicable to motions for new trials at law." I have considered the matter alleged as grounds for a rehearing, and am of opinion that they do not, as regards the substance of the application, bring the case within the rules.

The surveyor-general is not required by the statute nor the instructions of the honorable Secretary of the Interior to give notice of the examination of private claims under foreign grants before him; and, as appears from the records, these examinations in his office have been uniformly *ex parte*. The same was the practice as to claims of like character before the Land Commission in California, as far as related to adverse claims and outside parties. The commission there, as well as the surveyor-general in New Mexico, was required to decide upon the validity of the claims presented; but in neither case has that requirement been held to authorize the adjudication of contests between conflicting claims; consequently the giving of notice to outside parties was not necessary. The issue in both cases is between the grant claimants and the United States. In cases before the California commission the United States was represented by a special agent appointed for the purpose. In the New Mexico cases the Government appears to have been represented solely by the surveyor-general.

The land sought to be entered by the objectors is shown by the plat annexed to their petition for rehearing to be within the claimed limits of the private claim. The facts alleged (that the two quarter-sections referred to have never been used for cultivation or grazing, &c.; that

about two years before several persons among the petitioners of the private claim, who had never before claimed beyond the acequias, went upon the same, staked off the ground, and claimed to hold it by virtue of assignments under the Spanish grant, and that said two quarter-sections were at the date of the treaty of acquisition unoccupied and abandoned), would therefore, if proved, be immaterial and inadmissible. It may, in case of confirmation of the claim, be competent evidence towards determining the correct location.

The proof of the existence of other towns or settlements within the alleged five leagues limitation, and the claim that therefore there was no grant to Albuquerque of the dimensions and locality claimed, would raise a question in the case not within your province to determine.

The surveyor-general is by the statute required to report upon the origin, &c., of claims presented, with his opinion as to their validity (which has been practically determined to relate to their regularity and genuineness), not to hear and determine contests between conflicting grants. It often occurs that there are overlapping grants, each regular and "valid" upon its face. In such cases, the duty of the surveyor-general is to report upon each by itself, and according to its character, in his judgment, for genuineness; and such has been the practice. The questions of priority and superiority of title are not passed upon by officers of the Executive Department, but are left to the proper judicial tribunals. This testimony would therefore be inadmissible if a rehearing should be ordered.

The inference drawn from what is claimed to be shown by the exhibits introduced before you by the grant claimants could only be employed by way of argument, to show that under alleged provisions of Spanish law such a grant as you have reported could not have been made, the lands in question being held by individuals in severalty, subject to abandonment, &c.

The lands under town or community grants, portions of them at least, are set off to individuals and held in severalty, and are subject to transfer, abandonment, and in case of abandonment to be regranted. The exhibits referred to were part of the testimony in the case as presented, and doubtless received due consideration. There is no allegation that they did not.

The prayer of the claimant's petition does not give shape to the confirmation, if confirmation be made. That is within the control of Congress. A rehearing would have no effect upon the prayer of the petition.

But, aside from matter of substance, the objectors did not comply with the rules as regards form and practice.

Rule 71 provides that—

The proceedings in hearings and contests before surveyors general shall, as to notices, depositions, and other matters, be governed, as nearly as may be, by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

Rule 76 provides that—

Motions for rehearings before registers and receivers \* \* \* will be allowed in accordance with legal principles applicable to motions for new trials at law *after due notice to the opposing party.*

The petition of the claimants is subscribed by their attorneys, whose residence is stated; but no notice is shown to have been given them.

Rule 78 requires that—

Motions for rehearings and reviews *must be accompanied by an affidavit* of the party or his attorney that the motion is made in good faith and not for the purpose of delay.

No affidavit containing the declaration required by the rule, or its equivalent, accompanies the petition for rehearing or is found in the case.

I shall not at this time consider whether the objectors have acquired a standing in regard to the land in question, which entitles them to appear in this case, since their appeals from the register's rejection of their declarations are pending undecided. It is possible that the proceedings taken would give them preference rights in case the private claim should be rejected by Congress, or, if confirmed, the land should be found to be not embraced within it.

The conclusions reached are:

First. That appeal does not lie to this office from your report on the private claim.

Second. That the appeal taken therefrom is ineffective for want of notice to the opposite party.

Third. That the grounds alleged for rehearing do not sustain the motion for rehearing.

Fourth. That the motion for rehearing is informal and invalid for want of notice to the opposing party, and of the affidavit required by Rule 78.

Fifth. That both appeals be dismissed.

The transcript in the case, with the objections, argument, and accompanying papers filed in this office by Mr. Johnson, and a copy of this decision, will be transmitted to Congress in due course.

You will give notice to Messrs. De Witt Stearns and Thomas G. Douglas of this decision, and that I shall suspend action on the case at issue for twenty days from the service of such notice to enable them to apply to the honorable Secretary of the Interior for an order, in accordance with Rules 83 and 84, and advise this office of the date of the service of such notice. The attorney of the parties, resident here, will be notified from this office.

## UNDER RULES OF PRACTICE 83, 84.

## TOWN OF ALBUQUERQUE.

When appeal has been denied by the Commissioner, application to the Department for an order, under Rules 83 and 84, that the record in the matter be sent up, will be denied in the absence of facts set forth justifying the exercise of the supervisory power.

*Secretary Teller to Commissioner McFarland, July 17, 1883.*

I transmit herewith an application of John J. Johnson, esq., praying for an order upon you to send up the records and papers in the matter of the appeal of De Witt Stearns and Mr. Douglass, who applied to enter tracts in Sec. 20, T. 10 N., R. 3 E. of the New Mexico principal meridian, under Section 2304 of the Revised Statutes.

Upon examination of the petition I fail to find any facts that would justify the exercise of supervisory power by me, and therefore decline to interfere. The motion is denied.

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**3. PRELIMINARY SURVEY.****PRELIMINARY SURVEY—CORRECTION.****FELIPE TEFOYA.**

Preliminary survey not to be taken as authoritative location of claim; final location is left to Land Department to be made in conformatity with confirmation, and cannot be made until after confirmation.

*Commissioner McFarland to surveyor-general, Santa Fé, N. Mex., September 19, 1883.*

SIR: In reply to your letter of August 3 ultimo, relating to the survey of the Felipe Tefoya claim, No. 99, in which you recommend that the present survey thereof be disapproved, and a corrected survey directed to be made to conform to the area granted, I have to say that the claim is before Congress awaiting its action; that the survey is merely preliminary, and is not to be taken as a final or authoritative location of the claim; that it has not been the custom of Congress to confirm claims of this character according to the preliminary surveys thereof, but to leave their final location to the Land Department to be made to conform to the act of confirmation; that the location of the claim cannot be properly made until after confirmation, if it shall be confirmed, and if not confirmed the correction of the survey recommended would be a loss of labor and expense. For these reasons I decline to give the direction suggested.

A copy of your letter will be transmitted to Congress for its information when acting upon the claim.

**4. PRIVATE CLAIMS.*****SURVEY DIRECTED BY DEPARTMENT.*****CHILILI TOWN GRANT.**

The survey of the public land and of private land claims is within the jurisdiction of the General Land Office.

Where the Department has given direction for the survey of a private claim, on return of the survey it rests with the Commissioner to decide whether it conforms to the direction.

*Secretary Teller to Commissioner McFarland, December 4, 1883.*

SIR: On July 22, 1881, you submitted to this Department a statement in the matter of the survey of the Chilili Town Grant, in Bernalillo County, New Mexico, confirmed by the act of December 22, 1858 (11 Stat., 374), and asked instructions thereon.

In reply my predecessor, July 28 following, directed the survey of said grant theretofore made by Deputy Surveyors Sawyer and McElroy to be set aside, and that the granted lands be located by a new survey, with certain named boundaries, which was made by Deputy Surveyor Mailand.

On objection by the grant claimants to this new survey, in that it does not conform to my predecessor's directions, and does not include certain land which should have been included, you transmitted to me, under date of the 22d ultimo, the papers in the case, and without deciding any question, but suggesting an opinion that the Mailand survey does conform to my predecessor's directions, ask of this Department whether it shall be approved or further amendment be directed.

The survey of the public land and of private land claims is within your jurisdiction under the general laws, and the act of December 22, 1858, specially imposes upon you consideration of the claim in question. I am unwilling, therefore, to assume your duties, and act upon this claim or its survey, except upon appeal from your decision in due course of proceeding, or under my general supervisory powers. There is no appeal before me, and I find no present reason for exercising such power. Whether or not the survey in question conforms to my predecessor's directions is a matter for your determination, and I return the papers for such action as you may see fit to give the case.

*CONFLICT—BOUNDRY.***ALEXANDER VALLE GRANT.**

The claim having been recommended and confirmed as "in the vicinity and beyond the limits" of the pueblo, the survey thereof must be amended so as not to conflict with the patented pueblo.

*Acting Commissioner Harrison to surveyor-general, Santa Fé, N. Mex., May 14, 1884.*

SIR: In the matter of the survey of the Alexander Valle grant, in San Miguel County (New Mexico private land claim No. 18), an examination of the record shows the following facts:

The grant was petitioned for by Juan de Dios Peña for himself and in the name of Francisco Ortiz (second), and Juan de Aguilar. In the petition the tract solicited is described as "situate in the vicinity of the Pecos pueblo, to the west beyond the limits of the pueblo," but giving no description by boundaries.

After the customary references and reports, one of which references was to the "Protector of the Indians," the governor, Maynes, made the following order, dated June 30, 1815:

The first alcalde, Don Martias Ortiz, being acquainted with the order of the establishment, will comply with the petition, who will measure the pieces (suertes) of tillable land, limiting the grants solely to the land they plough and plant, with the obligation that they shall inclose the same to prevent the recovery of damages, because the grounds must be common and public pastures for the Indians and citizens that have a right therein.

The alcalde, in compliance with the direction, certifies that having measured the entire league of the Indians, commencing at the cross of the cemetery, up the river, on the residue he gave possession to the grantees, &c.

Then follow sundry conveyances, bringing the title as claimed down to Alexander Valle, the claimant.

The petition to the surveyor-general, for confirmation under the act of July 22, 1854 (10 Stat., 307), describes the tract claimed as being known as the rancho of Alexander Valle (formerly Pino's), of the canon of the Pecos River, and bounded and described as follows:

Commencing at the point of rocks to the south of the tract where the principal house stands; thence in a direct line to the north, passing along the foot of the "Cuchillas" to an island above the Lisbon Spring, and from thence running a straight line to the east until it reaches the chain of the "Cuchillas," and from thence following the line of the same to the south until it terminates at the point of rocks, the place of beginning.

On the examination before the surveyor-general no testimony was taken having relation to the boundaries.

In his decision recommending the claim for confirmation, Surveyor-General Pelham refers to its origin and limits in the following terms:

On the 28th day of March, 1815, Juan de Dios Peña for himself and in the name of Francisco Ortiz, jr., and Juan de Aguilar, petitioned Acting Governor Maynez for a tract of land situate in the vicinity and beyond the limits of the pueblo of Pecos, in what is now San Miguel County, with the boundaries, in said petition mentioned.

The claim was confirmed by the act of June 21, 1860 (12 Stat., 71), "as recommended," without specification of boundaries or quantity.

The survey of the confirmed claim, now under consideration, was executed by United States Deputy Surveyors Sawyer and McBroom in May, 1876; was approved by you November 10, 1876, and returned to this office with your letter of November 11, 1876.

The plat does not show the connection of the surveyed tract with the township surveys, nor with the survey of the pueblo of Pecos. But the plat of the public surveys, T. 16 N., R. 12 E., New Mexico Principal Meridian, approved by you September 30, 1882, shows that the Alexander Valle tract as surveyed conflicts to a small extent with the patented survey of the pueblo, its south boundary line being located some 8 to 10 chains within the line of the pueblo.

By reference to the foregoing, it will be seen that every description of the tract which mentions it in connection with the pueblo places it outside of the pueblo. The petitioners for the grant asked for a tract in the vicinity, *but beyond the limits* of the pueblo; the alcalde in giving the possession first measured the league of the Indians, and *on the residue* gave the possession. Surveyor-General Pelham, in recommending the claim for confirmation, describes it as in the vicinity, *but beyond the limits* of the pueblo, following in that respect the original petition. The confirmation was in accordance with the recommendation.

The pueblo of Pecos was recognized under the Spanish rule by a grant to the Indian village of that name, by Don Domingo Jironza Petros de Cruzate, governor and captain-general, September 25, 1689, more than a century before the date under which the Alexander Valle grant is claimed. It was confirmed by the act of December 22, 1858 (11 Stat., 374), located by the survey hereinbefore referred to, and patented to the pueblo November 1, 1864.

There is no ground upon which the conflict of the survey under consideration with the pueblo patent can be maintained. You are therefore instructed to amend the Sawyer and McBroom survey of the Alexander Valle grant so as to conform its south boundary to the north patented line of the pueblo. The remaining lines seem to conform to the description given by the claimant in his petition to the surveyor-general for confirmation; and there is nothing that suggests their incorrectness.

You will give notice of this decision to all parties interested, informing them also of their right of appeal, and advise this office of the time and manner of service of such notice; and if appeal be not taken within the time allowed by the rules, amend the survey as above directed and make return thereof to this office as soon as practicable.

*CONSTRUCTION AS TO BOUNDARY—DIRECTION FOR COMPLETION OF SURVEY.*

## LAS VEGAS TOWN GRANT.

*Commissioner McFarland to surveyor-general, Santa Fé, N. Mex., May 27, 1884.*

SIR: Your letters of 10th and 13th, referring to my instruction of the 5th instant, relating to the completion of the survey of the Las Vegas grant, have been received and considered.

Regarding the western boundary and the conflict of the grant, as surveyed, with the preliminary survey of the unconfirmed San Miguel del Bado grant, by reference to the decision of this office of May 31, 1878, approving the Pelham and Clements survey of Las Vegas, with certain amendments then directed, to conform it to the lines of Tecolate and the Ortiz grant, it will be seen that though the San Miguel del Bado had not then been surveyed, the boundary between it and Las Vegas was to some extent considered and passed upon.

The grant of San Miguel del Bado was made in 1794, the boundaries being "on the east the Cuesta, with the little hills of Bernal," and "on the north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente."

The grant to the town of Tecolate, which lies east of San Miguel and is bounded north and east by Las Vegas, was made in 1824. Its western boundary is "the cañon of Tres Hermanos."

Las Vegas was granted in 1835, bounded on the north by the river Sapello and on the west by the boundary of the grant to San Miguel del Bado. The survey makes the northwest corner at the point as described in the field notes, "near the source of the Sapello"—in fact, where the Rio Sapello issues from the mountains—and the west boundary, as also described in the field notes, a line "south along the base of the mountain." The plat of the survey shows the continuation of this line along the base of the mountain, south, until it intersects the north line of Tecolate at the northwest corner of the latter grant.

The western boundary of Tecolate, the cañon de Tres Hermanos, which has been followed by the several surveys made of that grant, is represented as running from the northwest corner southeasterly, and turning more easterly at a point nearly north of the Bernal hill.

The preliminary survey of the San Miguel grant makes the south half of the eastern boundary a line governed by the two points, the Bernal hill and the town La Cuesta, being a northeasterly and southwesterly line extending between the two points named, and southerly from La Cuesta, in the same direction, to the southeast corner; and for the north half of said boundary a line due north from the Bernal hill, thus causing the grant to largely conflict with both Tecolate and Las Vegas.

(If the line from Bernal hill, one of the boundary points taken, should

run due north, should it not from La Cuesta, the other boundary point, run due south?)

The north boundary of San Miguel being the Rio de la Vaca, *from the place called the Rancheria to the Agua Caliente*, these two points would seem to be the northwest and northeast corners of the grant. They are not named as points in the boundary, or as governing the boundary, in a way that it might extend in either direction, more or less beyond them, but are made the *termini*. The boundary is to extend *from one to the other*.

Rancheria is made the northwest corner of the preliminary survey, but the Agua Caliente is represented at about midway the north line, which is extended east to intersect the line run north from the Bernal hill. A line from the Bernal hill northwesterly to the Agua Caliente will correspond very nearly with the course of the cañon de Tres Hermanos, the western boundary of Tecolate, and relieve the three grants from conflict.

The grant to Tecolate was subsequent to that to San Miguel; but it is only reasonable to presume that the granting authority had knowledge of the matter with which it was dealing, and did not act in it in such manner as to produce a conflict between the two grants, and defeat, to a large extent, the purpose intended.

The San Miguel survey is not before me for affirmative action. Whether it correctly locates the claim or not cannot be definitely determined until after its confirmation by Congress, if it shall be confirmed. Conforming the eastern boundary to the western boundary of Tecolate, or locating it by a line governed by La Cuesta and the Bernal hills and extended northerly, will relieve the Las Vegas grant from the conflict shown by the San Miguel preliminary survey.

If the question were an open one, I should be inclined, as between Las Vegas and San Miguel, to extend the former to the west, rather than to restrict it within the present limits, on account of the preliminary survey of the latter. As it is presented, I shall adhere to the decision of this office of May 31, 1881, aforesaid. The boundary approved by that decision has not been objected to by the claimants of either grant, and must be regarded as established.

You are, therefore, instructed, at as early a day as practicable, to conform the Pelham and Clements survey of Las Vegas to the northern and eastern boundaries of Tecolate, as located by the resurvey thereof by Deputies McBroom and Taylor, in December, 1881, and the south line to the northern line of the patented Ortiz grant, as heretofore directed; and to take such measures as may be necessary to correct and close the remaining lines of the survey as located by Pelham and Clements.

You will give notice of this decision to the parties interested, informing them of their right of appeal, and advise this office of the date and manner of service of such notice; and if appeal be not taken within the time allowed by the rules, execute the instructions herein given, and make the usual return of the corrected survey to this office.

*BOUNDARIES—INTERFERENCE.***OJO DEL ESPIRITU SANTO.**

Where a river and a point of table land are named as the western boundary of a grant, the point of table land forming the southwest corner, and the river, after a northeast and northwest course, running east for  $3\frac{1}{2}$  miles, when it makes a short turn northeasterly at a point nearly due north from said point of table land, the line should be run north from the point of table land to the turn in the river aforesaid, and not northwesterly to the river.

Especially as the latter course produces a conflict with a senior, though unconfirmed, grant, June 14, 1884.

*Commissioner McFarland to the surveyor-general, Sant Fé, N. Mex.*

SIR: I have examined the survey Ojo Spiritu Santo grant, made by United States Deputy Surveyors Sawyer and McBroom in June and July, 1876, approved by you November 10, 1876, and returned to this office with your letter of November 11, 1876.

The tract of land which this survey was intended to locate was granted by Don Alberto Mainez, governor of the Province of New Mexico, May 24, 1815, to Luis Maria Cabeza de Baca and his fifteen children, upon his petition therefor, in which the boundaries are described as follows:

On the east the summit of the Jemez Mountain, on the west the Puerco River and the point of the Prieto table land, on the north the table land commonly called "La Ventana," on the south the cañon of La Querencia and the boundary of the farm of Don Antonio Armento.

The grant and the act of juridical possession refer to the petition for description of boundaries. The report of the surveyor-general, in which he recommends the claim for confirmation, describes the land claimed by the same boundaries. It was confirmed by Congress by the act of March 3, 1869, as claim No. 44 (15 Stat., 342).

The survey in question appears from the plat and field notes to conform substantially to the above description (except, I think, in one particular, hereafter mentioned), making the south foot of the table land of La Ventana the governing point of the north boundary, the summit of the Jemez Mountain and a line south from its south terminal point the boundary on the east, and on the south a line from the cañon of the Querencia west to the point of the Prieto table land. These lines follow the description adopted in the title papers and seem to be correctly located.

The western boundary, as will be seen by reference to the description, is "the Puerco River and the point of the Prieto table land."

The survey makes the point of the Prieto the southwest corner, which is doubtless correct; but from thence for the west line runs northwest-  
erly, reaching the Puerco River at a point where its course is something west of north, from which it turns to nearly due east, continuing on that course about  $3\frac{1}{2}$  miles, when it makes a short turn northeasterly,

and follows that general direction by various courses to the northwest corner of the tract; the bend last mentioned at the end of the 3½ miles east course being almost due north from the point of the Prieto table land at the southwest corner of the tract.

The courses run from the southwest corner to the point at the end of the east course above described, occasion the conflict with the senior unconfirmed grant of Ignacio Chaves and others, as shown on the plat of the preliminary survey thereof, approved by you May 31, 1879, and returned to this office with your letter of June 7, 1879.

Without regard however, to this fact of interference, in my judgment the tract should not be extended west of the point of the Prieto, but the line should be run from thence north to the Puerto at the point where it turns from the east course northeasterly as above described, and I direct the survey to be amended in that particular.

There are also interferences with the survey in question, as follows: On the east to a small extent by the grant of San Isidro; on the west, also to a small extent, by the Joaquin Mestas grant, and to its whole extent by the grant to the pueblos of Jemez, Zia, and Santa Ana which covers the whole of the Ojo Espiritu Santo as surveyed.

These three grants are severally senior to that of the Ojo Espiritu Santo. The San Isidro has been confirmed and surveyed, but the survey not finally approved; the others are before Congress awaiting action on the applications for confirmation. Preliminary surveys have, however, been made which show the interferences referred to. If these two grants shall be confirmed and the three finally located in accordance with the present survey, or otherwise, so that the interferences are not obviated, the matters in conflict will remain to be thereafter adjusted. In locating conflicting claims of this character, the officers of this Department cannot determine questions of title, but must follow the granted and confirmed boundaries, leaving matters of interference to be adjusted by mutual arrangement of the parties interested, or by adjudication between them in the proper courts (Rancho Santa Ana, Sec'y's Decision, April 14, 1883; Rancho Entre Napa, 6 Copp's L. O., 37; Miller v. Dale, 92 U. S., 477).

You will please give notice to the parties interested of this decision, informing them also of their right of appeal, and advise this office of the date and manner of service of such notice; and if appeal be not taken within the time allowed by the rules, as soon as practicable execute the amendment to the survey herein directed, and make return thereof to this office in due course.

## VII.—OREGON.

## DONATIONS—ABANDONMENT.

JOHN P. BLALOCK.

Where the donation claimant made improvements, but did not actually reside upon the land improved; afterwards removed to another part of the State, and the improvements were sold by his direction; the decision of the local officers holding the claim abandoned affirmed.

*Acting Commissioner Harrison to register and receiver, Oregon City, Oreg., August 13, 1883.*

GENTLEMEN: I am in receipt of your letter of the 26th of March last, transmitting here the testimony taken at your office, pursuant to instructions from this office of December 19, 1882, in the matter of the abandonment by John P. Blalock of his claim to 320 acres of land as a donation in Sec. 15, T. 10 S., R. 1 E., Oregon, notification No. 5726, under the act of Congress of September 27, 1850, and supplemental legislation, Stats. 9, p. 496.

It appears from the whole record in this case, as it now exists, that the claimant made, or caused to be made, some improvements on the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of said Sec. 15, being a portion of the land claimed as aforesaid. The proof furnished by Blalock shows that his residence and cultivation on said land commenced on the 25th of January, 1855, and was continued until the 2nd of February following.

It also appears by evidence now on file in this case that Blalock never resided upon the land in question, but, on the contrary, had his residence at the house of one of his neighbors during the whole period he was improving and cultivating said donation, and up to the time he took up his residence in another part of the State; and that thereafter, and pursuant to Blalock's direction in 1856, or 1857, said improvements were sold. After this sale other parties claimed the land covered by said donation, and the records of this office show that the greater portion of the same has been patented to these claimants.

The lands herein referred to which have been patented to other claimants include those upon which Blalock placed his improvements.

In view of the foregoing, your decision in this case holding that the acts of the donee have been such as to constitute an abandonment of said claim, and to have worked a forfeiture of his rights thereto, is affirmed, and the claim of said Blalock to the land covered by his notification No. 5726, in Sec. 15, T. 10 S., R. 1 E., Oregon, has this day been canceled upon the records of this office, and you will note the cancellation upon your records and acknowledge the receipt of this communication.

*ERROR IN CERTIFICATE—AMENDMENT OF PATENT.***WILLIAM BLAND.**

Where a tract forming part of donation claim was omitted from certificate, and patent erroneously issued thereon, an amended patent may issue covering the whole claim, the erroneous patent not having been surrendered; and this notwithstanding the objection that the omitted tract had been disposed of by the State as school lands.

*Acting Commissioner Harrison to register and receiver, Oregon City, Oreg., June 24, 1884.*

**GENTLEMEN:** Public surveys were extended over T. 2 S., R. 1 E., Oregon, and the plats thereof approved June 30, 1852.

William Bland claimed 640 acres in said township as a donation, under act of September 27, 1850 (9 Stats., p. 496), and supplemental legislation, covering, as per his notification No. 729, filed August 20, 1852, parts of Secs. 26, 35, and 36.

On July 31, 1862, your office issued certificate No. 1256 for said donation, describing the land claimed as being parts of Secs. 26 and 35, *omitting* the tract claimed in Sec. 36.

Upon this certificate patent was issued February 20, 1866, and was delivered February 1, 1867. In May, 1868, Bland applied for an amended patent to include the lands covered by his notice in Sec. 36; to which application the governor of Oregon objects, on the ground that these lands have passed to the State as school lands and have been disposed of as such.

The outstanding patent has not been surrendered, nor is it necessary, in my judgment, that it should be, as an amended patent, when issued, would cover the land already patented and contiguous lands claimed in Sec. 36.

I do not find among the papers any relinquishment or evidence of abandonment by Bland of the tracts claimed by him in said Sec. 36, and I therefore conclude that a clerical error was made in the certificate, which error was carried into the outstanding patent, and should be corrected by the issue of a patent which shall include *all* the lands for which notice was filed as aforesaid, among which are lots 1, 2, 3, and 4, and the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of said Sec. 36, claimed by the State of Oregon as school lands.

You will notify the governor of the State of Oregon of this ruling, and advise him of his right of appeal therefrom, fully informing him of the time allowed by the rules of practice now in force within which to take such appeal.

After the time for appeal has expired you will make the usual return to this office.

**VIII.—SCRIP CASES.*****REPAYMENT—SCRIP LOCATION—ASSIGNMENT BY FRAUDULENT HOLDER.*****ANTONIO VACA.**

Where entry has been made by scrip assigned by a fraudulent holder, repayment of purchase money will be refused, even though the assignee entryman was ignorant of the fraud.

Besides, the law requires the applicant for repayment to relinquish the land, which is not done in this case except upon named conditions.

*Secretary Teller to Commissioner McFarland, December 27, 1883.*

SIR: I have considered the application of Albert S. Foster for repayment of purchase money under the act of June 16, 1880 (21 Stat., 287).

The facts relative to the subject-matter hereof are set forth in your letters of April 5 and May 8 to this Department, and in my letter of June 13, 1882, to the President (House of Representatives Ex. Doc. 212, first session Forty-seventh Congress), from which it appears that the private Louisiana land claim of Antonio Vaca, deceased, was confirmed by the act of February 28, 1823 (3 Stat., 72), for 2,708 acres, and that, not having been surveyed nor located, the surveyor-general of Louisiana, August 18, 1877, issued and transmitted to your office nineteen certificates of location in satisfaction of the claim, under the act of June 2, 1858 (11 Stat., 294); that, on recommendation of your office, Secretary Schurz, November 19, 1877, authenticated the certificates, and they were transmitted to the surveyor-general of Louisiana for delivery to the person entitled thereto, and that he delivered them to one Hawford, whose claim thereto was without right, or, as expressed in their letter of October 26, 1882, to your office, by Messrs. Dillaye & Mason, attorneys for A. H. Sands and J. Ledyard Hodge, supposed to be the rightful owners of said scrip, "the whole proceeding on which Hawford's title was based was extrajudicial, fraudulent, and void."

The certificate of location in question (No. 364 C) authorized "Antonio Vaca or his legal representatives" to locate 160 acres upon any public land of the United States subject to sale at private entry, in part satisfaction of Vaca's claim, and it appears from an indorsement thereon that, November 27, 1877, Hawford assigned and transferred the same to Albert S. Foster, who located it July 7, 1879, upon lot 2 of the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of lot 1 of NW.  $\frac{1}{4}$  of Sec. 18, T. 24 N., R. 1 W., in the Marysville, Cal., land district. Foster now applies for repayment of his purchase money, under the second section of the act of June 16, 1880, upon the ground that this Department has ruled that neither Hawford nor his assignee had or has any legal claim to the land.

It is not necessary here to consider whether money may be refunded under this act upon an erroneous scrip location, because the application of Foster must be decided on other grounds. To grant it would

be to recognize the validity of Hawford's claim, which has been already held fraudulent, and to regard as valid in the hands of an assignee a claim which is invalid in the hands of the original party; and I am unwilling to assume that an invalid claim imposed upon your office as valid has such standing as entitles it to consideration under the act of June 16, which authorizes repayment where an entry "has been erroneously allowed and cannot be confirmed." I do not think this act can properly embrace an entry which was not merely erroneous but was founded in fraud, even though the assignee entryman be ignorant of the fraud, and especially in a case where the assignee is not the "legal representative" of the confirmee.

Besides, the act requires that upon application for repayment of purchase money the applicant shall relinquish the land. Foster does not do this, except upon certain named conditions. This Department will not act upon a conditional relinquishment, nor except upon full compliance by the applicant with the requirements of the act.

For these reasons I concur in your recommendation, and reject the application.

It is understood that Congress failed to act in this matter at its last session, as recommended by my letter of June 13, 1882, because of want of time merely, and not because of hostility to the claim of the alleged rightful owners of the scrip. Should they see fit to further press the same at its present session, they will have my continued recommendation to that effect.

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*CERTIFICATES OF LOCATION—ASSIGNMENT.*

MARK L. ELKINS, JR.

Assignment of certificate in blank not sufficient to transfer same to party claiming. Where doubt exists as to spelling of name of transferee, proof as to same and identity of party required.

*Acting Commissioner Harrison to register, Fargo, Dak., August 14, 1883.*

SIR: Certificates of location Q 5 and Q 6, issued by this office March 15, 1878, in satisfaction of the private land claim of Mark L. Elkins, jr., under act of June 22, 1860, and supplemental legislation, and located by Peter Verne or Veren on the SW.  $\frac{1}{4}$  of Sec. 20, T. 141 N., R. 49 W., Dakota Territory, are held suspended upon the records of this office for the reason that the certificates have never been assigned to the party in whose name the locations appear to have been made.

It appears by reference to the instruments indorsed on the backs of said certificates that under date of March 19, 1878, Albert C. Janin, as the attorney in fact of said confirmee, executed assignments in blank, and the said certificates are herewith returned in order that the party in interest may have an opportunity to perfect said assignments. You

will also require the party to furnish an affidavit showing the true orthography of his name, and that the party who made said locations is the identical person to whom said certificates were assigned.

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*CERTIFICATE OF LOCATION—MISNOMER OF ASSIGNEE.*

**CHARLES H. BEATTIE.**

Certificate to Charles H. *Beattie*; assignment to Charles H. *Peattie*; proof as to correct spelling of name and identity of party required.

*Acting Commissioner Harrison to register, Fargo, Dak., August 14, 1883.*

SIR: Upon an examination of the papers in pre-emption entry for W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  Sec. 20, T. 141, R. 51, Dakota Territory, paid for with certificate of location R 309, act of June 22, 1860, and supplemental legislation, I find that the certificate of entry issued in name of Charles H. *Beattie*, and application is signed by same person, but the certificate was assigned to Charles H. *Peattie*.

The case is therefore held suspended, and you will call upon the party to furnish an affidavit showing the true orthography of his name, and that he is the identical person who made said entry and to whom said certificate was assigned, upon the receipt of which you will transmit the same to this office.

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*MERGER—RES JUDICATA—INDEMNITY.*

**CHILDREN OF PAUL TOUPS.**

The claim of the Toups children and that of St. Amand were merged in Lanfear by act of Augnst 18, 1856. The survey, approval, confirmation, and patenting of the Toups claim comprehend a location and satisfaction thereof by the United States.

The case appears to be *res judicata*, and the parties estopped both by conduct and the record from receiving indemnity scrip under the general scrip act of June 2, 1858.

Scrip cannot issue in the Toups claim upon the first confirmation by the "old board"; and where it is judicially determined that Lanfear and his successors have the best title to a parcel of the land in controversy, the property vests in them under the confirmatory act and patent; but where the rights of other claimants are found to be superior, the patent becomes inoperative, and no confirmation to Lanfear under the act of 1856 attaches.

*Acting Commissioner Harrison to surveyor-general, New Orleans, La., October 5, 1883.*

SIR: On July 13, 1882, your predecessor prepared and transmitted to this office, for authentication, twenty-one certificates of location, numbered 433 A to 433 U, aggregating 1,141.34 acres, under the provisions of the third section of the act approved June 2, 1858 (11 Stat., p. 294).

in part satisfaction of the private claim of "*the children of Paul Toups*," originally confirmed as No. 74 by the old board of commissioners for the eastern district of Orleans Territory. (See Am. State Papers, Green's ed., vol. 2, p. 324.)

There was a conflicting private claim in the name of *Daspit St. Amand* entered as No. 529 in the report of Harper and Lorrain, dated November 20, 1816 (State Papers, 3, 225), and confirmed by the act of Congress approved May 11, 1820. (3 Stat., 573.)

These claims were merged in *Ambrose Lanfear* by the special act of Congress approved August 18, 1856. (11 Stat., 473.)

The lands were patented to Lanfear, August 7, 1876, under said confirmation, and a survey made by United States Deputy Surveyor Maurice Hanké, and approved by Surveyor-General McCulloh, May 5, 1855.

The conflict between the Toups and St. Amand claims was decided by the district officers at New Orleans, March 13, 1876, in accordance with the sixth section of the act of March 3, 1831. (4 Stat., 492.)

It being held that the children of Paul Toups had a prior confirmation, scrip was issued October 24, 1879, and delivered to the heirs of Lanfear, to the extent to which the St. Amand claim had been reduced by said adjustment of the interference, viz, 1,670.45 acres.

This action was taken with the concurrence of the Department.

The heirs of Lanfear now make application for scrip in satisfaction of that portion of the Toups claim northeast of the Bayou Crocodile, embracing Secs. 120, T. 13 S., and 37, T. 14 S. of R. 20 E., late southeastern land district, Louisiana.

The location of the Toups claim to cover the above-described sections led to a heated controversy between Ambrose Lanfear and numerous actual settlers on said lands, who alleged that the just limits of the Toups claim should not extend further in a northeasterly direction than the Bayou Crocodile, separating Secs. 37 and 39, 14 S., 20 E.

The questions involved were contested in the State courts, and finally determined by the United States Supreme Court in the case of "Lanfear v. Hunley," December term, 1866. (See 4 Wallace, 204.)

The claims of various settlers on said lands have since been adjusted (or are in course of adjudication by this office) upon the basis of the decision in Hunley's pre-emption case.

Lanfear's heirs were informed, through their attorney, per office letter ("C") dated November 21, 1881, of the condition of the settlers' claims, and that "it is believed that when all the claims valid under the provisions of the act of August 18, 1856, shall have been finally adjusted only a few scattering lots of small area will remain."

The aforesaid heirs have filed, with the incomplete scrip, a relinquishment of all their "right, title, and interest in and to all and every part of said Sec. 120 in T. 13 S., R. 20 E., and Sec. 37 in T. 14 S., R. 20 E., containing 1,141.34 acres, as aforesaid, declaring that the sole and only

consideration for this relinquishment is the indemnity to be issued or granted to us by the United States," &c.

To issue scrip in satisfaction of *any* small parcels of land which upon final settlement of the settlers' claims might possibly accrue to Lanfear's heirs, under their patent of August 7, 1876, would be premature, and the legality of a relinquishment or yielding of a superior title in favor of subsequent and conflicting confirmations and locations, provided the parties in interest can obtain compensation in scrip was adversely ruled upon April 12, 1873, in the case of *Rudolphus Ducros*. (Copp's Land Owner, vol. 1, p. 38.)

In addition to these objections, under existing decisions scrip cannot be issued upon the *confirmation by the old board of commissioners* of the Toups claim; and after a careful examination of the record in the case of "*Lanfear v. Hunley*," and the confirmation of 1856, I am satisfied that the present parties in interest are barred from receiving the scrip now applied for by the general laws of estoppel.

Lanfear during his lifetime, and those in privity with him by successive relationship to the same rights of property, seem to be estopped by conduct.

Having evidently a good title to whatever rights in said lands were vested in St. Amand and Toups through the original confirmations, Lanfear might have relied upon the laws in force providing for the issuance of patents, and action by the proper courts, if necessary, to place him in possession of the realty embraced in each of said claims, considered *separately*; but he elected to seek absolute security through new legislation, and succeeded in having said claims *merged* in conformity with their alleged exterior limits, and the same having been surveyed, approved, confirmed, and patented to him by the United States *in place*, a bar is created to the seeking of indemnity under shadow of a subsequent act of Congress of a general and equitable character.

The patent of 1876, upon an approved survey, seems also to have comprehended a *location and satisfaction* of the Toups claim in its entirety by the United States, under the principles enunciated in the Rudolphus Ducros case and that of *John Dejan*. (See Land Office Report for the year 1880, p. 192.)

But, aside from this view, the case appears to be *res judicata*, and the parties estopped by the *record*, such as arises from the adjudication of a competent court.

In the causes of Lanfear against various actual settlers upon the land in dispute, the district court (third judicial district, parish of Saint Charles, Louisiana) thoroughly investigated questions of fact, and determined the true *locus* of the Bayou Crocodile, one of the calls in the grant made to Paul Toups by the Baron de Carondelet.

The judgment of the lower court sets forth, amongst other things, that the old confirmations by Congress set up by Lanfear "allowed no more to the children of Paul Toups and to Daspit St. Amand than

had been granted by Baron de Carondelet"; that "this confirmation [by the special act of August 18, 1856] only recognizes the grant of the Spanish Government, but gives no more land to the grantees"; that "the two confirmations of 1812 and 1820, upon which plaintiff bases his present claim, are but one and the same grant, as appears clearly from the description of said grant"; that, "upon the whole, after a careful examination of this case, we have been forced to the conclusion that the plaintiff, as successor of Paul Toups and of Daspit St. Amand, has no *title* to the land making part of the Coteaux de France, situate north of Bayou Crocodile," &c.

On the 23d January, 1860, the supreme court of Louisiana affirmed the judgment of the district court.

The case was brought before the United States Supreme Court under the twenty-fifth section of the judiciary act of 1789; and in the opinion by Mr. Justice Swayne it is set forth that the court was not warranted in reviewing an adjudication upon a mere question of *boundary*; that the supreme court of Louisiana construed correctly the several acts of Congress relating to the subject of the controversy; that full effect is given to the title, and the error, *if any were committed*, was in locating the Toups claim upon the land and fixing its boundaries; that the special act of 1856, "considered in its entirety, confirmed to the plaintiff whatever he was entitled to by virtue of the original grant, conceding that to have been valid. It neither enlarges nor diminishes what the grant gave him. It extinguishes all claim on the part of the United States to the land covered by the surveys; but as regards all adverse claimants, it determines nothing and concludes no one," &c.

The said act of 1856, and the patent issued thereunder, vested as good a title as the Government was able to give, in Lanfear and his successors, to the lands included in the St. Amand and Toups claims as located *pro tanto*, subject, as set forth, to the rights of third persons; but the *provisos* to said act are fatal to the demand for indemnity based upon that *confirmation*.

Where it is judicially determined that Lanfear and his successors have the best title to a parcel of land northeast of Bayou Crocodile, as surveyed by Hanké, the property vests in them under the confirmatory act and patent; but where the rights of some other claimants to such a tract are found to be superior, the patent, of course, becomes inoperative, and no confirmation to Lanfear by the act of 1856 attaches.

In any view of the case I am satisfied that this demand for indemnity under the act of June 2, 1858, cannot be sustained; and the scrip is therefore hereby held for cancellation, and you will so advise the parties in interest, allowing the usual time for an appeal from this decision; after which you will be governed by the rules of practice in force, and, at the proper time report what action, if any, has been taken in the case.

## IX.—WASHINGTON TERRITORY.

## I. DONATIONS.

*SETTLEMENT—RESIDENCE—RIGHT TO PURCHASE—ALIENATION—ABANDONMENT.*

ELDRIDGE *v.* VARNER.

The donation act of July 17, 1854, does not permit a donee to make payment in lieu of residence, under act of September 27, 1850, after residence of one year, unless survey of the land is made before the expiration of four years from date of settlement.

Nor can the donee sell the land claimed until he has fully completed his title thereto, without forfeiting and abandoning his claim to the same.

*Acting Commissioner Harrison to register and receiver, Olympia, Wash., May 26, 1883.*

GENTLEMEN: I have had under consideration the full record in the case of the donation claim of Daniel Varner, notification No. 741, for 160 acres of land in T. 19 N., of R. 5 E., Washington Territory, which claim was initiated under the provisions of the act of Congress approved September 27, 1850 (9 Stats., p. 496), and supplemental legislation.

The record before me includes amongst its principal papers the aforesaid notification, with proofs attached; the testimony taken before you on November 16 and 17, 1881, in the matter of this claim, contested by Frederick E. Eldridge; your opinion of January 7, 1882, upon the matters in controversy; the appeal of Eldridge therefrom, and the motion of Varner to dismiss said appeal.

The donee's first affidavit, filed April 2, 1855, with his notification, shows that he was born in Ohio some time in the year 1833; arrived in Washington Territory September 12, 1853; settled as a single man upon the land described in his notification on October 15, 1854, and continued thereafter to reside upon and cultivate the same until March 21, 1855.

In support of his statement as to residence, &c., affidavits by Jesse Varner and Charles H. Bitting were filed. Two other witnesses were also produced, who executed affidavits at your office, Henry Whitesell and Thomas Headley.

Whitesell's affidavit, executed December 13, 1858, shows that Varner's residence upon the land in question commenced on the 15th day of October, 1853, and continued until the 13th day of December, 1858, except when it was dangerous for the donee to remain there on account of Indian hostilities.

Headley swears that Varner's settlement commenced October 15, 1854, and continued until December 14, 1858, with the same exception stated by Whitesell.

On June 8, 1861, Whitesell executed a new affidavit, amendatory of his

original deposition, making the date of Varner's settlement October 15, 1854, instead of October 15, 1853.

The official plat of survey of T. 19 N., R. 5 E., on file in this office, was approved August 27, 1873; and the township plat, showing the survey of this donation claim, was also approved in the year 1873.

After survey, Varner filed the joint affidavit of Whitesell and Headley, aforesaid, which was executed September 19, 1874.

These affidavits date Varner's settlement on the lands claimed as commencing on the 15th day of October, 1854, and to have continued thereafter until "about the *first day of October*, 1855, when on account of danger from Indian hostilities it was unsafe for said Daniel Varner to reside upon said claim, and from about the 1st day of October, 1855, to the 1st day of November, 1858, it was not safe for said Daniel Varner to reside upon or cultivate said tract of land on account of the dangers from hostile Indians." The italics are mine.

It is well to call attention to the fact in passing that the *exact date* of Varner's birth is not shown; and if he began settlement in the year 1853, or if he was born later than October 15, 1833, he was not legally qualified to initiate this claim upon any of the evidence adduced.

The proofs referred to remained in this condition until a hearing was ordered by you in the year 1881.

Prior to said hearing the contestant, Eldridge, addressed a communication to the honorable Secretary of the Interior, dated April 12, 1881 (but transmitted the letter by mail to this office), in which he stated that Varner, in the year 1861, sold, and by deed conveyed, said donation to one Gunson; that he (Eldridge) was now living upon and improving said tract of land; and that he had been "to the land office in Olympia and wanted to file upon it," but his application to enter the land was refused.

In view of his statements, this office advised Eldridge on May 5, 1881, that if he desired to contest said claim he should apply to the district land officers at Olympia, who would instruct him how to proceed.

It now appears that the contestant filed with you, on July 28, 1881, his own affidavit, uncorroborated by the affidavit of any other person, and that upon this showing you, on the 4th day of October following, ordered a hearing to take place at your office on the 16th day of the succeeding November. On the day appointed for this hearing Varner and Eldridge appeared in person and by attorney. Varner entered his appearance in the first instance for the purpose of making a motion to have the proceedings initiated by Eldridge dismissed, which motion you overruled; after which Varner entered his appearance generally, cross-examined Eldridge's witnesses, and introduced and examined his own witnesses.

You having found, under date of January 7, 1882, upon the testimony adduced at said hearing, that Varner had so complied with the law as to establish his right to perfect his claim thereto, and that the proceed-

ings instituted by Eldridge ought to be dismissed, an appeal was taken therefrom to this office by Eldridge.

On the 18th of November, 1882, the register forwarded here the motion papers of Varner to dismiss the appeal and all other proceedings instituted by Eldridge in this case, for the following reasons:

1. Eldridge had no interest in the land; hence he was incompetent to institute a contest. (Rule 2.)
2. The entry being of record, there must be some showing besides the affidavit of contestant before hearing can be ordered. (Rule 4.)
3. The register and receiver have no power to order hearing on case disclosed by record. (Rule 5. *Expressio unius est exclusio alterius.*)

I am of the opinion that the points made by Varner as to the irregularities of the proceedings had in this case before you are well taken; and that the order made as aforesaid, appointing a day for a hearing, and all proceedings had pursuant thereto, ought to be set aside for the reasons appearing in the record; therefore, the order made by you, upon the showing made by Eldridge, appointing a day for a hearing, and all the proceedings had before you subsequent thereto in this case, are hereby *set aside and vacated*; and the contest of Eldridge and his appeal from the ruling made by you are dismissed.

There is, however, one paper in this case which (although it falls with the other evidence in the matter of said *contest*) is, in my judgment, a very important link in the history of Varner's claim to said land as a donation, and is entirely disconnected from the acts of *Eldridge* relative thereto. This paper is a certified copy of the deed of Varner conveying the land in question for a consideration expressed therein of \$1,000 to *Gunson*, which deed was executed by Varner on the 12th day of June, in the year 1861, and made a matter of record in Pierce County, Washington Territory (the county where the land involved is situated), as appears by the certificate of the county auditor attached to the instrument.

By the act of July 17, 1854 (10 Stat., p. 305), it is provided by the first section that a donee may, after one year's residence and cultivation on his claim, be permitted, after survey, to make payment therefor at the rate of \$1.25 per acre.

The second section of this last-mentioned act repeals the third proviso to the fourth section of said act of 1850, and provides "that no sale shall be deemed valid unless the vendor shall have resided four years upon the land" claimed.

Varner's right to a grant of the land in question could not be perfected and completed until he had performed *all* the conditions imposed by law (*Hall v. Russell*, 11 Otto, p. 503); that is, had, among other things, resided upon and cultivated his donation for four consecutive years from the date of his settlement, or had resided upon and cultivated said tract the statutory period, and made payment as directed, such payment to be *in lieu* of the further occupation required by the donation act.

Assuming that Varner has deposited the requisite sum of money with the receiver to pay for said land, as stated in your decision in said contest, and that it will be paid as the law directs, if it is finally found that he can be permitted to make such payment, and also assuming that he can, if given an opportunity in all other respects, perfect his proofs, then, upon the facts as they appear in the case, and according to the law applicable thereto, shall Varner be permitted, at this late day, to perfect his right to a grant of said land by paying therefor in cash?

I am of the opinion that Varner cannot now be permitted to make such payment.

I admit that Varner's acts in relation to this land, if he had not abandoned before, and could pay therefor at any time after actual survey by simply perfecting his proofs as to one year's residence, &c., make the question of his right to purchase a very close one.

The original donation act of 1850 provided but one way, by which a duly qualified donee could acquire a grant of land thereunder, and that was by residence on and cultivation of the land claimed for four consecutive years after the date of settlement. Under this act of 1850, Varner having settled in October, 1854, his residence and cultivation would have been completed in October, 1858. The law under consideration does not allow a claim to land to be initiated after December 1, 1855, and consequently these donation acts did not require any residence on or cultivation of the land claimed after December 1, 1859. The provisions of the act of 1853 as amended by the act of 1854 do not, in my judgment, by allowing a cash payment in lieu of a portion of said four year's residence, *extend the time* in which to perfect a grant, but made the cash payment subject to the same limitation as to time as was placed upon that for which it was in lieu of.

This construction of said acts only grants the privilege of ceasing occupation of the land claimed, and to make a cash payment therefor, to those whose donations were surveyed while residence and cultivation were incomplete, and was not intended to apply to those whose claims were not surveyed until after the period of residence and cultivation required had expired.

Varner does not come within the class entitled to this privilege, as his claim was not surveyed until 1873.

Again, in any aspect in which this case may be viewed as to the law, I am of the opinion that Varner's acts constitute an abandonment by him of his claim to said land.

If it were held that the permission to pay for the land after survey was intended to extend the time beyond four years after the date of settlement within which to acquire a vested right or grant to the soil, then, according to the views of the Supreme Court in the case above quoted, Varner could not acquire anything but a *possessory right* to said land until he had made such payment; hence it follows that his sale or attempted sale of said land to Gunson (if the transaction is not entitled

to any greater dignity) is sufficient to show his *intention* to dispossess himself of his incomplete title, and, so far as it was in his power to do so, to transfer whatever rights under the law he had acquired at that time to the purchaser, and was an abandonment of whatever claim he had initiated to the land in question, and a forfeiture of his right to thereafter perfect his claim thereto by payment in cash therefor.

Whether Varner could cease residence on, and occupation of, his donation, and not make payment therefor in cash, and not abandon it, without giving some notice within the period of four years from the date of his settlement that he claimed the privilege or permission given by law to make such payment, I do not deem it necessary to discuss.

Upon the facts as they are made to appear in this case, and with the views above expressed of the law applicable thereto, I decide that Varner has abandoned his claim to the land described in his notification No. 741, as a settler under said act of September 27, 1850, and supplemental legislation, and has forfeited his rights, and cannot now be permitted to purchase said land at the rate fixed by law, and thus perfect title thereto under said acts.

The claim is, therefore, hereby held for cancellation, subject to the Rules of Practice now in force in case of an appeal.

You will notify all parties in interest of the purport of this decision, and report in due course of business any further action taken in the premises.

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*DECEASED ALIEN CLAIMANT—PATENT.*

*HEIRS OF JAMES TUCKER.*

The alien donation claimant, having declared his intention to become a citizen, died before completing his naturalization, his possessory right descended to his heirs, and patent properly issued to them.

Application by purchasers at administrator's sale to cancel patent to heirs and for issue of patent to them denied.

*Commissioner McFarland to register and receiver, Olympia, Wash., August 1, 1883.*

**GENTLEMEN:** On the 2d of September last the register transmitted here a patent, dated June 9, 1876, issued in favor of the heirs at law of James Tucker, deceased.

This patent is for lands claimed by Tucker during his lifetime as a donation under the act of Congress approved September 27, 1850 (9 Stat., p. 496), and supplemental legislation.

These lands are a part of Sec. 23, 24, 25, and 26, in T. 29 N., R. 2 W., Washington Territory, and are surveyed and designated as claim No. 40.

This patent has been forwarded here for the purpose of having it canceled and a new patent issued in lieu thereof in favor of James

Tucker, upon the application of Seabury L. and Levi Mastick. The Masticks claim title to said lands as purchasers by virtue of mesne conveyances, based upon an administrator's sale.

The fourth section of said act of September 27, 1850, provides:

That no alien shall be entitled to a patent to land granted by this act until he shall produce to the surveyor-general of Oregon record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of intention to become a citizen of the United States after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue.

The proof in this case shows that James Tucker was an alien; had declared his intention to become a citizen of the United States; died intestate, without having completed his naturalization as the law directs; and, consequently, while the facts remain in this condition this office cannot grant the relief asked, and therefore declines to cancel said patent, and refuses to issue a new patent in favor of said James Tucker.

Said patent is herewith returned subject to former instructions as to its delivery.

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*NOTICE—FORFEITURE—EXEMPTION.*

**NORTHERN PACIFIC RAILROAD COMPANY v. PEONE.**

Provisions of law relating to notifications by donation claimants considered. Peone settled on unsurveyed land, survey of which was made August 12 and filed in local office October 7, 1880. He gave the required notice March 16, 1881. The railroad company made definite location October 4, 1880. *Held,* That the act of June 25, 1864, exempted from forfeiture for failure to give notice, absolutely, all donation claims, otherwise regular, until the time limited by law for giving notice (in case of Peone, three months after survey), during which time his claim was in reserve, and therefore excepted from the grant to the railroad company upon general principles and by the express provisions of the granting act of July 2, 1864.

*Secretary Teller to Commissioner McFarland, September 19, 1883.*

SIR: I have considered the case of the Northern Pacific Railroad Company *v.* Baptiste Peone, involving Sec. 13, T. 26 N., R. 43 E., Colfax, Wash., on appeal by the railroad company from your decision of June 6, 1882, adverse to their claim.

Peone's claim is made under section 4 of the Oregon donation act of 1850 and supplementary legislation. The amending act of 1853 required him to file notice of his claim with the proper officer prior to December 1, 1853 (which limitation the act of 1854 extended to December 1, 1855), upon penalty of a forfeiture of all rights as donee in the event of failure to so file; and the act of 1864 remitted this penalty in all cases ex-

cept those where "adverse rights intervene before the filing of the required notification." Peone settled on an unsurveyed tract between 1848 and 1853, and the public surveys embracing it were approved August 12, 1880, and filed in the local office October 7, 1880. Some five months afterwards, namely, on March 16, 1881, he filed the first and only notice of his claim with the local officers, and at the same time submitted his final proofs, which show him to be entitled to patent, provided no adverse rights have intervened. The railroad company contend that such adverse rights did intervene by the withdrawal of February 21, 1872, for their benefit, and by the definite location of their line October 4, 1880; that for this reason the act of 1864 did not remit the penalty in this particular case; and that title to the tract in question, which is within the limits of the land grant, has vested in them.

A determination of the rights of the parties will require consideration of the several provisions of law relating to the said notice.

By section 4, act of September 27, 1850 (9 Stat., 496), there was granted to a married settler on the public lands in Oregon Territory, resident therein on or before December 1, 1850, the section of land embracing the tract actually occupied and cultivated by him for four consecutive years, without limitation as to the date when such settlement or occupation and cultivation should commence (see also section 12), the grant taking effect upon his conforming to the provisions of the act (*Hall v. Russell*, 101 U. S., 503). Section 5 granted certain lands, on similar conditions, to certain settlers coming of age or emigrating to the Territory between December 1, 1850, and December 1, 1853, which limitation was extended to December 1, 1855, by section 5, act of February 14, 1853. Section 6 provided that—

Within three months after the survey has been made, or where the survey has been made before the settlement, then within three months from the commencement of such settlement, each of said settlers shall notify the surveyor-general of the precise tract or tracts claimed by them respectively under this law.

So the law stood for some three years prior to or during which Peone's settlement was made, he having resided in the Territory before December 1, 1850, and being otherwise qualified.

By section 6, act of February 14, 1853 (10 Stat., 158), it was provided that—

Every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said Territory on or prior to the 1st of December, 1850, shall be and hereby is required to file with the surveyor-general of said Territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing, setting forth his claim to the benefits of said section, and citing all required particulars in reference to such settlement claim; and all persons failing to give such notice on or prior to the 1st of December, 1853, shall be thereafter debarred from ever receiving any benefit under said fourth section. And all persons

who, on the 1st December, 1853, shall have settled on surveyed lands in said Territory, in virtue of the provisions of the fifth section of the act of which this is amendatory, who shall fail to give notice in writing of such settlement, specifying the particulars thereof, to the surveyor-general of said Territory, on or prior to the 1st of April, 1855, shall be thereafter debarred from ever receiving the benefits of said fifth section.

First. It is to be observed of this section that its latter part applies only to settlers under section 5, act of 1850, and to such of said settlers as had occupied "surveyed lands." Whereas by the former act they were required to give notice of their claims "within three months after such settlement," by the latter act the time was extended to April 1, 1855, after which their rights were to be forfeited. This appears to amount to a legislative declaration that the rights of settlers were not to be forfeited by a failure to give the notice required by the act of 1850.

Second. The latter part of said section applies only to settlers who had become of age or emigrated to the Territory between December 1, 1850, and December 1, 1853; consequently it does not apply to those who may have emigrated and settled between December 1, 1853, and December 1, 1855, to which time the privileges of section 5, act of 1850, were extended by section 5, act of 1853, for their benefit. Therefore such settlers on surveyed land were still required to give notice of their claims within three months after settlement, and those on unsurveyed land within three months after survey.

Third. The former part of said section evidently applies only to settlers under section 4, act of 1850 (those resident in the Territory prior to December 1, 1850), who might locate on unsurveyed land; wherefore, as to those who might locate on surveyed land, the requirement of a notice within three months after settlement remained in force.

Fourth. Residents in the Territory prior to December 1, 1850, who might locate on land still unsurveyed, were required to file notice of their claims prior to its survey, and on failure to file such notice prior to December 1, 1853, were to forfeit their rights. The former of these requirements is necessarily limited by the latter, and the obvious meaning of the provision is that, whether the survey were made before or after said date, such settlers must file notice of their claims on or before December 1, 1853, and that they could receive no benefits under the donation act if they filed notice after December 1, 1853.

Fifth. Since no notice after December 1, 1853, could benefit such settlers, it follows that no future notice by them was contemplated; wherefore the requirement of notice within three months after survey, provided for in section 6, act of 1850, was not contemplated. The earlier and the later provisions are irreconcilably antagonistic, and hence the earlier provision was repealed. From and after February 14, 1853, the only provision in force concerning notice by claimants on unsurveyed land, under said fourth section, required the notice to be filed on or be-

fore December 1, 1853; for the earlier law did not revive at the expiration of the time limited in the latter (*Sedgwick on Construction*, 107).

Section 3, act July 17, 1854 (10 Stat., 305), extends pre-emption privileges under the act of 1841 to surveyed and unsurveyed lands in Oregon and Washington Territories, and requires notice of pre-emption claims on unsurveyed lands to be filed with the proper officer "within six months after the survey of such lands is made and returned;"

And all persons claiming donations under this act, or the acts of which it is amendatory, shall in like manner give notice to the surveyor-general, or other duly authorized officer, of the particular lands claimed as such donations within thirty days after being requested to do so by said officer; and failing such notice in either case, the claimant or claimants shall forfeit all right and claim thereto: *Provided, however*, That the time limited in the sixth section of the act of 1853, in which claimants under the act of 1850 are required to give notice of their claims, shall be, and is hereby, extended to the 1st of December, 1855, except in cases where the surveyor-general shall request them so to do, as above provided.

The proviso to this section evidently extends to December 1, 1855, the time of filing notice by the two classes above referred to, namely, those on surveyed land, before limited to April 1, 1855, and those on unsurveyed land, before limited to December 1, 1853. And the section requires the filing of notice by all claimants under the donation acts within thirty days after request by the proper officer upon pain of forfeiture of all right and claim thereafter. Thus the law stood until 1864.

On June 25, 1864, an amending act was passed (13 Stat., 184), which provides "that in all cases under the act of Congress approved September 27, 1850, entitled "An act," &c., and the several acts amendatory and supplemental thereto, in which the actual settlement may be shown to be *bona fide*, and the claim in all respects to be fully within the requirements of existing laws, except as to the failure of the party to file notice within the time fixed by statute, such failure shall not work forfeiture when no adverse rights intervene before the filing of the required notification by the claimant."

While the language of this act is somewhat obscure, its purpose is quite clear. It was intended to place donation claimants upon the same footing as claimants under the pre-emption laws; that is, to give them a preferred right to the land upon which they had settled until the time fixed for filing their notices, and afterwards to extend such preferred right to the time at which they actually filed the required notices, provided no adverse rights intervened after the time fixed by law. In other words, a notice is required, and the date of filing it is fixed; but a failure to file it by the time fixed does not forfeit the right of any claimant, and it is only barred by an adverse right intervening between the required and the actual time of filing. This is the construction given by the Supreme Court in *Johnson v. Towsley* (13 Wall., 72) to section 5, act March 3, 1843, which declares a forfeiture of the pre-empt-

or's right to the land on failure to file notice within the required period. But in the case of the donation acts legislative action was important, because donations are not simply preferred rights of purchase, to be acquired by settlement and improvement, but actual grants of land, which, as above remarked, take effect only upon the settler's compliance with all the conditions attached to them. One of these conditions is the filing of a notice of his claim, which, it has been said by the Supreme Court in *Hall v. Russell*, is a condition precedent (this, however, without reference to the effect of the requirement of a fixed time of filing), and a failure to file as required might imperil the donee's claim in the event of settlement by another qualified person on the same tract before the fixed time of filing. The act of 1864 removes all difficulties of this kind, and absolutely reserves the land to the claimant until the time fixed for filing, and thus harmonizes the donation and pre-emption laws in this respect.

With regard to the forfeitures already incurred under the acts of 1853 and 1854, the act of 1864 unquestionably remitted the penalty. And, though the language is not clear, I am of opinion that it also removed the limitation of time expressed in those acts, and restored the provisions of section 6, act of 1850. It is a maxim that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter," and it is evident that in this act Congress regarded a future filing of the required notice as essential in all donation claims, because it provided that such a filing after the time fixed should be regarded as a compliance with the law. If the limitations of the acts of 1853 and 1854 are regarded as still in force, then, as no notice after December 1, 1855, was required by them, the act of 1864 does not operate on that class of claimants as to notice after survey; they are not required to give notice at all; no adverse rights can intervene after said date, and they are thus distinguished from all other classes. There appears to be no reason why they should be accorded this preference, and, in fact, the acts of 1853 and 1854, by shortening the time of filing, rather indicate the purpose of Congress to discriminate against them. Wherefore the object of the act of 1864 may be reasonably regarded as a restoration of their privileges under the act of 1850, and as placing them upon the same footing as other classes of donation claimants.

Applying these conclusions to the facts of the case at bar, it appears that Baptiste Peone failed to file the required notice on or before December 1, 1855, but that any forfeiture thereby incurred was remitted, and his claim was absolutely reserved to him until three months after survey, and thereafter conditionally reserved until he filed the required notice. It appears also that he did not file within three months after survey, but as no adverse right intervened between date of survey and the date of actual filing, March 16, 1881, such failure did not work a forfeiture. And since his claim was reserved until three months after sur-

vey, it follows that it was excepted from the grant of lands to the railroad company taking effect by definite location October 4, 1880, not only upon general principles, but by the express provisions of the granting act—section 3, act July 2, 1864. (13 Stat., 367.)

Your decision is accordingly affirmed.

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*ABANDONMENT—HEARING.*

JACOB B. LEACH.

When abandonment is alleged against the donation claimant, and affidavits are filed to obtain a hearing in his behalf on the question of abandonment, but it appearing by the record and the admission of the claimant that he has failed to comply with the requirements of the donation act, and thereby to acquire right to the land claimed, hearing will be denied and the claim canceled.

*Commissioner McFarland to register and receiver, Olympia, Wash., September 2, 1883.*

GENTLEMEN: I am in receipt of the register's letter of the 9th ultimo, inclosing Joseph C. Kincaid and C. C. Newhard's affidavits, with other papers, relating to the alleged abandonment of the land claimed by Jacob B. Leach, as a donation under act of Congress approved September 27, 1850 (9 Stats., p. 496); and supplemental legislation, notification 1467, surveyed as claim No. 45, covering parts of Secs. 26 and 27, T. 20 N., R. 4 E., W. T.

These affidavits are forwarded here for the purpose of obtaining an order from this office for a hearing before you, to determine whether the claim of Leach to the land in question has been abandoned, as alleged.

I find by an examination of the donation papers of said Leach, on file here, that he filed a notification which was numbered 1467, claiming 160 acres of land as a single man, under the aforesaid acts of Congress; and that the land thus claimed was subsequently surveyed as claim No. 45, covering parts of Secs. 26 and 27 in T. 20 N., R. 4 E., W. T.

Leach's settlement on said land is shown by the donee's own affidavit and the other proof in the case to have commenced July 5, 1855, and to have continued until July 5, 1859, excepting a period of forty-one months, from about the 1st of November, 1855, to the 5th of July, 1859, when, on account of Indian hostilities, it was unsafe for him to remain upon his claim.

The claimant, Jacob B. Leach, having admitted his non-compliance with any of the conditions of the said act of September 27, 1850, and supplemental legislation, so as to acquire a grant of the land in question and establish his right to a patent therefor, you are instructed not to allow a hearing in this case upon the allegations made by said affiants.

I am satisfied from the admissions of the donee, Jacob B. Leach, and from all the facts as they appear in proof relative to this claim to said land as a donation, that he has not established his right to a patent therefor under any of the provisions of said acts; and therefore his claim thereunder to the land described in his notification No. 1467, surveyed as claim No. 45, covering parts of Secs. 26 and 27, T. 20 N., R. 4 E., W. T., has this day been canceled upon the records of this office, and you will note the cancellation upon your records.

I have also to instruct you not to allow any entry to be made of any portion of the land covered by the claim hereby canceled until after the lines of the public surveys have been extended over the same, and a plat of such extension filed in your office by the surveyor-general, pursuant to instruction from this office.

Please acknowledge the receipt of this communication.

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*NOTICE OF SETTLEMENT—PROOF OF SETTLEMENT.*

E. SEYMOUR HANFORD.

The party claiming donation having failed to comply both with the 6th section of the act of September 27, 1850, by not giving the notice within the time therein required, and with the 7th section by not making the proof of settlement prescribed therein, his claim is held for cancellation.

*Commissioner McFarland to register and receiver, Olympia, Wash., October 24, 1883.*

GENTLEMEN: It appears by the records and files of this office that E. Seymour Hanford filed notice April 23, 1855, on unsurveyed land, which was numbered 1,092, claiming 160 acres as a donation under the act of Congress of September 27, 1850 (9 Stats., p. 496), and supplemental legislation, describing his claim as follows:

Beginning at an ash tree 10 inches in diameter, standing on the south line and distant 15.50 chains west of the southeast corner of Edward Hanford's claim; thence east 40 chains to a cedar 18 inches in diameter; thence south 40 chains; thence west 40 chains; thence north 40 chains to the place of beginning.

The settler shows by his own affidavit that he arrived in the territory October 14, 1852; was born in Ohio in the year 1824, and was a single man. The respective affidavits of Edward Hanford and Lemuel J. Holgate show that said donee settled upon the land which he claimed under said notification, No. 1,092, March 11, 1854, and continued to reside thereon, and to cultivate the same from that date until April 19, 1855.

All of these affidavits were executed on the 19th of April, 1855. No

further proof has been furnished or action taken by said donee to perfect his claim to said donation.

The public surveys were extended over T. 24 N. of R. 4 E., Washington Territory, and the plat thereof approved February 3, 1862.

If the donation claim of E. Seymour Hanford, notification No. 1,092, herein referred to, is bounded in part by the donation claim of Edward Hanford in said T. 24 N. of R. 4 E., its survey would include a part of lot 2, the whole of lot 1, the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , a part of the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and a small strip off of the north part of the SE.  $\frac{1}{4}$  of Sec. 16, and a part of the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , and a small strip off of the north part of the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 15. All of these lands have been patented to other claimants, except lot 2 and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 16.

It now appears by the papers on file here that you have refused to allow Albert A. Manning to purchase the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lot 2 of said Sec. 16, for the reason that a portion of said land is embraced in the donation claim of E. Seymour Hanford, notification No. 1,092.

The 6th section of said act of September 27, 1850, required all donees who had settled on land as a donation under the preceding section, which was at the date of their settlement unsurveyed, to give notice within three months after survey of the precise tracts claimed by them, while the 7th section of this act required this donee within twelve months after survey to make proof of the commencement of his settlement and cultivation on the tracts claimed by him, specifying the date of such settlement.

Neither of these requirements of the law have been complied with by said E. Seymour Hanford; and consequently his claim to a donation under said notice No. 1,092 so far as it affects any lands in sections 15 and 16 in said T. 24 N., R. 4 E., is held for cancellation.

You will notify all parties in interest of this ruling, and thereafter be governed by the rules of practice now in force in case of an appeal; but if appeal is not taken you will, at the proper time, so report to this office.

*SETTLEMENT—RESIDENCE—SALE—COMMUTATION—ABANDONMENT.***ELDRIDGE v. VARNER.**

Acts of September 27, 1850, February 14, 1853, and July 17, 1854, relating to Oregon donation claims, considered and applied.

The law as amended, while shortening the period of residence, prior to commutation, and recognizing the right to sell the located land, did not extend both the right to commute and the right to sell to the same person. Only those who had resided four years upon their claims could make a valid sale.

Where the settler is driven from the land by hostile Indians, if he would have the time of his compelled absence computed in his favor, he must return to the land when the cause of his absence ceases; if he fails to do so, and to thus manifest his *bona fide* intention, it would be construed as an abandonment of the claim.

Good faith is as fully required in respect to the right to purchase as in regard to residence.

When Varner made sale in 1861, he had nothing but the possessory right. By failure to return after his enforced absence, the time had passed when he could complete his title by residence, and his conveyance can only be regarded as further evidence of intention to abandon his possessory right.

*Acting Secretary Joslyn to Commissioner McFarland, March 21, 1884.*

SIR: I have considered the case of F. C. Eldridge *v.* Daniel Varner, as presented by Varner's appeal from your decision of May 26, 1883, holding for cancellation his donation claim, notification No. 741, for 160 acres of land in T. 19 N., R. 5 E., Olympia, Wash.

July 28, 1881, Eldridge filed an affidavit in the local office, setting forth that Varner had abandoned the land, for that he had not resided thereon, or cultivated the same, since October, 1855, and that he did not complete one year's residence thereon, so as to entitle him to purchase under the donation act, but that he, in 1861, sold his right to said land. Eldridge further alleged that he had settled upon the land and desired to enter the same as a homestead.

On this affidavit the local office ordered a hearing, fixing the date thereof on November 16, 1881. From the evidence adduced the register and receiver held that Varner had so far complied with the law as to entitle him to perfect his claim to the land. Eldridge appealed.

It is urged by Varner's counsel that there was no jurisdiction in the local office to entertain the contest, on the bare allegation of contestant, it not appearing of record that said contestant had any interest in the land.

You held that the points made as to the irregularities of the proceedings were well taken, that the action of the local office based upon contestant's affidavit should be vacated and set aside, and the appeal of Eldridge dismissed.

Although you concluded that the contest was illegally instituted and hence should be dismissed, you also found from evidence "entirely disconnected from the acts of Eldridge" that Varner had abandoned his claim, forfeited his rights, and cannot now be permitted to perfect his

title under the donation acts by purchasing the land at one dollar and twenty-five cents per acre.

Varner's first affidavit was filed April 2, 1855, with his notification, and shows that he arrived in Washington Territory September 12, 1853; that he settled as a single man upon the land described in his notification October 15, 1854, and continued to reside upon and cultivate the same until March 21, 1855. This affidavit was duly corroborated. December 13, 1858, Varner made final proof, showing residence and cultivation from date of settlement up to the time of making such proof, "excepting when on account of Indian hostilities it was unsafe to remain on said claim."

The township plat showing the survey of this claim was approved in 1873.

The final proof not being satisfactory, additional evidence was filed, dated September 17, 1874, showing that from about the 1st of October, 1855, to the 1st day of November, 1858, it was unsafe for Varner to remain on his claim.

On this proof the case rested until the contest of Eldridge was begun.

At the contest Varner furnished further evidence to the effect that he resided upon his claim from October 15, 1854, to November 1, 1855.

November 18, 1881, Varner deposited with the local office the requisite amount for the purchase of the land under the act, and applied to make such purchase.

With the papers in the case is a duly authenticated copy of a deed from Varner to one Gunson, wherein it appears that for a consideration of \$1,000 Varner did, July 12, 1861, sell and convey to Gunson the premises now in question. This deed was recorded in the county where the land is situated. Varner does not deny the execution of the deed, but alleges that Gunson never took possession thereunder.

It is not claimed on behalf of Varner that he has, at any time subsequent to November 1, 1855, lived upon the land embraced within his claim.

By the fifth section of the act of September 27, 1850 (9 Stat., 496), there was granted to qualified persons settling in the Territory of Oregon, between December 1, 1850, and December 1, 1853, 160 acres of land, upon certain conditions expressed in said act. One condition named was a settlement upon the tract claimed, followed by *four consecutive* years of residence and cultivation.

The seventh section of said act provides—

That within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been *commenced*, specifying the time of the commencement; and at any time after the expiration of four years from the date

of such settlement, \* \* \* shall prove in like manner by two disinterested witnesses the fact of *continued residence* and cultivation required by the fourth section of this act.

A proviso in the fourth section declares—

That all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void.

In the twelfth section provision is made that all persons claiming lands under said act shall first make affidavit “that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer, or alienation of the same, or by which the said land shall inure to the benefit of any other person.”

The law then as expressed in the act of September 27, 1850, contemplated a settlement followed up by four years' consecutive residence as the consideration moving from the donee to the Government by which title was to be secured under said act, provided checks against speculative entries, and declared a sale before patent absolutely void.

The act of February 14, 1853 (10 Stat. 158), amending the act of September 27, 1850, extended the provisions of that act to December 1, 1855, and provided—

That all persons who have located, or may hereafter locate lands in the Territory of Oregon \* \* \* and of which survey shall have been made, or may be hereafter had, *in lieu of the term of continued occupation after settlement*, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the surveyor-general of said Territory at the rate of one dollar and twenty-five cents per acre for the lands so claimed, located and surveyed as aforesaid.

This amendment permitted a commutation of time into money where the settlement had been followed by two years of residence, and the survey of the lands had been made, but left the checks upon speculative entries unmodified.

By the act of July 17, 1854 (10 Stat., 305), the original donation act was further amended as follows :

That the period of occupancy required of settlers before they can purchase the lands claimed by them under the provisions of the first section of the act of February 14, 1853, above mentioned, shall be, and the same is hereby, reduced to one year.

By this act the proviso to the fourth section of the original act, declaring all sales, before patent, void, was repealed, with the following qualification :

That no sale shall be deemed valid unless the vendor shall have resided four years upon the land.

The law, as thus amended, while shortening the period of residence prior to commutation, and recognizing the right of the settler to sell his located land, did not extend both the right to commute and the

right to sell to the same person, for only those who had resided four years upon their claims could make a valid sale.

It will be observed that Varner, up to the time this contest was initiated, acted apparently on the assumption that his residence was, under the circumstances, in compliance with the law requiring four years' continuous residence, and that he based his claim to the land on such residence.

It was held, however, by this Department, in the case of Reuben A. Finnell (Copp's L. L., 1882, p. 1368), where the settlement was made in September, 1853, and the settler was driven therefrom in October, 1855, by hostile Indians, that if the settler would have the time when he was compelled to be absent from his claim computed in his favor, he must return to the land when the cause of absence ceased to exist, and that if he did not thus manifest his *bona fide* intention of complying with the law, such failure would be construed as an abandonment of the claim, on account of which it would be accordingly canceled. Hence Varner's claim, falling within the foregoing rule, would have to be canceled, unless his application to purchase gives him a better standing before the Department.

But, as may be readily seen from the statutory provisions respecting the right to purchase, such provisions were not enacted for the purpose of enabling the settler to acquire title by that method, because he had failed to secure it by residence. Good faith is as fully required in the one instance as in the other.

In *Hall v. Russell* (101 U. S., 503), arising under this donation law, it was held that the title to the soil did not vest in the settler before the conditions had been fully performed. (See also the case of Juan Rafael Garcia, 9 Copp's L. O., 203.) Hence at the time when Varner executed the deed, in 1861, he had nothing but the possessory right to the land. The time had passed by when he could by residence perfect his title, and by his failure to return to the land at the earliest practicable opportunity he had lost the right to have the term of enforced absence computed in his favor, which had been accorded by the Department in such cases, and the execution of the deed can only be looked upon as further evidence of his intention to abandon his possessory right to the land.

Your decision is therefore affirmed, and Varner's notification is canceled.

## V. MISSIONARY OCCUPANCY.

## EXTENT OF CLAIM.

## CATHOLIC MISSION, VANCOUVER, WASH.

The area to which the mission can claim title depends upon the extent of its occupancy August 14, 1848 (act of that date), as held by the honorable Acting Secretary of the Interior, March 11, 1872.

The occupancy having only included the church and the land on which it stood, the survey representing that area is approved.

*Acting Commissioner Harrison to surveyor-general, Olympia, Wash.,  
August 4, 1883.*

SIR: With your letter of the 24th of July, 1873, you forwarded here the objections made by A. M. A. Blanchet, bishop of Nesqually, as the representative of the Roman Catholic Church, against the correctness of the survey of what is known as the Catholic Mission claim of Saint James, at Vancouver, Wash.

Messrs. Curtis & Burdett, of this city, as attorneys for said mission, filed in this office, with their letter of the 28th ultimo, certain papers, for the purpose of showing that said survey ought not to be adopted as the proper survey of said mission.

A copy of Messrs. Curtis & Burdett's letter and inclosures are herewith transmitted.

The survey herein referred to is that made of said mission claim in pursuance of the decision of March 11, 1872, of the honorable Acting Secretary of the Interior.

In said decision upon the rights of the mission aforesaid the honorable Acting Secretary of the Interior held that on the 14th day of August, 1848—

The Mission of Saint James was in actual possession of a small piece of land, upon which had been erected a church, in which the priests there stationed held religious worship; [that] the mission at that date had never asserted any claim whatever, had no inclosure, and was therefore only in occupancy of the land covered by the church edifice and such land as was appendant to it; [that] this it occupied as a missionary station among the Indians; [that] the society to which said mission belongs has, therefore, a vested title, under the act of 1848, to the land upon which the church edifice stands, and as much appurtenant thereto as at the date of the passage of the act was within the inclosure or used for church purposes; [and that a religious society took, under the act of August 14, 1848] only the land actually occupied as a mission, and which was with reasonable clearness set forth by specific boundaries, together with all improvements thereon, the amount in no case to exceed 640 acres.

On the whole [continues the decision], I am satisfied that on the 14th day of August, 1848, there was existing a missionary station, within the meaning of the act, at Vancouver, known as the Mission of Saint James, and that such mission then occupied a small tract of land, which had been improved by the erection of a church.

On the 9th of May, 1872, this office transmitted to L. P. Beach, then United States surveyor-general for Washington Territory, a copy of the above decision, and directed him to take immediate steps to make a survey of the aforesaid mission; and with letter of July 31, 1872, that officer returned to this office a survey of the claim, in which letter he stated that from the facts elicited—

It appeared that the mission, on the 14th day of August, 1848, had been granted permission from the Hudson Bay Company to erect a small church for religious and mission purposes outside of the stockade, on the public commons; that there was no inclosure, other than the church, erected by any party at that time, by which the premises intended to be granted or donated to the mission could be designated; [and] that the land subsequently inclosed and now occupied by the mission, which the plat of the survey herewith inclosed will represent, has never been in the immediate possession of or occupied by any other parties, so far as I am able to ascertain. I have therefore caused the survey to be made within the bounds of and in accordance with such prescribed limits as appear to have been continuously occupied by the mission, and which appear most definitely to conform to the decision of the honorable Secretary of the Interior.

Both that part of this survey including lands which, according to the report of the surveyor-general, were not occupied by the mission until after the 14th of August, 1848, as well as that smaller tract designated thereon by red lines, which included the church and appurtenances, and which, according to said report, were understood to represent the land occupied by the mission on the 14th of August, 1848, were examined, and on the 10th day of March, 1873, the surveyor-general was directed to prepare and transmit to this office a plat and the field notes of said smaller tract, if, as supposed by this office, such tract had been found by him to be the only land inclosed by the mission at the date of said act; but if he found in his investigation of the matter that a larger area was thus inclosed, then he was directed to make a survey thereof, and return the same to the General Land Office at the earliest practicable moment. With letter of April 21, 1873, the surveyor-general made a return of the survey and plat of the smaller tract, showing that it was surveyed by Levi Farnsworth on the 10th of July, 1872, at the time the larger survey was made, and that it included the only land found by him to have been inclosed by the mission authorities at the date of the passage of the act of 1848; whereupon, by office letter of May 19, 1873, you were advised of the receipt and examination of said survey and field notes, and that, as said survey included all the lands occupied by the mission on the 14th of August, 1848, it was, in the opinion of this office, in strict conformity with the limits of the claim as set forth in the decision dated March 11, 1872, by the honorable Acting Secretary of the Interior. Said survey, however, was not formally approved by this office, but the letter of May 19 directed you to notify the parties in interest of the contents of said letter, and allow thirty days from such notice within which to file objections to said survey, at the expiration of which time

you were also directed to transmit to the General Land Office all the papers in the case, together with your opinion thereon.

Your report, dated July 24, made in obedience to said letter of May 19, 1873, is now before me. By it and the accompanying papers it appears that on the 4th of June, 1873, you furnished the Right Rev. A. Blanchet, bishop of Nesqually, with a copy of the plat and field-notes of the survey of the Saint James Mission claim made by United States Deputy Surveyor Levi Farnsworth on the 10th of July, 1872, and notified him that all parties desiring to file objections to the survey would be allowed thirty days within which to "file such papers and protests" as might "by them be deemed wise and proper"; and it also appears that no papers were filed in response to this notice except a protest by Bishop Blanchet, wherein, after objecting to the correctness of the decision dated March 11, 1872, in this case, by the honorable Acting Secretary of the Interior, he protests against the survey made of the Saint James Mission on the 10th day of July, 1872—

Because, even if the decision of the Secretary of the Interior was correct in his construction of the law whereby missionary stations should be limited to the land occupied by them, nevertheless the small parcel of land now surveyed and given to the Saint James Mission is greatly less than that occupied by it on the 14th day of August, 1848, and the said survey and diagram do not include more than a fractional part of what was actually occupied and to which it is entitled even under the decision of the Secretary of the Interior; [and, further] because the surveyor-general of Washington Territory did not regard his [Blanchet's] legal notification filed in his [the surveyor-general's] office, nor did said surveyor-general have the legal right to determine *ex parte* how much ground was occupied by the mission on the 14th of August, 1848.

The greater part of the above letter is composed of protests against the decision of March 11, 1872, by the honorable Acting Secretary of the Interior, over which decision this office has no control, further than to be assured that its requirements are strictly complied with.

Bishop Blanchet, as an officer of the Roman Catholic Church, and representing the mission claimants at Vancouver, Wash., procured the consent of the Hudson Bay Company to have established on lands in the company's possession a building to be used by said bishop and those under his charge as a church.

Pursuant to this permission said company thereafter built a church and yielded to said missionary claimants exclusive control thereof; and, according to the testimony of this same bishop taken before the United States surveyor-general in 1860, this building, or church, and the land upon which it stood, constituted the extent of the missionary occupancy on the 14th day of August, 1848. Other witnesses whose testimony was taken before said surveyor-general in 1866 corroborate Bishop Blanchet as to the extent of occupancy by the mission claimants August 14, 1848.

Bishop Blanchet being a representative man, acting for and in behalf

of the Catholic Church in establishing and maintaining said Mission of Saint James, cognizant, by virtue of his position and his agency, of all that appertained to, belonged, or was within the control or occupancy of this mission at said date of August 14, 1848, his evidence, in my judgment, was and is binding upon the mission claimants, and fixes the extent of the mission occupancy as it existed at the date of said act of 1848.

I therefore decide that, upon the whole record in the case as it now exists, the survey executed July 10, 1872, by Levi Farnsworth, United States deputy surveyor, which was reported here with your predecessor's letter of April 21, 1873, covering an area of  $\frac{46,346}{100,000}$  of an acre, being a part of Sec. 27 in T. 2 N., R. 1 E., Washington Territory, is a substantial compliance with the Department decision of March 11, 1872, and said survey is hereby approved and adopted by this office as the final and official survey of the grant in question, and in your official action thereon in the future you will so regard it.

You will notify all parties in interest of the purport of this decision, and thereafter be governed by the Rules of Practice now in force in case of an appeal.

If appeal is not taken within the time allowed by said rules, you will thereafter proceed to carry this decision into effect by constructing, in triplicate, a plat of said mission survey, showing its connection with other private and public surveys in said Sec. 27, T. 2 N., R. 1 E., Washington Territory, one of which you will retain for your files, forward one to this, and the other to the local office at Vancouver.

## DIVISION E.—SURVEYS.

- I.—APPLICATION.
- II.—APPROVAL.
- III.—INDIAN RESERVATION.
- IV.—LEGAL SUBDIVISIONS.
- V.—PAYMENT FOR SURVEYS.
- VI.—PRIVATE LAND CLAIMS.
- VII.—RECONSIDERATION.
- VIII.—RESURVEY.
- IX.—SCHOOL SELECTION.
- X.—SWAMP LANDS.

### I.—APPLICATION.

#### *ARSENAL ISLAND—GOVERNMENT OPERATIONS.*

ROBERT CARRICK.

Application for survey of Arsenal Island denied, on account of the drifting character of the island, and also of the operations of the government, not yet completed, in fixing and making permanent the river channel.

*Secretary Teller to Commissioner McFarland, May 16, 1884.*

SIR: You transmitted to me October 13, 1883, the application of Robert Carrick, of Saint Louis, Mo., for the survey of an island in the Mississippi River called "Arsenal Island," stated to be located in Secs. 3, 9, and 10, T. 44, R. 7, Missouri, opposite the city of Saint Louis, and which when surveyed from the State of Illinois is located in Saint Clair County, Illinois, in T. 2 N., R. 10 W., opposite what is commonly known as Common Fields of Prairie du Pont and Second Sub-division of Cahokia Commons. The applicant also asks that when surveyed the island may be brought into market for disposal according to the laws of Congress and the regulations of the General Land Office relative to the disposal of lands embraced in fragmentary surveys. Affidavits accompanying the application state that this island contains about 230 acres; that the width of the channel on either side between the island and the main shore is from 1,500 to 2,000 feet; that the depth thereof at ordinary stages of the water is about 10 feet above high-water mark, not subject to overflow, and that the land is fit for agricultural purposes; that the configuration of either shore has not materially changed since the original survey of the water front on the mainland and there are no existing improvements on the island.

Notice that the application would be made appears to have been served upon the governors of the States of Missouri and Illinois,

upon the mayor of the city of Saint Louis, and upon sundry proprietors of land on either side of the Mississippi River opposite the island, claiming or supposed to claim riparian rights thereto. After argument by the respective counsel for Carrick and the city of Saint Louis, you reached the conclusion that title to the island as it now exists is in the city of Saint Louis, and, while rejecting the application, submit it for my examination and instructions.

There has been no hearing in the case and the facts are informally presented by sundry *ex parte* affidavits, by the protests of the riparian owners against the survey, and by the report of Major Ernst to the War Department, under date of January 11, 1884.

It appears from the latter that Arsenal Island is a low alluvial island lying near the middle of the Mississippi River, subject to overflow at high-water mark, and its banks subject to erosion at all stages; that it was under water part of the years 1875, 1876, 1877, 1881, 1882, and 1883, but not submerged at all in 1872, 1874, and 1879, and but a few days in 1873, 1878, and 1880; that the main channel of the river was west of the island in 1821, and still west of it in 1830, with a fair inference that it had been so for a number of years; east of it in 1838, with a fair inference that it had been so since about 1835; west of it in 1839, east of it in 1844, still east of it in 1853, and from 1861 to 1865; west of it from 1866 to 1873; east of it from 1874 to 1878, and west of it from 1879 to 1884. Whether, therefore, this island is now within the State of Illinois or within the State of Missouri, does not, under these facts, clearly appear.

Arsenal Island (then called Quarantine Island) appears to have been first surveyed as a whole in 1853, and to have contained 404.65 acres. It was again surveyed in 1863 and found to contain but 119.57 acres.

Under the acts of Congress of June 13, 1862, and May 26, 1864, the surveyor-general of the State of Missouri, under the direction of the Commissioner of the General Land Office, February 10, 1863, assigned and set apart a portion of the island designated as survey No. 411 of Saint Louis lands, containing 109.92 acres, to the board of Saint Louis public schools, and August 25, 1864, the Commissioner allotted to the schools, under a selection made by the State's agent, the remaining part of the island containing 9.65 acres, and the selection was approved by this Department September 8 following. February 8, 1866, the school board sold and conveyed to the city of Saint Louis "the whole and every part of said island." Under the said acts and under that of August 3, 1854 (10 Stat., 316, now Sec. 2449, Rev. Stat.), which makes such approval equivalent to a patent, the title of the United States to the island and all its rights thereto was divested and vested in the public schools and their grantees. The right of the city of Saint Louis to the original island is not disputed by the applicant, but he claims—and the fact so appears—that it has shifted downwards, and that as its head is washed away under the ordinary currents of the river and otherwise,

its foot is enlarged and that there has been a continual growth at the down-stream end. Major Ernst states that the up-stream end moved southward about 1,700 feet between 1837 and 1863, and that since 1863 it has moved further southward about 4,800 feet—the rate of motion since that date being about 240 feet per year or 8 inches per day.

The applicant claims that this new formation is public land of the United States and subject to disposal as such; the city of Saint Louis, that it is accretion merely to the original island and belongs to the city; and the owners of land upon either side of the river, that they have riparian rights thereto. There appear also to be undetermined jurisdictional questions as to this formation between the States of Illinois and Missouri, and it is understood that actions commenced by citizens of the State of Illinois are now pending in the proper courts touching its status. Without expressing any opinion upon the respective rights of these several claimants to this new formation, I do not think you would be justified in ordering its survey, because under the facts presented it is not fast land, but a mere drift or float of sand and other material carried by the waters of the river from one point and deposited temporarily upon another, the process of erosion and accretion being constantly at work. As above stated, the original island embraced 404 acres in 1853, reduced in 1863 to 119 acres, and from 1837 to 1863 its up-stream end moved southward about 1,700 feet, or about one-third of a mile, and since the latter date it has been, and now is, moving in the same direction at the rate of 8 inches per day, so that even during the time of a survey what would be a monument and boundary to-day might require change to-morrow. The new formation, if surveyed and disposed of as public land, would thus very soon present the same questions which are now presented respecting the original island. Hence, so long as the same causes continue to operate and make this formation a mere moving mass of alluvial deposits from one end to the other, repeated day by day, it would seem useless to establish corners and monuments subject to immediate obliteration. Such a formation has not, in my judgment, the fixed and permanent characteristics which make it a solid part of the earth's surface, capable of supporting title under the laws relating to the public lands.

It is also brought to my attention that the War Department, under the authority of Congressional appropriation acts for the improvement of the channel of the Mississippi River, a matter of great public moment, is engaged in operations tending to fix this drift and secure permanency and stability in the channel affected thereby. This is a Government work and should not, in my judgment, be hampered nor interfered with by this Department.

Until, therefore, the ultimate purpose of Congress in this respect is known, and until this formation from natural or artificial causes ceases to retain its drifting and uncertain character, and becomes what is

termed "fast" or "anchored" land, it should not be surveyed as public land.

Concurring with you in the rejection of the application, I return the papers transmitted with your letter of October 13, 1883.

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## II.—APPROVAL.

### *CONFLICT WITH PATENTED PRIVATE CLAIM.*

G. A. HEINLEN.

The issue of patent finally settles all question of boundary, though a later survey may cast doubts upon the correctness of the original survey.

*Secretary Teller to Commissioner McFarland, December 10, 1883.*

SIR: I have considered the case presented by the appeal of G. A. Heinlen from your decision of November 25, 1882, refusing to approve certain surveys made by United States Deputy Surveyor Thomas Creighton, under his contract and instructions No. 221, in T. 18 and 19 S., R. 19 and 20 E., M. D. M., California.

It appears that said Heinlen purchased from the State of California Sec. 36, T. 18 S., R. 19 E., based upon a segregation survey made by the county surveyor of Fresno county, and that said tract, as shown by the survey of Deputy Creighton, conflicts with the patented limits of the Rancho Laguna de Tache. The conflict consists in the difference of location of the southeast corner of the rancho, and the difference in meanders and identification of the channel of King's River which forms the southeastern boundary of said rancho.

The records in your office show that said rancho was surveyed in 1864, by Deputy B. T. J. Dewoody, that said survey was approved by your office March 1, 1866, and that patent issued for said rancho as thus surveyed March 6, 1866.

All questions affecting the correct location of the boundaries of said rancho were finally settled, so far as any adjudication of such matters by this Department is concerned, when patent was issued therefore, and you very properly held, that while the survey made by Deputy Creighton throws great doubt upon the accuracy of the survey as made by Deputy Dewoody, the said rancho having been patented, the integrity of the lines as patented must be maintained until otherwise ordered by a court of competent jurisdiction.

Your decision is therefore affirmed.

**III.—INDIAN RESERVATIONS.***KLAMATH RIVER, CALIFORNIA.***JOHN McCARTHY.**

The land must be regarded as reserved until the selections for the Indians are all made. The question of restoring the remainder to the public domain will then be considered.

*Secretary Teller to Commissioner McFarland, December 14, 1883.*

SIR: I have considered the appeal of John McCarthy from your decision of March 8, 1883, sustaining the action of the local officers at Humboldt, Cal., in suspending McCarthy's pre-emption filing of lots 3 and 4, and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , in Sec. 3, T. 13 N., R. 1 E., H. M., for the reason that said tracts fall within the Klamath River Indian Reservation.

The appeal raises the question of fact, namely, whether said reservation, which was created by Executive order of November 16, 1855, has been regarded as a reservation since passage of the act of April 8, 1864 (13 Stat., 39), which limited the Indian reservations in California to four. It is sufficient for me to say that it has been so regarded, and that various allotments within its limits have recently been made. In my letter of March 26, 1883, to the Commissioner of Indian Affairs, I stated that when the selections within said reservations were all made, I would consider the question of restoring the remainder of the lands to the public domain.

Your decision is affirmed.

Herewith are returned the papers accompanying your letter of May 9, 1883.

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**IV.—LEGAL SUBDIVISIONS.***LOTS—SMALL FRACTIONAL PARCELS.***HILEMAN AND CLEVISH.**

Lots made by attaching small and presumably unsalable tracts to adjoining subdivisions are legal subdivisions of the public lands.

*Secretary Teller to Commissioner McFarland, January 28, 1884.*

SIR: I have considered the application of Louis W. Crofoot, attorney in fact for Samuel S. Hileman and William F. Clevish, to have proceedings instituted by the United States to set aside the patents issued to Charles E. Simmons for lots 1 and 2 of Sec. 5, T. 110 N., R. 79 W., Fifth P. M. Dakota, so far as they cover any portions of the NW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of said section.

It appears that said section is made fractional by the Missouri River, and that said lots, which are bounded by the river on one side, though they contain but 38.80 and 38.10 acres respectively and lie chiefly within the NE.  $\frac{1}{4}$  of the section, include a small portion of the NW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  respectively. It appears further that they were entered by Simmons with Valentine scrip in 1881, and patented to him on August 10, 1882. Subsequently to said entry the additional homestead entries, numbers 4,287 and 2,386, of Hileman and Clerish were allowed for those portions of said lots lying within the NW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  under a mistake as to the facts, the local officers erroneously supposing that said lots did not include said portions. Thereafter said error was discovered, and said additional homestead entries were by your office held for cancellation on September 15, 1883, for conflict with said Valentine scrip locations.

As a reason for instituting the judicial proceedings aforesaid, Mr. Crofoot urges that the act of April 5, 1872 (17 Stat., 649), creating the Valentine scrip, provided that it should issue "in legal subdivisions" and be located on "tracts not less than the subdivisions provided for in the United States land laws"; that these subdivisions are fully described in section 2,396 Rev. Stat., which provides that the quarter-section corners marked in the surveys "shall be established as the proper corners of the subdivisions which they were intended to designate," and that the quarter-section boundary lines in fractional townships "shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course," &c.; that the ordinary north and east quarter-section corners of the NE.  $\frac{1}{4}$  of said Sec. 5 were duly marked by the surveyor-general, and hence north and south and east and west lines drawn from them indicate the legal quarter-section, a subdivision of which might lawfully be located with Valentine scrip; but that said lots 1 and 2 of said section include more land than a subdivision of said quarter-section, each lot in fact including land in two distinct quarter-sections; and hence that said lots are not legal subdivisions, and the scrip entries are void as to those portions of said lots lying without the legal boundary lines of said NE.  $\frac{1}{4}$ .

To this the answer is, that for more than forty years the practice has been to survey tracts of land situated as the NE.  $\frac{1}{4}$  of the section herein involved is situated in the manner that the quarter-section has been surveyed, namely, so that small and presumably unsalable tracts shall not be segregated from adjoining subdivisions; that this practice has been uniformly sanctioned by the heads of the Treasury and Interior Departments and of the Department of Justice, and it is founded on provisions in the acts of April 24, 1820, and April 5, 1832, now incorporated in section 2367 Rev. Stat., which applies the provisions of section 2396 Rev. Stat., above cited, to the subdivision of fractional sections only, "as nearly as may be practicable;" that this practice had the sanc-

tion of the Supreme Court in the case of *Gazzam v. Lessee of Phillips et al.* (20 How., 372), where two lots were formed of parts of three quarter-sections, as in the case now before me; and that therefore the lots so surveyed in this case are the smallest legal subdivisions of the NE.  $\frac{1}{4}$  of Sec. 5 aforesaid, and were subject to location with Valentine scrip.

Wherefore the said application is denied.

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## V.—PAYMENT FOR SURVEYS.

### *CHANGE OF SOURCE OF PAYMENT.*

Where the appropriation is not sufficient to pay for the surveys contracted for, special deposits may be allowed in cases expressly authorized by the Commissioner of the General Land Office.

*Secretary Teller to Commissioner McFarland, March 10, 1883.*

SIR: I am in receipt of your report of 17th ultimo, respecting the application of settlers in certain townships in California to pay for the survey of the same by special deposit, the amount of appropriations in the hands of the surveyor-general not being sufficient to complete the surveys under the contract already made with Deputy John D. Hall, contract No. 287, dated November 18 and approved November 27, 1882.

In view of the facts, I see no objection to the use of such deposit when made, in adjusting the payment on the contract, and you are at liberty to instruct the surveyor-general accordingly.

Referring to the suggestion made by you, to the effect that an authorization of such change would, if adopted as a rule, render it impossible for you to be at all times in possession of accurate information as to the condition of the appropriations applicable to the survey of public lands, I have to remark, that if such change is only made when authorized specially in each case by your office, no difficulty need arise; and further, that no more uncertainty will be likely to ensue than is now attendant upon the making of a contract in the first instance based upon a deposit by settlers, where the surveyor-general proceeds to authorize and provide for the deposit, and enters into contract thereon before submitting the same for your approval.

The papers are returned.

*REPAYMENT—PRIVATE CLAIM.***PIERRE DOLET.**

The act of July 31, 1876, requiring payment for surveys of private claims before patent can issue, contains no provision limiting its application. The former construction as to its intent should be accepted as correct, and decision denying repayment is affirmed.

Objections that the survey was unnecessary and to the cost thereof cannot, in the absence of evidence or allegation of fraud, be considered, and the action of the officers charged with determining the necessity for and supervising the survey, reviewed; it being presumed that they have properly discharged their duty.

Certificates that may be issued on deposit for cost of survey cannot be used in payment for lands entered under the homestead and pre-emption laws.

*Acting Secretary Joslyn to Commissioner McFarland, August 6, 1883.*

SIR: I have considered the questions raised by Henry Safford, attorney for the heirs of Pierre Dolet, on appeal from your decision of November 23, 1882, denying the right of repayment of the costs of a survey of the private land claim of the said heirs.

It appears that suit was instituted in the United States district court for the district of Louisiana, May 13, 1874, by the heirs of Pierre Dolet, for the confirmation of a Spanish land grant, under the provisions of the act of June 22, 1860, "for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri," as the same was revived and extended by the act of June 10, 1872, and judgment was rendered in said court for the said heirs. On appeal to the United States Supreme Court the judgment of the lower court was affirmed October 28, 1879, and the title to the said heirs to over 17,000 acres of land was confirmed. In the opinion of your predecessor, a survey in the field was necessary, "as the bounds of the claim as established cut the legal subdivisions very generally," and the confirmees were called upon to deposit in advance the amount required for such survey, but being unable to comply with such requirement, the survey was made at the expense of the Government, and the confirmees required to reimburse the Government prior to the issuance of patent or scrip. The money called for as such reimbursement was furnished by the confirmees, under protest, and has since been paid into the Treasury of the United States.

The attorney for the heirs alleges that the demand for the payment of these costs was illegal; that there was no necessity for the survey in the field; that certain items in the account rendered for the survey were illegal and excessive; and that if the demand for such payment was legal the certificates of deposit could be used in paying for lands entered under the homestead and pre-emption laws.

If the law governing the class of cases to which this belongs requires all costs for the survey of private land claims to be paid before the issuance of patent or scrip, it is not within the province of this Depart-

ment, as an executive branch of the Government, to inquire whether such law does or does not impose an additional burden upon the confirmees, but rather to take such action as is prescribed by the law in ascertaining the boundaries of the claim, preparatory to issuing the patent or scrip.

The act of July 31, 1876, provided, among other things—

That an accurate account shall be kept by each surveyor-general of the cost of surveying and platting every private land claim, to be reported to the General Land Office with the map of such claim; and that a patent shall not issue, nor shall any copy of any such survey be furnished for any such private claim, until the cost of survey and platting shall have been paid into the Treasury of the United States by the parties in interest in said grant, or by any other party. (U. S. Stat., vol. 19, p. 121.)

But it is urged by the attorney for the appellants, that this act cannot be held as furnishing a permanent rule for the survey of all private claims subsequently to the passage thereof, for the reason that it formed a part of an act entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1877, and for other purposes," and occurred immediately in connection with an appropriation of \$25,000 for the survey of private land claims.

This act included a further provision, immediately following the portion quoted above, as follows:

That before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto under any of the acts, incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest.

And it was held in the case of the Southern Pacific Railroad Company (Copp's L. L., 1882, p. 749) that Congress intended that this provision should be made general and apply to all roads falling within its terms, not restricting its application merely to the expenditure of the appropriation for that year. In response to an inquiry from your office, it was held by this Department April 2, 1879, that the act established a general rule, which must govern this Department until changed by Congress (*Ibid.*, 1272).

Inasmuch as this act contains nothing in its provisions limiting or restricting its application, I am of the opinion that the former construction of this Department as to the intent of the act should be accepted as correct; and this being the law at the time of demand made for survey and patent, and for delivery of scrip, such patent or scrip could not issue except in accordance with its provisions.

So far as the appeal raises the question of the necessity for the survey, and the alleged excessive charges made therefor, it would be manifestly improper for this Department, in the absence of any evidence

or allegation of fraud, to review the action of your office, or of the surveyor-general; the presumption being that the officers to whom the Government has intrusted the duty of determining when the necessity for a survey exists, and of supervising such survey, have properly discharged their duties.

It is further manifest that whatever foundation may have existed for an allegation involving the propriety of making the survey, the manner in which it was made or the charges for making the same, such question should have been presented and determined prior to the payment of the costs, for at that time this Department was in a position to afford relief to the confirmees, if any wrong had been done, but at the present no such remedy exists. No appeal having been prosecuted at that time, this ground of the allegation must be considered as having been waived by the payment, and the purely legal question alone saved by the protest.

The reimbursement required by you can in no way be construed as such a deposit as is contemplated in sections 2401, 2402, and 2403 of the United States Revised Statutes, and the amendment of March 3, 1879, and cannot entitle the maker thereof to use the certificates he may receive therefor in payment for lands entered under the homestead or pre-emption laws, for the reason that one is a refunding of money already expended in the survey of a private land claim, and the other is a deposit to secure the survey of a township.

Your decision is therefore affirmed.

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## VI.—PRIVATE LAND CLAIMS.

### *ALLEGED ERROR—PATENTED SURVEY.*

#### RANCHO CASMALIA.

The evidence does not justify any interference with the original survey as patented. Commissioner's decision rejecting Von Schmidt's resurvey affirmed.

*Secretary Teller to Commissioner McFarland, October 17, 1883.*

SIR: I have examined the matter of the survey relating to Rancho Casmalia, Antonio Olivera, confirmees, on appeal from your decision of September 30, 1882, rejecting the survey of A. W. Von Schmidt, United States deputy surveyor.

The questions involved relate to the location of the northern and eastern boundary lines of Casmalia.

The grant owners ask for a relocation of those lines, and a location thereof different from those described in the patent—or at least different from those located under the patent.

Two surveys of Casmalia were made by Deputy Surveyor Terrell in 1860. The second (being approved) was carried into patent in 1863.

The northern boundary of the survey, as patented, had its beginning at a rocky point on the seashore called Cerrito Del Medio, at a point marked "C. No. 1," from thence running N. 75° E. 188 chains, to a live-oak tree marked "C. and B. T., No. 2," and continuing on the same course 18 chains farther (206 chains in all) to a post marked "C. No. 2."

The eastern line ran from said station No. 2, S. 50° E. 395.55 chains to an old post in the entrance of the Canada Verde, marked "T. S. No. 5," and "C. No. 3."

Subsequently to the patent, Surveyors Harris and Von Schmidt, under authority given by your predecessor, made partial surveys of the rancho.

The application of the owners of Casmalia is to change the north-eastern and southeastern corners so as to correspond with the Von Schmidt survey.

It will be observed that under the patented survey the live oak in the north line 18 chains from station "C. No. 2" is reached by a course from the point of beginning N. 75° E., and the corner is reached by a measurement of 206 chains. As now claimed, the live oak would be reached by a line N. 63° 15' E., and the corner at a distance of 200.26 chains. This would have the effect, as stated by you, to place the corner "C. No. 2" about  $\frac{5}{16}$  of a mile northeasterly from the corner as patented, and the relocation as requested would also have the effect to place the southeastern corner, "C. No. 3," about  $\frac{5}{16}$  of a mile northeasterly from that corner as patented.

It is alleged that the amount of land involved in the readjustment asked for is about 400 acres.

Rancho Guadalupe, which is contiguous to Casmalia on the north, was carried to patent on a modified survey of Guadalupe made in 1876. The second course of that survey coincides with the first course of the Casmalia, running in a reversed direction from said "C. No. 2" S. 75° W. to the seashore at "C. No. 1."

You state that the southeastern corner, as located by Von Schmidt, is about a quarter of a mile within the patented limits of Rancho Todos Santos; that the result of the changes claimed would be to place the eastern boundary line a quarter of a mile or more outside of the patented line, including lands settled upon as public lands, and to include also within Rancho Casmalia a parcel of the patented Rancho Guadalupe and of Todos Santos. Upon examination I reach the same result.

I am unable to discover any error in the survey of Rancho Casmalia as patented.

If, as claimed, the public surveys have been extended upon the lands of Casmalia as patented, and settlements have been made thereon, or if there is a conflict between the patented lines of Casmalia and the adjoining patented ranchos, the owners of Casmalia must seek a remedy in the courts.

Twenty years have elapsed since that rancho was patented and the lines of the final survey regarded as settled. Contiguous ranchos have been patented, and abutting public lands disposed of and settled upon the lines of such final survey. If this Department had any power to now readjust such lines, nothing but the most satisfactory proof of error or fraud would justify any interference therewith.

After a somewhat careful examination I am unable to find that there has been any error in such final survey or location of the lines as patented.

I affirm your decision rejecting the Von Schmidt survey.

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*SURVEY PATENTED—ERROR ALLEGED*

*RANCHO HEDIONDA.*

No evidence of error of survey of the east boundary line appears. If there did, no change could now be made by the Government, the lands having been disposed of.

*Commissioner McFarland to Messrs. Drummond & Bradford, Washington,  
D. C., November 22, 1883.*

**GENTLEMEN:** I have received your letter dated the 15th instant, entering your appearance as attorney for John Kelly, owner of Rancho Aqua Hedionda, California, and asking that an examination of the east line of said rancho in the field be ordered by this office with a view of determining whether Deputy Wheeler correctly closed the lines of public surveys upon said rancho boundary. You also state reasons why, in your opinion, doubt exists as to the correctness of Wheeler's survey.

In reply I have to state that after a critical examination in this office of the field notes of survey of said rancho and of the lines of public surveys closing thereon, there is no indication whatever that corner No. 5 of the rancho is where complainant alleges; on the contrary, all the notes tend to show that said corner is where Wheeler's notes place it, and that it is impossible that said corner is where affiants allege it to be. But whether there be any error or not in said survey or reported location of corners, the lands have been disposed of by Government according to the approved survey; hence I hold that I have no right under existing laws to make any further surveys or corrections of the surveys once made and approved.

The application for examination of the survey in the field is therefore hereby denied.

## VII.—RECONSIDERATION.

## ARSENAL ISLAND—GOVERNMENT OPERATIONS.

ROBERT CARRICK.

The allegations upon which reconsideration is moved being *ex parte* and in conflict with the evidence furnished by the War Department, reconsideration would not be granted without the fullest investigation, all parties to be heard, nor so long as the Government is carrying on its work, and while it is uncertain to what extent the island may be required for public use.

*Acting Secretary Joslyn to Commissioner McFarland, August 7, 1884.*

SIR: On May 16 last this Department affirmed your decision rejecting the application of Robert Carrick for survey of Arsenal Island, opposite the city of Saint Louis, in the Mississippi River, holding that so long as the island retained its drifting character, and until it becomes what is termed "fast" or "anchored" island, and until also the ultimate purpose of Congress—now engaged, through the War Department, in operations tending to fix this drift and secure permanency in the channel affected thereby—is known, this Department should take no action tending to hamper or interfere with the said operations, and hence that the island should not be now surveyed as public land.

A motion has been filed for reconsideration of this decision, upon the ground that the facts upon which it was based—so far as respected the character of the island—were erroneous. These facts were taken chiefly from an official report of Major Ernst of the Engineer Corps, under date of January 11 last, to whom the subject-matter was specially referred by the War Department, and seemed, therefore, entitled to special consideration. With the present motion are filed the affidavits of two civil engineers and surveyors of Saint Louis, stating their personal knowledge of the present and (for several years) past condition and character of this island, and that it has now become fixed and permanent land; and to this extent their statements conflict with those of Major Ernst. But whatever may prove to be the actual facts, this Department would not order a survey of land of the commercial value and importance of Arsenal Island upon mere *ex parte* and contradictory affidavits and statements, nor without the fullest investigation at which all parties in interest might be heard, nor especially at the solicitation of private persons, so long as the General Government is carrying on its work, and while it is uncertain to what extent the island may be required for public purposes.

Finding no reason for modification of the Department's decision of May 16, the motion for reconsideration is overruled.

**VIII.—RESURVEY.*****NO EVIDENCE OF ERROR.*****J. F. HENNEUSE.**

The township survey having been amended, on application of Henneuse, so as to show the true lines, by which he gets the full quantity to which he is entitled, and no evidence of error appearing, decision declining to order a resurvey affirmed.

*Secretary Teller to Commissioner McFarland, April 24, 1884.*

SIR: I have considered the appeal of J. F. Henneuse from your decision of June 7, 1883, declining to order a resurvey of lands in T. 10 S., R. 2 W., San Francisco, Cal.

During 1882 Henneuse, who is represented as the patentee of the S. W.  $\frac{1}{4}$  of Sec. 30, in that township, made application to the surveyor-general of California to have the plat of the township amended so as to show the public lands in Sec. 31. On attempting to construct the amended plat, that officer discovered that such action was impossible on account of the discrepancies found to exist between the different surveys. Whereupon your office directed that a deputy surveyor be sent into the field, with instructions to correct the defects.

Your letter of June 7, 1883, shows that a survey was made as per your directions, and that the survey and amendments transmitted by the surveyor-general of California were accepted by your office. The ground on which Henneuse rests his appeal is, that the resurvey does not establish what he contends is the true boundary line of the private land claims, which join on the southern part of Sec. 31.

The alleged reason for his dissatisfaction appears to be that on establishing the true line it was discovered that a small strip of land to the south, which he had occupied as a part of the SW.  $\frac{1}{4}$  of Sec. 30, was situated in Sec. 31. The tract covered by the description under which he holds contains by the new plat 160.64 acres of land. The resurvey was the result of his request to have the boundary lines definitely ascertained. The work appears to have been carefully and accurately done, and has received your approval. The appellant has also received the full quantity of a quarter section under his patent, and is not injured by the adjustment of the lines of subdivision.

Your decision is affirmed.

**IX.—SCHOOL SELECTION.****MANNER OF SURVEY—INDEMNITY.**

Where one system of surveys closes upon another, and the last range of townships are only about half the regular width, as they *could not* be surveyed differently, they have been accepted as surveyed according to law.

The question of State indemnity for school section lands wanting in such cases reserved.

*Commissioner McFarland to register, Humboldt, Cal., November 10, 1883.*

SIR: I have received your letter dated the 26th ultimo, transmitting a State indemnity selection, and appeal by Hon. James T. Stratton in behalf of the State of California, from your action in rejecting the same.

You also ask for a ruling as to the right of the State to indemnity in townships surveyed in the manner that T. 14 N., R. 8 E., M. D. M., was, and call my attention to decision of Hon. Secretary Schurz, dated April 14, 1879, in case of surveys by Deputy J. R. Glover.

In reply, I have to say that I do not consider that said decision applies to cases where one system of surveys is being closed upon another from west to east, and the last range of townships to the east is found to be only about half the regular width, as in the case under consideration, and as has been the case in many other township surveys where the work from Mount Diablo base and meridian has been closed upon the S. B. meridian, or where the work east of Humboldt meridian has been closed upon the Mount Diablo system of surveys, as has been in range 8, east of Humboldt meridian, referred to by you.

In view of the system of surveys provided for by the instructions to surveyors-general, based on the law, and carried on now for many years, so far as said fractional townships are concerned, they *could not* be surveyed in any other manner than they were, hence they have been accepted by this office as surveyed in conformity to law and instructions.

The case referred to by you as decided by Secretary Schurz was an entirely different one, being one in which the surveys were progressing from east to west, west of Mount Diablo meridian.

You will be advised in another communication more particularly in reference to the treatment of State indemnity selections.

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**X.—SWAMP LANDS.****STATE SEGREGATION—AMENDMENT.**

Amendment to plat showing State swamp segregation (the State survey not being according to rectangular system) is disapproved.

*Commissioner McFarland to surveyor-general, San Francisco, July 12, 1882.*

SIR: I am in receipt of your letter dated the 20th ultimo, inclosing copy of letter addressed to you by the State surveyor-general of Cali-

fornia, and at his request transmitting a diagram showing amendments made to lots 1 and 6 of Sec. 7, T. 13 S., R. 2 E., M. D. M., California, according to State segregation survey No. 10, made August 9, 1860. You also transmit two certified copies of said State survey, to one of which is attached the application of the person for whom the survey was made.

The application of the State in this case to have the said segregation survey approved is made in order that lot 1 of Sec. 7, surveyed in 1867, as dry land, may be listed to the State and patented as swamp and overflowed, and in your certificate approving the amended diagram you state that it is in strict "conformity with the decision of the Department of the Interior, dated December 21, 1877, and the segregation of swamp and overflowed land made by the State of California prior to July 23, 1866, which segregation conforms to the system of surveys adopted by the United States."

In reply, I have to say that an examination of said State survey shows that it was not made in accordance with the system of surveys adopted by the United States, and your amended diagram is therefore disapproved, and the designations of lots as swamp and overflowed must stand as represented on plat of said township approved March 30, 1880, and August 28, 1872.

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#### AMENDMENT ALLOWED.

Commissioner's decision of July 12, 1882, modified. Plat should be amended to show the lot claimed by State as swamp—the greater part of the 40 acres having been returned as swamp.

The lands in the rest of the proposed amendment having been already patented to the State, no further amendment is necessary.

*Secretary Teller to Commissioner McFarland, November 2, 1883.*

SIR : I have considered the case presented by the appeal of the State surveyor-general of California from your decision of July 12, 1882, disapproving the amended diagram forwarded to you by the United States surveyor-general of California, showing amendments made to lots 1 and 6 in Sec. 7, T. 13 S., R. 2 E., M. D. M., California, according to State segregation survey No. 10 made August 9, 1860.

On the segregation map of T. 13, approved August 28, 1872, the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7 is divided into dry land lot 1, containing 15.69 acres, and swamp land lot 7, containing 24.31 acres, and lot 6, being a part of the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of said section, and 10.62 acres in area appears as swamp land.

If the amendment to the segregation map is made strictly in accordance with the State survey, referred to above, lot 1 will appear as swamp land, and a new lot designated as No. 11 will be carved out of lot 6; but the real object of the desired amendment is to secure the designation of lot 1 as swamp land, for, by the records of your office, that

part of lot 6 which would be included in lot 11 appears to have been patented to the State as swamp land February 8, 1873.

The Southern Pacific Railroad Company of California, by its attorney, resists the application of the amendment of the segregation map, and claims said lot 1 as part of an odd section enuring to said company by the act of July 27, 1866 (14 Stat., 292). You disapproved the amended diagram for the reason that—

An examination of said State survey shows that it was not made in accordance with the system of surveys adopted by the United States.

By the act of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits (9 Stat., 519), the whole of those swamp and overflowed lands, made unfit thereby for cultivation," which were unsold at the date of the passage of the act, were granted to the State of California.

Section 3 of said act provides—

That in making out a list and plats of the land aforesaid, all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

The act from which the foregoing quotation is made is a present grant, vesting in the State, from the day of its date, the title to all the swamp and overflowed lands within the State that were then not sold, and requiring nothing but the determination of boundaries to make it complete. (*Wall et al. v. The State of California*, Copp's L. L., 1882, p. 1848; *Railroad Company v. Smith*, 9 Wall., p. 95.)

In order that there should be no difficulty in determining the boundaries of the granted land, Congress, in section 3 of the act, defined with precision the lands which should be taken by the State under the grant as "swamp and overflowed lands," to wit: "All legal subdivisions the greater part of which is wet and unfit for cultivation." When the character of the greater part of a legal subdivision has been ascertained by properly constituted authority, the character of the whole of that subdivision is determined, and the question as to whether title to such tract will or will not pass under the grant is settled by virtue of the statute itself.

In this case it appears that the segregation surveys, made both by the Government and the State, agree so far as the character of "the greater part" of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7 is concerned, but the approved segregation map of that township shows lot 1, which only contains 15.69 acres, as dry land, and the remainder of the 40 as swamp land, and in this particular I think the said map should be amended.

The remainder of the amendment, asked to be made under the designation of lot 11, includes 3.95 acres already patented to the State as hereinbefore stated, and the title thereto having passed to the State as

swamp land, no further act on the part of the Government, as affecting the legal status of said tract, is required under the grant.

The whole of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7 passed to the State under the grant when the character of the greater part of such subdivision was determined to be swampy; hence the segregation map of that township should designate lot 1 as swamp land, on account of the character of the greater part of the legal subdivision of which it is a portion.

Your decision is accordingly modified as indicated in the foregoing.

## DIVISION F.—RAILROADS.

- I. ABANDONMENT.
- II. CERTIFICATION.
- III. DEFINITE LOCATION.
- IV. FORFEITURE.
- V. HOMESTEADS.
- VI. INDEMNITY LANDS.
- VII. INDIAN RESERVATIONS.
- VIII. NEW MEXICO DONATION.
- IX. PRACTICE.
- X. PRE-EMPTION.
- XI. RELINQUISHMENTS.
- XII. RIGHT OF WAY.
- XIII. SWAMP LANDS.
- XIV. TIMBER CULTURE.
- XV. WITHDRAWALS.

### I.—ABANDONMENT.

#### NORTHERN PACIFIC RAILROAD *v.* HESS.

A valid pre-emption claim had excepted a tract from the withdrawal on general route; when the settler afterwards abandoned it, though on erroneous advice and information by the local officers, the land became public, and passed to the company by definite location of the road.

*Secretary Teller to Commissioner McFarland, September 21, 1883.*

SIR: I have considered the case of the Northern Pacific Railroad Company *v.* Theodore Hess, involving the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 21, T. 18 N., R. 18 E., Yakima, Wash., on appeal by the company from your decision of September 29, 1881, holding that the tract was excepted from their grant.

It appears that Hess, being qualified, settled on said tract March 7, 1873, and on March 31, 1873, filed declaratory statement No. 491, covering this and the adjoining tract, namely, the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 28; that on November 12, 1873, he applied to make proof and payment, which he was not permitted to do for want of his naturalization papers; and that, having procured the necessary proofs, he twice afterwards applied to make proof and payment, and was informed by the local officers that the tract had been withdrawn for the benefit of the railroad company, and that therefore he could not acquire it under the pre-emption laws. It appears further that, acting on this information, he homesteaded the tract in the even section on July 21, 1874, applied to the railroad company to purchase the tract in controversy in August,

1874, and built a house on the former tract in December, 1874, where he has since resided. In June, 1881, he proved up his homestead claim, and at the same time applied to amend it so as to cover the tract in controversy; but to this the railroad company object on the ground that the land was withdrawn for their benefit on general route August 15, 1873, and again on amended location July 18, 1879.

I concur in your opinion that on August 15, 1873, Hess had a valid claim to the tract, which the withdrawal of that date could not defeat, but I find myself unable to agree with your conclusion from the evidence that he has continued to assert a claim to the land. The land grant to the company (sec. 3, act of July 2, 1864) embraced all lands to which the United States had full title, not reserved, &c., "and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed." Hence if the tract in controversy was actually abandoned, though upon erroneous information as to the fact of withdrawal in 1873, it passed to the United States, was included in the withdrawal of 1879, and passed to the company at date of definite location. The railroad company assert the abandonment, and Hess denies it; but there is not sufficient evidence before me on which to determine the truth of the matter, and it is suggested that a hearing be had before final disposition of the case.

Your decision is modified accordingly.

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## II.—CERTIFICATION.

### REVERSIONARY RIGHTS—ACT OF JUNE 3, 1856.

#### ALABAMA RAILROAD LANDS.

The State is entitled to have certification of the lands in question for purposes of identification, leaving all questions of reversionary right to the action of Congress.

*Secretary Teller to Commissioner McFarland, November 23, 1883.*

SIR: I have considered and heard oral argument upon a request of the governor of Alabama for a review and modification of my decision of December 21, 1882 (9 Copp., 200), in the matter of the application for certification of lands granted to the State by act of June 3, 1856 (II Stat., 17), for what is now the Alabama and Chattanooga Railroad, with other roads named therein, which grant as to the road in question was revived by act of April 10, 1869 (16 Stat., 45).

These lands lie within the intersecting lines of the above-named completed road and the Tennessee and Coosa, uncompleted, and the legislature of the State, since the date of my decision, has, by certain acts approved respectively February 20, and February 21, 1883, made disposal of the same for the benefit of the completed road.

By said decision it was held that the granting act of 1856 operated as a limitation upon the power of the State to dispose of the granted lands except as the several roads should be constructed; and as by the second proviso it was declared "that the lands hereby granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever," it was held that such a tenancy in common was created in trust in favor of all the several intersecting roads, as to deprive the State of any power to confer the grant upon one, or to dispose of it for the benefit of one to the exclusion of the others; and that the only power of disposal brought into exercise by the completion of one road was the power to make distribution for quantity to the extent of the lands earned by the completed road, leaving the residue, either as an undivided share or segregated by act of partition, for future disposal in favor of any intersecting road, as the same should be completed.

It is now urged by counsel that this construction of the proviso is not necessary to effect the purposes of the limitation; that there are, in reality, two descriptions of lands which may be brought into classification for the purposes of adjustment under the grant, viz:

1. Lands lying within the limits of each several road outside the intersecting lines, title to which as to one can have no relation whatever as to another; and which, not being within the reach of the other, should not, by any act of the State, be set over for the benefit of any other than the road to which they properly attach under the grant.

2. Lands lying within the intersecting limits, which it is and must be within the province of the State to apportion in such manner as to secure proper connections and adjustments; and the equitable bestowment of which, subject to judicial or legislative control, is purely a matter of State concern, which it was not, and should not be, the intention of Congress to limit or restrain.

I am not prepared to say that this position is untenable, considering the fact that title passed to the State by the granting act upon definite location of the first road located, and that whatever of right accrued to subsequently located intersecting roads must be enjoyed under equitable rules and principles, subject to the general scope and limitations of the granting act; considering, also, that if a common tenancy in interest was acquired by any *cestui que trust* in said lands, the State must have power, in order to make any partition in severalty, to exercise some prerogative of disposal over the whole, embracing each and every parcel, and so, in effect, encroach, to that extent at least, upon the limitation of the proviso, if it in reality held back such power to await the completion of all the roads; and considering further the principle that a limitation in a proviso in restriction of a general grant takes nothing out of the grant except the special matter contained in the ex-

ception, I am constrained to the view that the words of exception may find sufficient scope and effect in relation to the lands lying outside the intersection, along the several roads, and that the power to adjust inside such intersecting limits may exist in the State, notwithstanding the restrictions of the proviso.

If this be so, the power being granted, and the contingency of the completion of one road having brought it into exercise, it remains in the State for all purposes of the act, and the manner of its exercise is, of course, no longer a question for this Department.

I therefore conclude that she is entitled to have certification of the lands for the purposes of identification, leaving all questions of reversionary right to be declared upon by Congress, should any action be determined upon by that body affecting the matter.

You are accordingly instructed to proceed with the adjustment of the grant upon the foregoing suggestions.

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### III.—DEFINITE LOCATION.

#### CENTRAL PACIFIC (SUCCESSOR TO WESTERN PACIFIC) COMPANY.

The grant by terms *in presenti* was made July 1, 1862. The land office refused to approve the selection of the tract for the reason that the land was included *at date of the act* within the exterior limits of the San Lorenzo Rancho.

The court ordered a resurvey of this rancho in 1863. The claim was finally confirmed October 31, 1864, and did not include this land. Therefore at the date of the preliminary withdrawal, January 31, 1865, the tracts were public land.

It is held that, as the land was public land at the latter date and at date of definite location, it inured to the railroad grant.

*Secretary Teller to Commissioner McFarland, March 14, 1883.*

SIR: I have considered the appeal of the Central Pacific Railroad Company, successor of the Western Pacific Railroad Company, from your decision of June 22, 1882, refusing to issue a patent for lots 1 and 2 of the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 25, T. 3 S., R. 2 W., M. D. M., San Francisco district, California, and holding for cancellation, selection list No. 19, so far as it embraces said land.

The land for which a patent is asked lies within the limits of the grant of July 1, 1862, to the Central Pacific Railroad Company, and the lands thus granted were withdrawn for the benefit of said company January 31, 1865.

The Central Pacific Company assigned to the Western Pacific Company the right to construct that portion of the road lying between San Jose and Sacramento, and Congress ratified the assignment March 3, 1865 (13 Stat., 504), confirming to the said Western Pacific Company all the benefits and privileges of prior legislation, subject to all the conditions thereof.

It appears that the line of road was definitely located opposite this land, between February 25 and April 1, 1868; and September 17, 1878, the Central Pacific Company, successor to, by consolidation with the Western Pacific Company, selected said land, but a patent therefor was refused, for the reason that the land was included within the exterior limits of the San Lorenzo Rancho, at the time the original grant of lands was made, July 1, 1862.

The title to the San Lorenzo Rancho was confirmed to Guillermo Castro, by a decree of the United States district court for the northern district of California, July 6, 1855, and a survey of the rancho was made by John La Croze, under instructions from the United States surveyor-general, which was returned into court November, 1859, and this survey included the land now in controversy. November 11, 1863, a new survey was ordered, but this order was vacated October 10, 1864, and a decree rendered fixing and defining the western boundary of the Rancho, and ordering a further survey, which was made by J. S. Stratton, approved by the surveyor-general October 17, 1864, and affirmed on appeal under the act of July 1, 1864, by the United States circuit court for the tenth circuit northern district of California, October 31, 1864, and a patent was issued February 14, 1865. The Stratton survey, as approved and confirmed by the final decree, did not include this tract of land.

From this statement of facts it will be seen that the tract in question, at the time when the original grant of lands was made, was included within the San Lorenzo Rancho by the La Croze survey, but that prior to the withdrawal of the lands, and prior to the definite location of the road, the said tract had been finally segregated from the Rancho by the approval and confirmation of the Stratton survey.

The attorney for the company alleges "that the grant in this locality was in truth and in fact by the act of March 3, 1865," and "that the grant was of public land not reserved at the time the line of said road is definitely fixed."

The act of July 1, 1862 (12 Stat., 489), entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," &c., after providing for the incorporation of the Union Pacific Railroad Company, and the right of way for said road, contains the following grant:

SEC. 3. *And be it further enacted,* That there be and is hereby granted to the said company for the purpose of aiding in the construction of said railroad and telegraph line \* \* \* 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 by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

Section 9 of said act provides as follows :

The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco or the navigable waters of the Sacramento River to the eastern boundary of California, upon the same terms and conditions in all respects as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.

From the sections quoted it would appear that the grant to the Central Pacific Company was made specific in its terms, and complete in all particulars, requiring no further legislation to define the relation of the company to the said grant, and that if the company proceeded to construct the said road and telegraph line, and completed the same as contemplated in said act, the said company would be fully entitled to receive the lands so granted. But the company thereafter assigned to the Western Pacific Railroad Company the right to construct that portion of the line lying between San José and Sacramento ; and March 3, 1865, Congress ratified the assignment in the following terms :

That the assignment made by the Central Pacific Railroad Company, of California to the Western Pacific Railroad Company of said State, of the right to construct all that portion of said railroad and telegraph line, from the city of San José to the city of Sacramento, is hereby ratified and confirmed to the said Western Pacific Railroad Company, with all the privileges and benefits of the several acts of Congress relating thereto, and subject to all the conditions thereof. (13 Stat., 504.)

It appears that the Central Pacific Company is the successor by consolidation of the Central Pacific Company and Western Pacific Company, under the statutes of California, on June 23, 1870, and it is now urged by the attorney for the Central Pacific, that the grant of lands under which this tract is claimed should be held as of March 3, 1865 ; but this position I do not think is tenable. The act of March 3, 1865, was simply one of ratification, by which the Western Pacific Company received the benefits previously granted to the Central Pacific, taking such benefits subject to all the conditions originally imposed on the grantee named in the act of July 1, 1862. In order to ascertain what is confirmed to the Western Pacific by the act of March 3, 1865, it is necessary to examine the act of July 1, 1862, and the subsequent act of July 2, 1864, for no express benefits are conferred or conditions named in the act of ratification ; hence it is difficult to see in what manner the rights of the Central Pacific have been enlarged by the assignment and the legislation with reference thereto. (M. K. & T. Ry. Co. v. K. P. Ry. Co., 97 U. S., 491.)

An examination of the record in this case discloses the fact that the tract in question, although *sub judice* at the time of the grant, had been finally segregated from the San Lorenzo Rancho before the withdrawal of the lands, as provided in said grant, and before the line of said road

was definitely located; and that by this segregation, the said tract became public land within the meaning of the granting act, it being not sold, reserved, or otherwise disposed of by the United States, and no pre-emption or homestead claim having attached at the time the line of said road was definitely fixed. While it is true that the grant was *in presenti*, it is also true that it specified the lands to be included therein as "public lands," and carefully defined what was meant by that term as used in the grant, and named a time when such definition of the term should apply, that time being when "the line of said road is definitely fixed." An absolute grant of land was made, but inasmuch as it was then impossible to know where the line of road would be finally located, so it was impossible to specify the particular tracts to be included within the grant; hence a time was named when the grant should be perfected, and at that time all "public land" as defined by the act, within certain fixed limits, was to pass to the grantee. The land in the case of *Newhall v. Sanger* (2 Otto, 761), was not in the same condition as in the case now under consideration, but was within the exterior limits of the false Mexican claim, when the road was located, and the required maps were made, the claim then being in litigation and the land *sub judice*. In *Ryan v. Railroad Company* (9 Otto, 382), attention is directed to the obvious implication in the opinion delivered in the case of *Newhall v. Sanger*, that if the lands had been disembarrassed at the date of the grant, or their withdrawal from sale, they would have passed to the company.

In the case of *Perkins v. Central Pacific Railroad Company* (9 Copp's L. O., 201), the land was held to be excepted from the grant to the railroad company; but the decision went upon the ground that at the time the line of road was definitely located, there was a valid pre-emption claim existing against the tract in question, and hence is not in conflict with the conclusion reached in the case.

I am of the opinion that the land in question was public land within the intent of the act of July 1, 1862, at the time when said grant took effect by the definite location of the road, and that a patent should issue therefor.

Your decision is therefore reversed.

**RESSEMAN v. SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.**

Under the rule in *Van Wyck v. Knevals*, it is held, that the line of the Saint Vincent extension of this company's road became definitely fixed and the company's right to land in its limits attached December 19, 1871, when the map of definite location of said line filed in the Department was accepted by the Secretary of the Interior, and not at the date of survey in the field, as formerly held.

*Commissioner McFarland to register and receiver, Saint Cloud, Minn., October 27, 1883.*

**GENTLEMEN:** By act of Congress approved March 3, 1857 (Stat. 11, p. 195), certain lands were granted to the then Territory of Minnesota to aid in the construction of proposed railroad lines in said Territory, consisting of "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads," with the privilege of selecting lands in lieu of tracts lost in place, as mentioned in the act, in alternate sections within 15 miles on each side of said roads. The time for the completion of the roads was fixed at ten years from the date of the act.

By act of March 3, 1865 (Stat. 13, p. 526), the act above mentioned was so amended as to grant ten sections per mile, instead of six, to each of the roads, with rights of indemnity within 20 miles of the lines of road, and the time for completion of the roads was extended to eight years from the date of the act.

The laws referred to apply to the Saint Paul and Pacific (now Saint Paul, Minneapolis and Manitoba) Railroad and its branches, known as Brainerd Branch and Saint Vincent Extension.

By act of March 3, 1871, the Saint Paul and Pacific Railroad Company was permitted to change the routes of its branch lines from those proposed by the original act of 1857, "with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws," subject to all the conditions imposed by the former acts, and the additional condition that all lands along the abandoned lines should be released. (Stat. 16, p. 588.)

In pursuance of this act the company proceeded to locate and construct the Saint Vincent extension line, no location having been previously made, and the entire line was located by survey in the field between May 18 and September 21, 1871. The right of the company has heretofore been held to have attached to lands along this line from date of survey in the field. In view of the fact, however, that the Supreme Court of the United States held, in the case of *Van Wyck v. Knevals* (Otto 16, p. 360), that—

The route must be considered as "definitely fixed" when it has ceased to be subject to change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the

ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.

And the language of the act of March 3, 1865, amendatory of the act of March 3, 1857, under which the Saint Paul and Pacific Railway Company received its grant, being identical—so far as relates to definite location—with that of July 23, 1866 (Stat. 14, p. 210), considered by the court, it must be held that the existing rule is erroneous, and that the right of the Saint Paul and Pacific Railway Company attached to the lands within the limits of the grant for its Saint Vincent extension line on December 19, 1871, which is the date, as shown by the records of this office and the Department, when the Hon. Secretary of the Interior accepted the map filed by the company designating the route of the extension line.

You will, therefore, be governed in accordance with this rule in considering matters under this grant in future. The withdrawal of lands for the extension line was made by office letter of February 6, 1872, and became effective in respect to lands in your district upon receipt of said letter at your office February 12, 1872.

January 18, 1876, John Ressemann was permitted to make homestead entry No. 9410, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , 3, 123, 31, the land being within the 10-mile or granted limits of the Saint Vincent Extension. The line of the road was completed to Melrose (a point beyond the land described) November 29, 1872, within the time prescribed by act of March 3, 1865.

On January 27, 1881, Ressemann's entry was held for cancellation by this office because of conflict with the right of the railroad company, the records of this office showing that the tracts embraced therein were vacant, unappropriated public land at the date of the act of March 3, 1871.

It having been established to the satisfaction of this office that Ressemann had settled upon the land in good faith and had valuable improvements thereon, Messrs. Curtis, Earle and Burdett, attorneys in this city for the railroad company, were requested by letter of May 2, 1881, to relinquish the land in favor of Ressemann, with the privilege of selecting other tracts in lieu thereof, as provided by act of June 22, 1874. It appears that no response was made to this request, and on October 27, 1881, the attorneys were asked whether the company would comply with the same.

With a letter dated November 8, 1881, the attorneys transmitted to this office a relinquishment of the land by the company, conditioned upon the right of the company to select other tracts in lieu thereof.

By letter F of November 21, 1881, you were advised that Ressemann's

entry would be allowed to remain intact, and subject to his ability to make satisfactory final proof.

February 10, 1882, the entryman submitted final proof, showing full compliance with the requirements of the homestead law, and final certificate and receipt No. 5059 were that day issued in his name and duly transmitted with the final proof to this office.

The relinquishment of the land by the railroad company is therefore accepted, subject to the conditions therein expressed, and the homestead entry No. 9410, final No. 5059, is this day approved for patenting.

The attorneys of the railroad company will be advised by this office of the action in the premises, and you are instructed to inform other parties in interest respecting the same.

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**CARRAHAR v. IOWA FALLS AND SIOUX CITY RAILROAD COMPANY.**

Under the rule announced in *Van Wyck v. Knevals* it is held that the line of the road became definitely fixed, and the right of the State and the company attached October 13, 1856, when the map of definite location filed in the Department was accepted by the Secretary of the Interior, and not on the date of survey in the field, as heretofore held.

The tract in question was vacant public land at the date the grant took effect, and it is not now subject to appropriation under the laws of the United States.

*Commissioner McFarland to register and receiver, Des Moines, Iowa,  
December 3, 1883.*

GENTLEMEN: I have considered the appeal of John Carrahar from your decision rejecting his application to enter under the timber-culture law the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , 1, 89, 46 W.

The tract is within the six-mile or primary limits of the grant to the State by act of May 15, 1856 (11 Stat., 9), for the Dubuque and Pacific, now Iowa Falls and Sioux City Railroad. The right of the road under said grant has heretofore been held to have attached from date of survey in the field. The line of the road opposite the tract now in question was surveyed July 7, 1856.

The United States Supreme Court, however, in the case *Van Wyck v. Knevals* (16 Otto, 360), held that the right of the State of Kansas, under a similar railroad grant, attached when the route of the road was definitely fixed, beyond the power of change by the railroad company, so as to affect the grant, and that this was not done until the route had been adopted by the company, and a map designating it had been filed with and accepted by the Secretary of the Interior.

The Dubuque and Pacific Railroad Company filed in this Department a map showing the definite location of its road on October 11, and the same was accepted by letter of October 13, 1856. Said map has since been used as a basis for the adjustment of the grant, and the right of

the State and the company will accordingly, hereafter, be held to have attached along the entire road October 13, 1856.

The records show that the tract in dispute was selected as swamp February 21, 1859, and that the claim of the State under said selection was finally rejected on February 26, 1878. It was also selected under the railroad grant, but was not included in the lists approved to the State, because of conflict with the swamp claim.

The tract is also within the ten-mile limits of the grant to the State by act of May 12, 1864 (13 Stat., 72) for the Sioux City and Saint Paul Railroad Company, but said company's claim was rejected October 2, 1879, and it took no appeal.

As shown by the facts above recited, the tract was vacant public land at the date the grant for the Dubuque and Pacific Railroad Company took effect, October 13, 1856, and it passed thereunder. It is not subject to appropriation under the laws of the United States, and the application of Carrahar is therefore rejected, subject to appeal within sixty days. You will so advise him. The attorney for the railroad company will be advised by this office.

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#### THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY.

The granting act provides that the rights of the companies to the lands shall attach "when the lines or routes of said roads are definitely fixed", but does not provide for the filing of a map of definite location.

*Held*, 1, that the lines of the roads are to be regarded as definitely fixed on the dates that the maps of definite location were filed in the Land Department, and not on the dates that they were fixed on the surface of the earth; 2, that this company is not entitled under the act of June 22, 1874, to indemnity for lands upon which the entries or filings of settlers were allowed prior to the filing of said maps.

*Secretary Teller to Commissioner McFarland, December 4, 1883.*

SIR: I have considered the case presented by the appeal of the South and North Alabama Railroad Company from your decision of July 15, 1882, rejecting a list of selections aggregating 5,160 acres filed by said company March 7, 1882, and claimed under the act of June 22, 1874.

A grant of lands to aid in the construction of certain railroads was made by Congress June 3, 1856 (11 Stat., 17), to the State of Alabama, in the following terms:

That there be, and is hereby, granted to the State of Alabama \* \* \* 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 sections or any parts 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 the lands of the United States, nearest to the tiers of sec-

tions 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 rights of pre-emption have attached as aforesaid: *Provided, further,* That the lands hereby granted, for and on account of said roads, severally, shall be exclusively applied in the construction of that road, for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever.

Among the roads named as beneficiaries under the foregoing act was one designated as the "Central Railroad, from Montgomery to some point on the Alabama and Tennessee State line in the direction to Nashville, Tennessee;" and March 3, 1857, Congress, by amendment to the original act (11 Stat., 200), substituted for the language used therein to describe the beneficiary, "the Tennessee and Alabama Central Railroad."

The act of June 3, 1856, contained a provision that, if any of the roads were not completed within ten years, the lands remaining unsold should revert to the United States; but Congress, March 3, 1871, passed an act reviving and renewing the original act for the use and benefit of the South and North Alabama Railroad Company, subject to all the conditions and restrictions of the said original act.

By act of June 22, 1874 (18 Stat., 194), Congress provided:

That in the adjustment of all railroad land grants, whether made directly to any railroad company, or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the Land Office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands, not mineral, and within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted.

Under the act last quoted the selections now under consideration were made by the South and North Alabama Railroad Company.

It will be observed that by the terms of the original grant indemnity was provided in cases where it appeared that lands included within the grant had been disposed of by the Government prior to the time when the line of the road was "definitely fixed," and that by the act last quoted indemnity was furnished the company for granted lands that had been entered under the pre-emption or homestead laws after the rights of the road had attached, in consideration of a relinquishment by the company of the lands so entered.

You rejected the list of selections made by the company because you found that the right of the said South and North Alabama Railroad had not attached to the lands for which indemnity was asked, prior to the allowance of the entries for said land.

The attorney for the company alleges in substance that you erred in

not deciding that the right of the road attached to the odd-numbered sections in the six-mile limits on the date of the definite location of the road on the surface of the earth as shown by the map of definite location, filed in the General Land Office July 26, 1871.

An examination of the list of selections shows that all the entries for which indemnity is claimed were allowed prior to the date when the map of definite location referred to above was filed. But it is strongly urged on behalf of the company that for the purpose of ascertaining when the right of the road attached, the filing of said map should not be accepted as conclusive; that such fact should rather be determined by an inquiry as to the time when the line of road was definitely located upon the surface of the earth. With this object in view, affidavits of the chief engineer of the road have been submitted, with other evidence of a similar character, to establish the fact that the line of said road was definitely located from station to station, as shown on said map, at various dates prior to the filing of said map, and that the road was definitely located on the ground as early as the year 1863.

The map heretofore referred to bears on its face a certificate signed by the president and chief engineer of the South and North Alabama Railroad Company, as follows:

It is hereby certified that, in pursuance of the act of the legislative assembly of the State of Alabama, approved February 8, 1856 (8), entitled an act to vest in the Tennessee and Alabama Central Railroad Company certain lands granted by Congress in trust to the State of Alabama to aid in the construction of the Tennessee and Alabama Central Railroad, this map shows in connection with the public surveys the actually surveyed line of route of the South and North Alabama Railroad, for said railroad company, as successors of the Tennessee and Alabama Central Railroad Company, from Montgomery to Decatur as definitely fixed, in compliance with the act of Congress approved June 3, 1856, and renewed March 3, 1871, and in pursuance of the resolution of the board of directors of said railroad company, passed May 7, 1860, and January 22, 1861, and May 30, 1871, and that the dates of the field work thereof are truly indicated along the line from station to station upon this map.

Now the grant of lands in this case was made to the Tennessee and Alabama Central Railroad; and that road, May 30, 1866, filed in the General Land Office a map showing the definite location of said road from Decatur on the north to Montevallo—now Calera—on the south; and said map bears on its margin a certificate signed by the president and secretary of the company, in the following language:

By a resolution of the board of directors at a meeting held at their office on the 22d day of May, 1866, the line as located by John T. Milner, chief engineer, and designated on the accompanying map, was adopted as the final location of the Tennessee and Alabama Central Railroad. Athens, Alabama, May 22, 1866.

You concluded, after an examination of the two maps, and the evidence borne on the face of said maps as to the action of said Tennessee

and Alabama Central and its successor, the South and North Alabama Railroad, that the line of road belonging to the same was definitely fixed between Decatur and Calera, May 22, 1866, and between Calera and Montgomery, May 30, 1871. But it is urged by the company that, as the lands in question lie opposite that portion of the road last designated, the map of 1866 is not to be considered, as the evidence submitted with the map of 1871 shows said portion of the road located as early as 1863. I see no reason, however, why the official action of the company in 1866 should now be ignored and the whole question as to the final location of the road in its present entirety be left to the map of 1871 and explanatory parol testimony.

The map of 1866 shows, according to the solemn declaration of the officers of the road at that time, that the line of the Tennessee and Alabama Central Railroad was finally located on the route shown thereon, in accordance with a resolution adopted by the board of directors of said company, May 22, 1866; but as said map does not show any location of the road south of Calera, the conclusion is irresistible that the line between Calera and Montgomery had not been adopted by said company as late as May 22, 1866, and that the adoption of the resolution of May 30, 1871, by the South and North Alabama Railroad Company, after the passage of the reviving act, which declared the final location of the road from Decatur to Montgomery, is the best evidence of the time when the route was definitely fixed between Calera and Montgomery, so far as the acts of the two companies are concerned prior to the filing of said maps.

When did the rights of the road attach to the lands embraced within the grant?

The grant was *in presenti*, only requiring a definite location of the line of road to give it precision, and thus carry by its terms the granted lands; hence the inquiry as to the time when the right of the road attached can only be answered by ascertaining when the line of said road was definitely fixed.

It is immaterial whether a map of definite location is required by the express terms of the act, for the act can take effect upon no land until such time as the line of road may be so fixed as to bring into operation the force of the grant upon the lands lying within the specified limits; and for the purpose of showing the line thus definitely fixed a map must be prepared setting forth the actual survey of such line as finally adopted by the company.

By the act of March 6, 1820 (3 Stat., 545), Congress provided for the admission of Missouri into the Union, and, among other regulations, enacted—

That four entire sections of land be, and the same are hereby granted to said State for the purpose of fixing the seat of Government thereon, which said sections shall, under direction of the legislature of said State, be located as near as may be in one body, at any time, in such

townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States.

In *Lessieur v. Price* (12 Howard, 59), the operation of said act was considered, and the court held—following *Rutherford v. Greene's heirs* (2 Wheaton, 196)—that the grant to the State of Missouri was a present grant, and the selection made by the State, and notice of such location to the surveyor-general, and the register of the district where the land lay, gave precision to the title and attached it to the land selected.

In *Van Wyck v. Knevals* (106 U. S., 369), the court said:

The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.

It will be observed that in the opinion of the highest judicial authority, where some act is necessary on the part of the grantee to give precision to a grant, such grant is held to take effect from the time when *notice* of the performance of such act is brought home to the grantor, and not before.

I am of the opinion that the grant in this case took effect on the lands lying between Decatur and Calera on May 30, 1866, and on the lands lying between Calera and Montgomery on July 26, 1871—the dates respectively when the said maps of definite location were filed.

With the modification indicated, your decision, therefore, rejecting said list of selections, is affirmed.

#### WOOLF *v.* CENTRAL PACIFIC RAILROAD COMPANY.

Under the rule in *Van Wyck v. Knevals*, it is held that the right of said company to land within its limits attached October 20, 1868, the date when its map of definite location filed in the Department was accepted by the Secretary of the Interior, instead of at the date of adoption and certification of said map by the officers of the company, as formerly held.

*Acting Commissioner Harrison to register and receiver, Salt Lake City, Utah, December 15, 1883.*

GENTLEMEN: I have considered final homestead entry No. 1,499, dated April 8, 1881 (original No. 2,379, October 8, 1875), in the name of Absalom Woolf, covering the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and lot 2, Sec. 7, T. 12 N., R. 1 E.

The tracts in question are within the twenty-mile (granted) limits of the grant to the Central Pacific Railroad Company (act of July 1, 1862, 12

Stat., p. 489, and July 2, 1864, 13 Stat., p. 356), the right of which has been heretofore held to have attached upon the adoption and certification of the map of definite location by the officers of the company, July 18, 1868, but under the decision of the Supreme Court of the United States, in the case of *Van Wyck v. Knevals*, it is now held that the company's right attached when the route had ceased to be subject to change at the volition of the company, which was upon the receipt and approval of map of definite location by the honorable Secretary of the Interior, October 20, 1868, and your action will hereafter be governed accordingly in cases involving lands within the limits of the grant to the company named. The records of this office show that one Seuel Lamb filed declaratory statement No. 1,426, June 8, 1869, alleging settlement October 1, 1863, on the NE.  $\frac{1}{4}$  of the section specified, and that the SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , and lot 2 of said section was covered by declaratory statement No. 1,437, filed by one William Gibson June 8, 1869, alleging settlement November 26, 1862, which was relinquished May 10, 1872; also, that the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  was covered by declaratory statement No. 3,298, in the name of Homer Brown, filed June 3, and alleging settlement March 3, 1872.

It will be necessary in this case to order a hearing for the purpose of ascertaining the true status of the land at the date of attachment of the company's right, October 20, 1868.

Let your inquiries be directed to the personal qualifications, date of settlement, duration of residence, and nature and extent of improvements of the parties claiming the land at said date.

Give due notice to all parties in interest of the time and place of said hearing, and at its conclusion transmit the testimony taken thereat, together with your joint opinion thereon, to this office.

The resident attorney of the railroad company will be notified hereof by this office.

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#### IV.—FORFEITURE.

##### CENTRAL PACIFIC RAILROAD COMPANY, SUCCESSOR TO CALIFORNIA AND OREGON RAILROAD COMPANY.

Though this road has not been completed within the time prescribed by law, and though the granting act provides for a forfeiture of the unpatented lands on failure to so complete it, it is held that, as Congress has failed to declare the forfeiture, patents must issue for the granted lands as they are earned by the construction and acceptance of portions of the road.

*Secretary Teller to Commissioner McFarland, May 26, 1883.*

SIR: In June 1880, the Central Pacific Railroad Company, successor to the California and Oregon Railroad Company, made application to the local office at Marysville, Cal., to select in list No. 11, the S.  $\frac{1}{2}$  of Sec. 11, all of Secs. 13 and 23, the E.  $\frac{1}{2}$  of Sec. 15, the N.  $\frac{1}{2}$  and the SW.  $\frac{1}{4}$  of Sec.

25, and the E.  $\frac{1}{2}$  of Sec. 27, T. 16 N., R. 1 E., under the grant of July 25, 1866 (14 Stat., 239), and the amendatory act of June 25, 1868 (15 Stat., 80).

These lands lie opposite the completed section of said road.

The local officers denied the application upon the ground that the surveys were not then completed.

The surveys having been completed, the company applied to your office October 10, 1881, asking that you direct the local officers to accept the fees and certify the list. You, by letter of December 15, 1881, refused the request, for the reason that the company had not completed its road within the time limited by the granting act and the act amendatory thereof.

March 1, 1882, you denied an application for a reconsideration of your said decision, and the company thereupon brought appeal to this Department.

The original act required the whole of said road to be completed "on or before the 1st day of July, 1875." The amendatory act extended the time for completing the whole road to July 1, 1880.

The road opposite the lands in question was definitely located September 13, 1867, and the granted lands were ordered to be withdrawn November 25, same year.

The first 77.6 miles were reported to the President as completed January 3, 1871, and the same having been accepted by him he ordered patents to be issued to the company for lands due on account of such construction.

The road has not been completed, and the time fixed by the acts for its completion, as before recited, expired July 1, 1880.

A large amount of land had been patented to said company on account of such construction before the time had expired for the completion of the whole road, and the land now in question would probably have been patented in like manner but for the want of the necessary Government surveys.

Section 4 of the act provides that—

If it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act \* \* \* patents shall issue \* \* \* for the lands hereinbefore granted, to the extent of and coterminous with the completed section.

Section 8 provides that in case the company shall not complete the road within the time mentioned, the "act shall become null and void and all lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States."

It is because of this supposed prohibition that you decline to issue the patents for which application is now made.

This leads me to an examination of the decisions bearing upon the question.

In the case of *Schulenberg v. Harriman* (21 Wall., 44), the land grant to the State of Wisconsin, to aid in the construction of railroads within that State, was under consideration. The forfeiture clause in that grant was:

If said road is not completed within ten years no further sales shall be made and the lands unsold shall revert to the United States.

That grant, like the one under consideration, was a present grant, and it was held that the clause cited was a condition subsequent, the non-performance of which no one but the grantor could take advantage of, and that if the condition be not enforced by legislative or judicial action "the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed in the act."

This doctrine has not been departed from, but was reaffirmed in *Van Wyk v. Knevals* (106 U. S., 360), decided at the last term of the Supreme Court. The forfeiture clause there under consideration was:

That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

The court cite with approval the case of *Schulenberg v. Harriman (supra)*, and say:

If the whole of the proposed road has not been completed any forfeiture thereon can be asserted only by the grantor, the United States, through judicial proceedings or through the action of Congress.

In the grant now under consideration, the additional words, not usually found in the forfeiture clause of railroad grants, are that the "act shall be null and void."

It will be found upon examination that the use of these words adds nothing to the legal effect of the forfeiture clause. The necessity of legislative or judicial action still remains in order to declare the forfeiture.

In *Schulenberg v. Harriman* it was held that the provision "that all lands remaining unsold after ten years shall revert to the United States if the road is not then completed," is no more than a provision that the *grant shall be void* if a condition subsequent be not performed.

The grant under consideration in that case had been made to the State of Wisconsin to aid in the construction of railroads in that State. No part of the particular road for which the grant was claimed had been constructed, and the time within which it was to be built had long since expired. The court held that when the grant on condition proceeded from the Government it bound the Government like any other grantor; that if the Government does not see fit to enforce the forfeiture "the title remains *unimpaired* in the *grantee* \* \* \* as completely as it existed on the day when the title by location of the route of the road acquired precision and became attached to the adjoining alternate sections."

This case was decided by the Supreme Court of the United States

more than eight years ago, and since then has been the law of all the State and Federal courts. The attention of Congress has been repeatedly called to the effect of the decision, but no action has been taken by that body, and it must be presumed that Congress intends that the land grant companies shall have the benefit of the decision.

At all events these decisions bind the Land Department, and rule and control its action, leaving it in this respect without discretion or power.

In the case under consideration there seems to be no course left except to issue patents for the granted lands as earned by the construction and acceptance of a portion of the road in the manner specified in the act, although the entire road has not been completed within the time named in the act.

I therefore reverse your decision and direct that patents be issued for the lands in question.

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#### V.—HOMESTEADS.

##### PATENT—CERTIFICATION.

###### THE SOUTHERN MINNESOTA RAILWAY EXTENSION COMPANY v. KÜFNER.

A patent is not necessary for the purpose of vesting title in the company; but title vests by virtue of the grant and the act of certification of the land to the State for the use of the company.

The title having thus passed, the land in question, which is in the granted limits, was not subject to the homestead entry.

*Secretary Teller to Commissioner McFarland, October 22, 1883.*

SIR: I have considered the case of the Southern Minnesota Railway Extension Company *v.* Augustine Küfner, involving title to the NW.  $\frac{1}{4}$  of Sec. 17, T. 104, R. 24, Worthington, Minn., on appeal by said company from your decision of March 31, 1883, permitting Küfner to make homestead entry of said tract.

The land described is within the ten mile or primary limits of the grant by the act of July 4, 1866 (14 Stat., 87), making an additional grant of lands to said State to aid in the construction of railroads therein. The grant was accepted by the State February 25, 1867, at which time it became effective.

May 24, 1864, J. H. Hovey made homestead entry 1,773, of the tract in question, which remained intact until March 27, 1872, when it was canceled.

The following facts appear from the final homestead proofs tendered and submitted with the record, *viz*:

Küfner settled upon the land in October, 1867, and since then has resided upon and cultivated the same. His improvements thereon are

valued at \$700. In June, 1872, he applied to enter the land as a homestead, and paid \$18 for fees and commissions. The local officers informed him that they would send him a receipt as soon as Hovey's entry was canceled. Some months after paying such fees, not receiving the receipt, he wrote to your office, and in reply was informed that the land had been awarded to said company.

March 6, 1876, the tract was certified to the State of Minnesota for the benefit of the railroad above named.

You hold that the certification was erroneous, because Hovey's entry excepted the land from the operation of the grant, and that since the land must be conveyed by patent it is still under the control of the Land Department; and direct that Küfner be allowed to make complete final homestead proofs.

The case thus presents for my consideration two important questions:

First. Was a patent necessary for the purpose of vesting title, or did the title by virtue of the grant and the act of certification pass to the State for the use of said company?

Second. The land having been awarded to the company and certified to the State in 1876, should your office, upon the facts disclosed by the record, now proceed to make another adjudication and disposition of the land?

The language of the grant before cited is that of a present grant: / ✓  
"That there be, and is hereby, granted to the State of Minnesota."

The general rule undoubtedly is, that title to the public lands of the United States shall pass only by patent.

Probably the most marked exception to that rule is that of a Congressional grant *in presenti*. / ✓

In Wilcox v. Jackson (13 Pet., 516), the court say:

We think it unnecessary to go into a detailed examination of the various acts of Congress for the purpose of showing what we consider to be true in regard to the public lands, that, with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done, in words of present grant.

When the language imports a present grant it is well settled that the title passes by the act and attaches to the grant, and such title becomes complete and perfect when precision and identity are given to the particular tract by selection or location of the land. (Rutherford v. Greene Heirs, 2 Wheaton, 195; Schulenberg v. Harriman, 21 Wall., 44; Missouri, &c., Railway Company v. Kansas, &c., Railway Company, 97 U. S., 491.)

Although the grant is a present one, it is undoubtedly competent for Congress to put a limitation upon the title, and direct at what time and in what manner it should vest.

It becomes necessary, therefore, to examine the acts relating to the grant in question, for the purpose of ascertaining whether there are any provisions restraining the operation of the words of present grant.

Section 4 of the act of July 4, 1866, provides—

That the lands hereby granted shall be disposed of by said State for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of 10 consecutive miles of road is completed, in a good, substantial, and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for all the lands in alternate sections, or parts of sections, designated by odd numbers, situated within 20 miles of the road so completed and lying conterminous to said completed section of 10 miles, and not exceeding one hundred sections, for the benefit of the road having completed the 10 consecutive miles as aforesaid. \* \* \* When the governor of said State shall certify that another section of 10 consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner for a like number; and when certificates of the completion of additional sections of 10 consecutive miles of said roads are from time to time made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid, and none other: *Provided*, That if said roads are not completed within ten years from the acceptance of this grant, the said lands hereby granted, and not patented, shall revert to the United States.

I do not mean to be understood as expressing the opinion that the title would not, in any instance, pass by a Congressional grant *in presenti*, although the act might provide for the issuing of patents. Such a provision, which would have the effect to place in the hands of the grantee evidence by patent of title, would not necessarily be inconsistent with the intention of Congress to pass the title by the act itself.

On the 13th day of July, 1866, Congress passed a further "act relating to lands granted to the State of Minnesota to aid in constructing railroads" (14 Stat., 97). Section 3 of that act provides—

That all lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads, shall be certified to said State by the Secretary of the Interior, from time to time, whenever any of said roads shall be definitely located, and shall be disposed of by said State in the manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act.

Section 5 provides—

That so much of any act as conflicts with the provisions of this act is hereby repealed.

This act contains no provisions relating to the issuing of patents for the granted lands, but provides that the Secretary of the Interior shall certify to the State the lands granted. The former act contained no provisions for certifying the lands to the States.

When it is remembered that the certification of lands by the Secretary of the Interior to the grantee has long been recognized as a mode of conveyance, and that such certificates have been regarded and treated as a sufficient conveyance and transfer of title (a fact which was well known to Congress), it can hardly be doubted that it was the intention

of that body to substitute that mode of transfer in place of conveyance by patent as provided in the act of July 4.

In the case of the land grants to the State of Minnesota for the benefit of the railroads, both parties have for many years treated the certification of the lands to the State as conveying the title; and acting upon the belief that such act conveyed the title, the lands have been generally disposed of, and are now in the hands of innocent purchasers.

Section 3 of the act of July 13, before cited, clearly gave to the State the right to dispose of the lands when certified to the State by the Secretary of the Interior. They were indeed to be "disposed of by said State in the manner and upon the conditions provided in the particular act granting the same;" but the power to dispose of them upon such conditions after being certified to the State was clearly recognized by the act. The lands were to be certified from time to time, whenever any of the roads were definitely located; but there was no condition like that of first receiving patents imposed upon the power of the State to convey after the lands were so certified. And no such conditions can be imported into the statute.

So much of any act as was in conflict with the act of July 13 was thereby repealed. When, therefore, that act provided for the well recognized mode of conveyance of railroad lands by certification, it repealed the provision in the act of July 4, to the effect that the Secretary should issue patents to the State for the granted lands. Since it was unnecessary that the lands should be both certified and patented, the mode provided by the latter act was sufficient to convey the title to the State.

Prior to the act of March 3, 1865 (13 Stat., 526), the power of disposal as to lands granted to Minnesota, as in other States, was governed by the specific provisions of March 3, 1857 (11 Stat., 195), and similar in the various granting acts. This was that, upon completion of specific sections of road, a quantity of land, within certain prescribed limits, "may be sold." This was the law of the railroad system of grants, and certification was the uniform mode of identification.

By the act of March 3, 1865, that system as to Minnesota was changed, and the new method of disposal was declared to be by the receipt of patents from the Secretary of the Interior; nothing whatever being provided as to sale of lands by the State. The act of July 4, 1866, was expressed in nearly identical terms as to this disposal.

But this new enactment manifestly was no law for disposal by the State, and only operated to complete the evidence of title in the State, and identify the lands by the issue of patent. It involved itself within itself, and gave no direction whatever as to the manner of disposal.

The act of July 13, 1866, on the contrary, did provide for a power in the State to be exercised by the State, and not by the Secretary of the Interior; and this power was expressly recognized to take effect after definite location and identification of the lands, not by patent, but by certification; and the language used, namely, "the quantity author-

ized to be sold," indicates that it was the identical customary mode recognized in the original acts of 1857, shorn and released from the restrictions of the provisions of the acts relating to patents. In both provisos to section 3 the disposal is clearly designated as a sale of lands—not the receipt of patents therefor.

And in section 4 the limitation is extended to a further restriction to the effect that granted lands in place should not be so disposed of, that is, "sold," until completion of the conterminous portions of the road.

✓ The act of August 3, 1854 (10 Stat., 346; section 2449, Rev. Stat.), provided—

That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the States or Territories, and where said law does not convey the fee-simple title of such lands or require patents to be issued therefor, the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby.

Such was the general law applicable to grants to States of the character of the grant under consideration when, July 13, 1866, Congress amended the act relating to lands granted to the State of Minnesota, in the manner before stated, leaving out of the amendment the provision for patents, and providing only for certifying the lands. When we apply to such amendment, as we must, the general law existing at the time applicable thereto, we find that such general law and the amendment are in complete harmony, and taken together they make the title perfect by the mode of certifying the lands.

As bearing upon such of the questions discussed, I refer to a few authorities in the Federal courts by which it will, I think, be seen that the view I have taken of the case under consideration is sustained. In *Hedrick v. Hughes* there had been a selection of land for the State of Missouri, in place of part of section 16, which had been disposed of. The selection had been entered upon the books of the register of the land office. It was held that such selection and entry vested the title of the substituted land in the State. Upon this point the court said:

No patent was necessary for the substituted lots any more than for the sixteenth section itself, had that been undisposed of. The things to be done in order to vest title in the State were certain acts of the register and receiver. The essential thing was the selection of the land.

(15 Wall., 129.) *Hedrick v. Hughes*.

The act of February 17, 1815 (3 Stat., 211), for the relief of certain inhabitants of Missouri who had suffered by earthquakes, provided that the person or persons whose lands had been materially injured by earthquakes might make a location on the public lands of a like amount not exceeding 160 acres. Notwithstanding the act provided for the issuing of patents on certificates, it was held that the title became complete

when the location was made and a plat and certificate of survey of the land selected was filed and recorded in the recorder's office. (*Lessieur v. Price*, 12 How., 59.)

In *Drury v. Hollenbeck*, eighth circuit, Judge Dillon, in construing the act of May 15, 1856 (11 Stat., 9), making a grant to Iowa to aid in the construction of railroads in that State, held that:

The tract in question was within the terms of the act of 1856, and when it was selected and the selection approved and certified by the Commissioner of the General Land Office, the title became perfect in the State. *upon the completion of 3 acts, 1/2 lots + 2 by Com*

The lands having been thus conveyed, all control of the Executive Department over the title thereafter ceased. (*Moore v. Robbins*, 6 Otto, 530.)

Upon the second proposition presented by this case I deem it only necessary to say that, it having been determined and adjudged by the Department, as long ago as 1876, that the land in question passed to the State by virtue of the grant, and it having been so certified, the Department cannot now proceed to make another adjudication and disposition of the land, even if the naked title did not pass by the act of certification.

It is not claimed that there was any mistake or fraud in certifying said land to the State. Such certification was in accordance with the decisions and rulings then prevailing in your office and this Department. Cases so adjudicated cannot be reopened and another disposition be made of the lands because a different rule may be found to prevail at a subsequent time. (*Thomas v. Saint Joseph and Denver City Railroad Company*, 4 C. L. O., 119; *Perkins v. Central Pacific Railroad Company*, 9 Ib., 201.) The lands having been certified to the State, such certification was evidence that the State was entitled to patents, if patents were necessary in order to convey the title. In such case it would clearly be the duty of this Department to issue the patents, and when issued they would by relation take effect as of the date of the certification and cut off all intervening claims. (*Shepley v. Cowan*, 1 Otto, 330.)

The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants. (*Stark v. Starrs*, 6 Wall., 418.)

For the reasons stated I reverse your decision permitting a homestead entry to be made for the land in question, and if the entry has been made under your decision, direct it to be canceled.

*TITLE—CERTIFICATION.***SAINT PAUL AND SIOUX CITY RAILROAD COMPANY v. JOHNSON.**

The land, which is within the indemnity limits, has been certified under the grant, and the case is ruled by the decision in the case of the Southern Minnesota Extension Company *v.* Augustine Kūfner.

*Secretary Teller to Commissioner McFarland, October 27, 1883.*

SIR : I have considered the case of the Saint Paul and Sioux City Railroad Company *v.* George W. Johnson, involving the homestead entry No. 1,238, for the NE.  $\frac{1}{4}$  of Sec. 5, T. 105, R. 27, Worthington, Minn., on appeal by said company from your decision of March 23, 1883, reinstating Johnson's homestead entry for the purpose of issuing patent thereon.

Said homestead entry was made December 8, 1863. It was canceled upon the records of your office March 26, 1866, because at date of entry the land was withdrawn and reserved for the benefit of said company, whose road was definitely located opposite said tract in June, 1857. Johnson having died, his widow, in March, 1869, was allowed by the local officers to make final proof, there being no record on the local office tract books of the cancellation of the entry by your office, although the register and receiver, successors of the officers who allowed final proof, report that the letter of your office ordering the cancellation is on file in the local office, and bears the indorsement following, viz : "Johnson notified at Mapleton, May 12."

The land is within the fifteen-mile indemnity limits of the road aforesaid, and was selected August 1, 1871, and certified to the State for the benefit of said road March 7, 1872.

The facts recited show that the case is ruled by my decision of the 22d instant in the case of the Southern Minnesota Extension Company *v.* Augustine Kufner.

I therefore reverse your decision, and direct said entry, if it has been reinstated under your decision, to be canceled.

*EFFECT OF FORMER RULING.***MEREDITH v. THE ATLANTIC AND PACIFIC RAILROAD COMPANY.**

Meredith applied in 1879 under the pre-emption law for land within the granted limits, and under rulings then obtaining his application was finally rejected; said rulings having been changed, he applied in 1883 under the homestead law for the same land, alleging no new facts, however.

Held, That as between him and the railroad company the question of right to the land is *res adjudicata*.

*Commissioner McFarland to register and receiver, Los Angeles, Cal., November 8, 1883.*

GENTLEMEN: I have examined the case of Charles T. Meredith *v.* The Atlantic and Pacific Railroad Company, involving the SW.  $\frac{1}{4}$  of Sec. 33, 5 N. 22 W., S. B. M., California.

The land in question is within the 20-mile limits of the grant of July 27, 1866, to the said company, the right of which attached August 15, 1871.

The lands in the odd-numbered sections were withdrawn for the benefit of said company December 10, 1874. The township plat of survey was filed in the district office June 28, 1878.

May 23, 1883, Charles T. Meredith made application at the said office to make homestead entry for the said land. His application was rejected by the register and receiver on the ground that the land was within the limits of the withdrawal for the Atlantic and Pacific Railroad Company.

Meredith appealed to this office, and in support thereof filed his own affidavit, and the affidavits of John H. Ayers and W. S. McKee, who swear that the land applied for by Meredith was occupied in the fall of 1870 by one Theodore Lopez, a citizen of the United States, and a qualified pre-emptor; that said Lopez claimed the land as a pre-emption right, and continued to reside upon and claim the same until about May 1, 1873, when he sold his claim to one Antonio Ortega, a citizen of the United States and a qualified pre-emptor, who resided thereon until May, 1874, when he sold to one Thomas J. Newby, a citizen of the United States and a qualified pre-emptor; that Newby claimed the same as a pre-emption right, and continued in possession of the same until June, 1876, when he sold to Charles T. Meredith, the present claimant.

It appears from the records of this office that Charles T. Meredith made application February 14, 1879, to make pre-emption filing for this same tract of land, alleging that he made settlement thereon in the month of June, 1876.

The register and receiver rejected his application, for the reason that the land was reserved for the Atlantic and Pacific Railroad Company. Meredith appealed to this office, alleging as grounds therefor that, the

said railroad company having failed to construct any portion of its road in the State of California within the time prescribed, the withdrawal of lands for its benefit was void; and on the further ground that the land applied for was occupied at the date of said withdrawal by Thomas J. Newby, a qualified pre-emptor; and in support of the latter allegation he filed his own affidavit, and the affidavits of James Ayers and Thomas Clark, who swore substantially to the same statement.

August 13, 1880, Meredith's application was considered by this office, and rejected on the ground that the occupation of the land by Thomas J. Newby prior to survey did not give Meredith any claim prior to his settlement; that whatever rights Newby acquired were personal, and when he abandoned the land he abandoned those rights.

Meredith did not appeal from the said decision; and the same was declared to be final May 24, 1881, and the case was closed.

It thus appears that the question as between Meredith and the railroad company is *res adjudicata*.

In his present application Meredith alleges no facts that were not alleged and passed upon under his first application. The state of facts material to the issue are the same now as they were then.

The fact that the present application is made under the homestead law raises no new question as to priority of right between Meredith and the railroad company; it raises no question which was not settled by the decision upon his first application, and although the ruling of the Department has since changed, cases decided under the former ruling are not to be reopened.

See case of Perkins (Copp, vol. 9, p. 201).

Meredith's application is accordingly rejected, subject to appeal within sixty days. You will so advise him.

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*ACT OF APRIL 21, 1876.*

**ALABAMA AND CHATTANOOGA RAILROAD COMPANY v. UPTAIN.**

Where entry is made after expiration of time for completion of road and before extension of time it can be confirmed under the act of April 21, 1876.

*Acting Secretary Joslyn to Commissioner McFarland, April 21, 1884.*

SIR: I have examined the case of the Alabama and Chattanooga Railroad Company *v.* Francis M. Uptain, involving the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 19, and the NW.  $\frac{1}{4}$  of fractional part of the NW. of fractional  $\frac{1}{4}$  (lot A) of fractional Sec. 20, T. 10 S., R. 5 E., Huntsville, Ala., on appeal by said company from your adverse decision of February 19, 1883.

Said Uptain made homestead entry No. 2303 (final certificate No. 183) for said tracts October 7, 1868, and final proof June 29, 1874. He had

the proper qualifications to make the entry and has duly complied with the homestead law.

The tracts in contest lie within the conflicting limits of the Coosa and Tennessee and the Wills Valley portion of said Alabama and Chattanooga Railroad. (Act of June 3, 1856, 11 Stat. 17.)

The said Wills Valley portion not having been completed within the time prescribed by the granting act, the grant, by act of April 10, 1869 (16 Stat., 45), was "revived and renewed," and the time for completion extended for a period of three years.

No portion of the Coosa and Tennessee Railroad has ever been completed.

You state that it does not appear from the records of your office that any part of the tracts in question "has been certified or selected for either of said roads." The company in its appeal asserts that the tracts in controversy were selected by the agent of the State for said company April 11, 1881, and such selection since that time has been on file in your office. The selection, if made at that time, would, I think, be immaterial, in view of a disposition of the case under the act hereafter cited.

Uptain's entry having been made after the expiration of the time for the completion of the road, and before said extension, you hold that the entry should be approved for patent, under the 3d section of the act of April 21, 1876 (19 Stat., 35).

I am of the opinion that said entry was confirmed by said section, and affirm your decision.

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*SUBSISTING ENTRY—GRANT—WITHDRAWAL.*

**OLSON v. THE SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, THE HASTINGS AND DAKOTA RAILROAD COMPANY AND LARSEN.**

Larsen's pre-emption application having been rejected by the Department his case is *res judicata*, and he cannot be permitted to make homestead entry under a new application based on a change of ruling.

The land in question having been covered by a homestead entry subsisting at the date of the grant for the first, and the withdrawal for the last named company, was excepted from the railroad grants, and Olson's application to enter the same is allowed.

*Commissioner McFarland to register and receiver, Benson, Minn., April 28, 1884.*

**GENTLEMEN:** With your letter of June 24, 1878, you transmitted to this office the applications of Simon Olson and Peter Larsen to file pre-emption declaratory statements respectively for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  1, 117, 29, with your decisions rejecting the same indorsed thereon, and appeals by the parties from said decisions.

The rejections were based on the ground that the land applied for is in the 10-mile or granted limits of the Saint Paul and Pacific (now Saint Paul, Minneapolis and Manitoba) Railroad under act of March 3, 1865 (13 Stat., 526), and in the 20-mile (indemnity) limits of the grant in aid of the Hastings and Dakota Railroad Company under act of July 4, 1866 (14 Stat., 87), and that the land was not subject to pre-emption settlement and entry.

The records of this office disclose the fact that the land in question was in the 15-mile (indemnity) limits of the grant in aid of the construction of the Saint Paul and Pacific Railroad, under act of March 3, 1857 (11 Stat., 195); that the grant to said company under that act was adjusted along the main line, as far west as range 38, in 1863, the lands to which the company was entitled being certified to it, and those not needed to satisfy the grant were restored to market by public offering under proclamation No. 700, dated April 18, 1864, the offering having been made September 5, 1864.

On November 18, 1864, the NE.  $\frac{1}{4}$  1, 11, 29, which was embraced in the offering, was entered as a homestead by William R. Cosgrove, at that time a single man in the military service of the United States, per homestead entry No. 1110, and said entry remained intact upon the records until September 30, 1872, when it was canceled by this office because of failure to make final proof within the period prescribed by law.

The appeal of Larsen was considered by this office September 4, 1879, and it was then held, in accordance with the decision of the Secretary of the Interior in the case of Kniskern *v.* Hastings and Dakota Railway Company (Copp's Land Owner, vol. 6, p. 50), that the Cosgrove entry was void *ab initio*, and therefore did not except the land embraced from the grant, although subsisting at date of grant. The land was awarded to the Saint Paul and Pacific Company subject to appeal by the Hastings and Dakota Company and Larsen. Both parties appealed, and on April 20, 1881, the honorable Secretary affirmed the decision of this office, a copy of his decision having been forwarded to you with letter "F" of April 26, 1881, and the case was closed.

By decision of February 12, 1883, the Secretary of the Interior reversed the decision in the Kniskern case (see Julia D. Graham *v.* H. & D. R. R., Copp's Land Owner, vol. 9, p. 236), and held that an entry subsisting at the date of grant excepts the land embraced from the operation of the grant.

The Saint Paul, Minneapolis and Manitoba Railway Company selected the NE.  $\frac{1}{4}$  1, 117, 29, September 18, 1880.

April 5, 1883, Simon Olson executed an affidavit before the clerk of the court for McLeod County, Minnesota (under section 2294, Rev. Stat.), which was forwarded to your office with his application for a homestead entry of S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , 1, 117, 29, alleging settlement on the land January 1, 1877, and continuous residence thereon since that time.

On May 31, 1883, the application was rejected, your decision, indorsed thereon, being as follows :

The within application of Simon Olson, to make homestead entry on the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and lot 1, of Sec. 1, 117, 29, is hereby refused under Rule 53, Rules of Practice. Simon Olson applied June 14, 1878, to file declaratory statement on S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and Peter Larsen applied June 14, 1878, to file declaratory statement on N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , of said section. Being refused, they appealed to the honorable Commissioner, and said appeals are now before the General Land Office awaiting action. For these reasons the within application is refused. You will be allowed thirty days in which to appeal from this decision.

Olson appealed from said decision June 2, 1883, on the following grounds : "That as to the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec 1, T. 117, R. 29, he is the identical person who applied to file said declaratory statement and made said appeal ; and that he hereby dismisses and withdraws said application and appeal, and now applies to enter said land, together with the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , and lot 1 (NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ) of said section as a homestead ; that Peter Larsen never settled upon or improved any portion of said land as required by law, and asks that a hearing be ordered to ascertain the respective rights of this appellant and said Larsen ; and that the testimony at said hearing be taken before the clerk of the district court at his office in Glencove, Minn., on account of great distance from the land office ; and that due notice of the time and place of taking said testimony be given to the parties in interest," and the papers were transmitted with your letter of June 14, 1883.

August 27, 1883, A. G. Heylmun, of this city, attorney for Olson, called the attention of this office to this and several other similar cases and asked that the same might be examined "with a view of final adjudication, either upon the legal question involved, or by hearing to determine the facts."

November 26, 1883, Peter Larsen executed an affidavit before the judge of the probate court for McLeod County, Minnesota, which was forwarded to your office with his application for a homestead entry for N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , 1, 117, 29, alleging settlement on the land in May, 1876. This application was rejected by you December 18, 1883, by your decision, as follows :

The within application of Peter Larsen to make homestead entry for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  Sec. 1, 117, 29, is hereby refused for the reason that Simon Olson applied to make homestead entry for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and lot 1, being the NE. fractional quarter of 1, 117, 29, on May 31, 1883. Being refused by this office, he appealed, and said appeal is now before the honorable Commissioner of the General Land Office awaiting action. Thirty days will be allowed within which to appeal from this decision.

Larsen filed his appeal January 11, 1884, and alleged in an affidavit accompanying the same that he began improvements on the tract applied for in May, 1876, and had continued to improve the same ever

since; that Olson had never resided upon or improved the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , his claim being for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and that he and Olson had jointly constructed a division fence between their respective fields. W. K. Mendenhall, of this city, Larsen's attorney, in his specification of error and argument asks:

First. That the claim of the two railroad companies to said land may be rejected. Second. That a hearing may be ordered between Larsen and Olson as to the better right to said N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ .

Your decision rejecting Olson's homestead application on the grounds stated was erroneous, inasmuch as the pre-emption application of Larsen had been disposed of by the Secretary's decision of April 20, 1881; and had not such been the case it would not have been a bar to the admission of Olson's entry any more than would have been his filing had it been admitted at the time of application. Olson's own application for a pre-emption filing could not operate to defeat his homestead application, because the filing of the latter was a virtual waiver of claim under and a withdrawal of the former; and had his filing been admitted at date of application to make the same he would have been entitled at the date of filing his homestead application to transmute the filing under act of May 27, 1878, to a homestead entry. The fact that the land had been selected by the railroad company is not mentioned in your decision, and seems not to have been considered by you, although sufficient in itself to preclude the admission of Olson's entry while intact upon the official records.

The reason stated by you for the rejection of Larsen's homestead application is sufficient to justify your action, and your decision is therefore affirmed. The remarks contained in the preceding paragraph respecting the railroad selection operating as a bar to the admission of Olson's homestead application apply with equal force against the application of Larsen, and other reasons exist why Larsen's homestead entry should not be admitted, not mentioned, and presumably not observed by you. First, the homestead affidavit filed by Larsen was executed before the judge of probate for McLeod County, Minnesota, and there is no legal authority for the execution of such affidavit before such officer. Section 2294 Revised Statutes provides that the affidavit required by section 2290 may, under circumstances mentioned, be made "before the clerk of the court for the county in which the applicant is an actual resident." This has been construed, and is held, by this office to mean the clerk of the district court. Second, the matter between Larsen and the railroad companies was adjudicated in the consideration of his pre-emption application, and the decision of the honorable Secretary dated April 20, 1881, was conclusive as to him. His case is precisely like that of Charles T. Meredith (Los Angeles, Cal.), treated in my letter "F" of November 8, 1883, and I quote from that letter, as applicable to Larsen's case, the following: "It thus appears that the question as between Meredith and the railroad company is *res adjudicata*. In the present application

Meredith alleges no facts that were not alleged and passed upon under his first application. The state of facts material to the issue are the same now as they were then. The fact that the present application is made under the homestead law raises no new question as to priority of right between Meredith and the railroad company; it raises no question which was not settled by the decision upon his first application; and although the ruling of the Department has since changed, cases decided under the former ruling are not to be reopened. (See case of Perkins, Copp, vol. 9, p. 201.)" In view of all the facts it is obviously unnecessary to authorize a hearing to determine the priority of right to the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , as between Larsen and Olson, because Larsen could not take the land as against the railroad company, even though his settlement upon the same may have been prior to that of Olson. The principle laid down by the Supreme Court in Atherton v. Fowler (6 Otto, 513), invoked by Larsen's attorney, is not applicable as against the admission of Olson's entry, because, since the promulgation of the Secretary's decision of April 20, 1881, Larsen has remained upon the land, if at all, without shadow of claim, and must be considered a mere trespasser, as far as the United States is concerned. Larsen may appeal in sixty days.

In considering Olson's claim as against the railroad companies, the rule established by the Graham decision (hereinbefore cited) is applicable, and it must be held that the entry of Cosgrove, No. 1110, existing at date of grant to the Saint Paul and Pacific Company, and at date of withdrawal for the Hastings and Dakota Company, excepted the land from the grant for the one and the withdrawal for the other, and upon the cancellation of said entry the land became subject to entry or selection by the first legal applicant.

Being excepted from the grant to the Saint Paul and Pacific Company the land was not subject to selection by that company. The selection of the tract made by said company September, 18, 1880, is therefore this day held for rejection subject to the right of the company to appeal within sixty days.

The Hastings and Dakota Company has not selected the land, and it was legally subject to pre-emption and homestead entry at the date of Olson's alleged settlement. The facts respecting Olson's residence upon the land are very satisfactorily established, and his right to the same is therefore held to be superior to that of the railroad company last mentioned, subject to the right of the company to appeal within sixty days.

Should this decision become final, Olson will be allowed to enter the land in controversy.

The attorneys in this city for the several companies and parties mentioned will be advised by this office respecting this decision, and you are directed to advise all other parties in interest of the same, and at the proper time report proceedings to this office.

*SUBSISTING ENTRY—INDEMNITY LIMITS.***PREST v. THE NORTHERN PACIFIC RAILROAD COMPANY.**

A homestead entry existing upon a tract within the indemnity limits at date of withdrawal is such an appropriation of land as excludes it from the withdrawal, and it is subject to appropriation by the first legal applicant.

*Secretary Teller to Commissioner McFarland, May 23, 1884.*

SIR: I have considered the case of Jasper H. Prest, cash entry No. 1,908, of lots 8, 9, 10, and 11, Sec. 5, and lots 3, 4, and 9, of Sec. 7, T. 9 N., R. 10 W., Vancouver, Wash., on appeal by the Northern Pacific Railroad Company from your decision of December 19, 1881, holding Prest's entry for approval for patent.

The land is within the indemnity limits of the Northern Pacific Railroad Company. Withdrawal of lands within such limits was made for the benefit of such company September 13, 1873.

The land covered by said entry was embraced in homestead entry No. 1,648, by James O'Leary, made March 22, 1872, and canceled April 3, 1879.

Prest, the cash entryman, filed declaratory statement No. 480, July 28, 1879, alleging settlement May 14, 1879.

The question presented is whether O'Leary's homestead entry, existing at the time of the withdrawal, was such an appropriation of the land as excluded it from the operation of the withdrawal, and from the indemnity grant, to such an extent as would authorize the awarding of it to the first legal applicant.

This question was expressly decided by my predecessor in the case of *Baughman v. Oregon Central Wagon-road Company* (Copp's P. L. L., vol. 2, p. 860).

It is claimed by the Northern Pacific Company that said decision was not well considered and should not be followed.

Lands within indemnity limits are not granted lands. The Company as to those lands does not claim to acquire title until actual selection. In this case there has been no selection. The claim of the company is that when homestead entry No. 1,648 was canceled the tract fell within the terms of the withdrawal of 1873, and should not again be the subject of entry, but should be held to await the exercise of the "floating right" of the company to select it in lieu of lands assumed to be lost in place.

Notwithstanding the withdrawal, your office retained jurisdiction of tracts covered by entries and pre-emptions at the time the withdrawal was made, and upon compliance with law would carry such entries and pre-emptions to patent. Does your office lose jurisdiction of those tracts by reason of cancellation, subsequent to withdrawal? If this

be so, I call attention in passing to the fact that they could not be awarded to successful contestants under the act of May 14, 1880.

What does a withdrawal withdraw? I think it will be found, both upon principle and authority, that when made in general terms it only withdraws from market *public lands* lying within the limits of the withdrawal. That lands covered by homestead entries are not public lands is well settled by the decisions of the Department and of the courts. (*Graham v. Hastings and Dakota Railroad Company*, 9 Copp, 236; opinion Attorney-General MacVeagh, July 15, 1881.) "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or disposal under general laws." (*Newhall v. Sanger*, 92 U. S., 761.) Lands then held under homestead entries would not be public lands, and would not fall within the prohibition of the withdrawal.

It is claimed, however, that if the homestead entry is canceled subsequently to withdrawal, the tract then falls within the ban of the withdrawal. This effect can only be reached by construing the order to be an order not only *in presenti* but *in futuro*. Such a construction would be more comprehensive than that generally given to a Congressional grant or a legislative withdrawal following the filing of a map of definite location.

It was held in *Thomas v. Railroad* (3 C. L. O., 197), that a grant to a railroad company would not take lands otherwise appropriated by reason of homestead entries existing at date of grant or of definite location, although subsequently canceled.

In the matter of the Montgomery and Pensacola Railroad (1 Lester, 532), Secretary Thompson said: "I think the instructions respecting the withdrawal of the lands from market should be construed as not embracing any lands excepting those clearly within them" (*i. e.*, within the meaning and effect of the act). In reference to the grant to Wisconsin he also said (1 Lester, 539): "Strictly construed, those orders (of withdrawal) reached only to lands that were in market at the date of withdrawal."

In *Railroad v. Fisher* (9 Copp L. O., 80) I said:

There can be no doubt that, by the withdrawal, the grant took effect upon such odd numbered sections of public lands within the specified limits as were not excluded from its operation.

In *Trepp v. Northern Pacific Company* (8 C. L. O., 181) Secretary Kirkwood said:

Now if there was a pre-emption claim (not since abandoned) attaching to the land at the date of withdrawal, it excluded the land from the withdrawal and from the grant.

And in the Perkins case I held that the fact of subsequent abandonment was immaterial.

These are instances of construction put upon withdrawals within granted limits. If any distinction is to be made it seems to me that

the withdrawal of lands within indemnity limits should be more strictly construed against the grantee than a withdrawal within granted limits. The first is not ordered by the act. It is made in the sound discretion of the Department. Under the scheme of the granting act to the Northern Pacific Company which designates indemnity limits, and under the provision in the act that lands in lieu of those lost in place shall be selected "under the direction of the Secretary of the Interior," it has come to be regarded as the duty of the Secretary to withdraw from other disposition a sufficient quantity of lands within indemnity limits to make good those lost in granted limits.

If the selection of indemnity lands is to be made under the direction of the Secretary of the Interior, all that can be demanded of him by the railroad company is that he shall not allow the lands within the indemnity limits to be appropriated to such an extent that the railroad company cannot receive the full amount granted to it. To protect the railroad company the Secretary may be required to withdraw all the lands within the indemnity limits, or a part only. He may be required to allow (if the railroad company's grant is one of quantity) the company to select all of the lands within the indemnity limits; or he may be required to allow only a small portion of the lands to be selected. It is discretionary with him as to what lands he will allow the company to select. It is not by this intended that the Secretary can arbitrarily and without good cause refuse to affirm the selection made by the company, for this discretion must be the exercise of judgment on the part of the Secretary. He ought not to allow the company to select lands on which settlers have made improvements under the supposition that they would not be required to make good the amount granted to the company, unless it is necessary to do so in order to give the company its full amount of land granted to it. If then the selection is under the direction and control of the Secretary, the withdrawal must be; and if at any time the Secretary is of the opinion that he has withdrawn more land than will be needed from which the selections are to be made, he may modify such withdrawal, or may revoke the order of withdrawal.

Congress, by the act and the joint resolution of 1870, provided with liberality for the selection of lieu lands by establishing broad indemnity limits. The Secretary of the Interior, with the opportunity thus afforded, and being clothed with ample power by the act to direct the selections, ought so to direct them as to protect occupants who have acted in good faith, so far as it can be done consistently with law and due regard to the rights of the company guaranteed by the act.

In my letter of May 17 last, I declined to withdraw from settlement any portion of the odd sections of land lying in the second indemnity limits within the Territories, upon the ground that there did not seem to be any present necessity for such action in order to protect the company in its rights to lieu lands.

In this state of the case, while so many lands within indemnity limits

remain unoccupied and unappropriated, I ought not to construe the orders of withdrawal already made, unless sound rules of construction leave me no alternative, with such strictness and severity as to take valuable improvements from settlers who have acted in good faith, and give them to the company.

The records of your office and of this Department show that many tracts, covered by entries at the time of withdrawals, and subsequently canceled, are occupied by settlers who have made or purchased valuable improvements under the belief that such entries excepted the tracts from the withdrawals.

The Baughman decision (*supra*) made by my predecessor in 1881 fully justifies this belief and the action of the settlers in going upon and claiming such lands.

The delay of the company in locating and constructing its road may have been unavoidable, but if by reason of such delay the adjustment of its land grant has been deferred, and the indemnity lands to some extent overflowed by the tide of emigration, resulting in entries and improvements upon lands which otherwise might have been secured to the grantee, the consequences should fall upon the company, and not upon settlers.

It is urged by the company that the decision in *Ryan v. Central Pacific Railroad* (99 U. S., 382) controls the case at bar in favor of the company.

The tract involved in that case was within indemnity limits, and at the date of the grant was within the boundaries of the Mexican (Diaz) grant. This grant was declared invalid by the Supreme Court March 3, 1873. The decision in that case does not show when the withdrawal of the land was made within the indemnity limits; but I find upon an examination of the records of your office that such withdrawal was made October 19, 1867, and notice thereof reached the local office November 25 following. Notwithstanding the fact that this withdrawal had been made and was existing at the time the Mexican claim was rejected, the court declared that "at the time of the selection (October 30, 1874) the premises were public land," that "it was as much public land as any other part of the national domain." No other claim had intervened at the time of such selection. Ryan made his application to enter long after the selection. The company's right to the land was put upon the ground that it was not longer *sub judice*; that it was disengaged from the Mexican claim; was public land within indemnity limits, and therefore subject to the right of selection. Although the withdrawal remained in terms, does it not follow by necessary implication that Ryan's claim to the tract would have been confirmed if his entry had been made prior to the selection by the company? It must follow from the single fact that the land "was as much public land as any other part of the national domain."

In the Ryan case the case of *Newhall v. Sanger* is distinguished and

explained. The distinction made is that when, in the latter case, the company's right attached, the tract in controversy was *sub judice*, being within the exterior limits of a Mexican claim; and that, "as the premises in controversy were not public lands, either at the date of the grant or of their withdrawal, it follows that they did not pass to the railroad company." In the latter case the lands were within the granted limits. In the Ryan case the land was in indemnity limits, and when the withdrawal was made the tract was *sub judice*, but when the company asserted its right of selection the tract had become "disembarrassed" of the Mexican claim. The court said, "the railroad company had not and could not have any claim to it until specially selected." The company selected it long before Ryan applied for it, and it was awarded to the company.

In the case at bar, when the withdrawal was made the title to the land in question was embarrassed by O'Leary's homestead entry; when it became disengaged of that claim, and before the company made or attempted to make any selection of the tract, viz, in May, 1879, Prest settled upon the land, and in July following made his declaratory statement therefor.

The principle laid down in *Newhall v. Sanger*, as explained and applied in *Ryan v. Railroad*, I think sustains the present holding.

I affirm your decision.

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#### ENLARGED GRANT—APPROPRIATED LANDS.

#### SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY *v.* STACY.

The act of March 3, 1865, enlarging the grant of lands for this company did not take effect as of the date of the original grant of 1857, so as to embrace lands which at the date of the later grant were lawfully appropriated.

*Secretary Teller to Commissioner McFarland, June 16, 1884.*

SIR: I have considered the case of the Saint Paul, Minneapolis and Manitoba Railway *v.* John Stacy, involving the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 7, T. 116, R. 30, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 24, T. 116, R. 29, Benson, Minn., on appeal by said company from your decision of February 23, 1883.

The land in said section 7 is within the 20-miles (indemnity) limits of the grant to said railroad, the withdrawal for the benefit of which became effective July 20, 1865.

The land in question was formerly embraced in homestead entry No. 928, made August 12, 1864, by Carl Strivert, which was on February 28, 1872, canceled for abandonment. August 2, 1877, said John Stacy made homestead entry No. 7699 of the land.

This statement of fact shows that the case is ruled by my decision of

the 23d ultimo, in the case of the Northern Pacific Company *v.* Jasper H. Prest.

The act of 1857, granting lands to the Territory of Minnesota to aid in the construction of certain railroads, is amended by the act of March 3, 1865, enlarging the grant. It is claimed on behalf of the company that this enlargement must be treated as if originally made, and "the right of the company to select and locate indemnity lands within the enlarged limits of twenty miles must be considered as taking effect as of the date of the act of 1857."

It will be observed, however, that Strivert's entry was upon the tract in question at the time the amended act was passed, and thereby the land was segregated and appropriated. The amended act was made subject to any and all limitations contained in the act of 1857 "and subsequent acts." The former act reserved all lands sold by the United States before the line of the road was definitely fixed and those to which the right of pre-emption had attached. The homestead law was a "subsequent act." If the position taken by the company were conceded it could not destroy the effect of Strivert's entry existing at the time the grant was enlarged.

The case of the Missouri, &c., *v.* Kansas Pacific Railway Company (97 U. S., 491), cited by the company, while holding that the enlarged grant took effect by relation as of the date of the former grant, also holds that the enlarged grant would be subject to all reservations by way of pre-emption, homestead, or other lawful claims, and would so take effect by relation as against the United States only.

I affirm your decision.

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## VI.—INDEMNITY LANDS.

### POWER OF EXECUTIVE—WITHDRAWALS.

#### NORTHERN PACIFIC RAILROAD COMPANY.

The power of this Department to withdraw lands within the granted limits, for the benefit of the grant, is well settled, and by parity of reasoning the authority to withdraw lands in the indemnity limits must follow.

As to indemnity lands, the law gives at date of definite location, not title, but a right to acquire title by selection, based on the deficiency ascertained in the granted limits.

It was clearly the intention of the legislature that, within the indemnity limits fixed by the Northern Pacific acts, the company should have the opportunity to take lands, acre for acre, for all those lost in place.

The Secretary of the Interior is, however, empowered with full control, supervision, and discretion in regard to withdrawals and selections of indemnity lands, which he is to exercise for the benefit of the public, as well as for that of the railroad company.

In the case of this road, existing withdrawals should be maintained; but at present it is not deemed necessary to withdraw in the Territories the lands within the second indemnity limits, established by the Joint Resolution of May 31, 1870.

*Secretary Teller to Commissioner McFarland, May 17, 1883.*

SIR: Your letter of January 22, 1883, after reviewing at length the practice which has prevailed in your office and in this Department in reference to the withdrawal of lands within the indemnity limits of railroad grants, submits the following question, viz:

Whether I shall direct the local officers to withdraw from entry and settlement the odd sections within the indemnity limits of the Northern Pacific Railroad, or whether I shall only mark the outer lines of said indemnity limits beyond which the railroad company cannot go, and hold the lands in such limits open to the first legal applicant?

You state—

That it has been the uniform practice, as to all grants having indemnity provisions, including that of the Northern Pacific Railroad, to withdraw from entry and sale the indemnity as well as the granted lands. It has been the rule, where the maps showing the definite location of a road have been presented to the Department, to refer the same to this office without comment or for appropriate action \* \* \*, and the withdrawals have followed as a matter of course, and without specific authority from the Department."

In some instances cited by you, relating to railroad grants other than that of the Northern Pacific, explicit instructions have been given by this Department to your office to cause to be withdrawn lands lying within indemnity limits.

You refer to certain "recent decisions rendered by the Department," and seem to be of the opinion that in view of those decisions the practice of withdrawals within indemnity limits cannot be continued and the terms thereof be "made identical with those heretofore made and now in force." In support of this view the cases referred to by you are Blodgett *v.* The California and Oregon Railroad Company (Copp's L. O., 6, p. 37), decided by my predecessor, Secretary Schurz, in 1879; Southern Pacific Railroad Company *v.* Rosenburg, decided August 18, 1882, and Southern Pacific Railroad Company *v.* McCarty, decided October 31, 1882, by this Department.

The first case—that of Blodgett—goes only to the extent of holding that the pre-emption claim, although initiated by settlement made after the withdrawal, might be permitted to remain subject to the right of selection by the company. It says: "Should the tract in question not be required in satisfaction of land lost in place, I see no reason why the claim of Blodgett may not be perfected, upon showing a full compliance with the law; this, however, cannot be done while the grant to the company remains unadjusted."

The case of Rosenburg *v.* The Southern Pacific Railroad Company is not an authority upon the question, since in that case it appeared that the settlement was prior to the withdrawal, and it was held that Rosenburg's "pre-emption claim was valid and subsisting at the date upon which the company's right attached."

The case of McCarty *v.* The Southern Pacific Railroad Company was

based upon the effect of the joint resolution of June 28, 1870 (16 Stat., 382), authorizing the company to construct its road on the line of a certain map filed in this Department January 3, 1867, and directing an adjustment of the land grant accordingly, but which in express terms saved and reserved "all the rights of actual settlers."

I therefore regard the questions submitted by you as fully open for the consideration of this Department.

Since the writing of your letter the Northern Pacific Company has filed a brief upon the questions submitted by you and been granted a hearing upon such questions.

The act (13 Stat., 365, section 3) grants to the Northern Pacific Railroad Company—

every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, "to which" the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, 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.

The joint resolution of May 31, 1870 (16 Stat., 378), provides that—

In the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands, as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864.

I am advised by your letter that in the case of the Northern Pacific Railroad withdrawals of lands within the indemnity limits have followed the filing of the maps of definite location to the full extent of both acts within the States, but within the Territories only to the extent provided in the first act. Neither act contains any express provisions for the withdrawal of lands within the indemnity limits.

In many instances acts making grants in aid of the construction of railroads provide for an executive withdrawal of the lands within

the granted limits. These acts do not, however, generally provide for an executive withdrawal of lands within the indemnity limits, and where such a provision exists it is found in general terms, which declare that it shall be the "duty of the Secretary to withdraw from market the *lands embraced* within the provisions" of the act. (13 Stat., 526; 14 Stat., 87.)

The grant to the Northern Pacific does not provide, either specifically or in general terms, for an executive withdrawal of lands within either granted or indemnity limits.

The power of the executive department of the Government, however, to withdraw lands for the benefit of the grant, within the granted limits, without any direction expressed in the act, is now too well settled to be questioned. (8 Atty. Gen'l Opin., 244; Wolcott *v.* Des Moines, 5 Wall., 681; Wolsey *v.* Chapman, 101 U. S., 755.)

Such power had been recognized by Congress (10 Stat., 269), and had been exercised by the Land Department for a long time before the Northern Pacific act was passed, and must have been well understood by Congress at the time of the passage of that act.

This Department has held that it had such authority in the case of the Northern Pacific grant. (Copp's P. L. L., 377.)

The object of the withdrawal is to prevent private appropriation of the granted lands, which would defeat the object of the grant. (5 Wall., 688, *supra*.) By parity of reasoning, the authority to withdraw lands within the indemnity limits must follow. Such authority has been repeatedly exercised by the Land Department in reference to the Northern Pacific and other indemnity lands.

X It is claimed by the company that the acts already cited, making and defining this grant, operate as an absolute exclusion of the right of entry or other disposal in both granted and indemnity limits from the moment of the fixing of the route of definite location by the filing of the map of such line and its acceptance by this Department. If this be so, there is manifestly no discretion vested in me as the executive officer of the law to do more than to decide when such location has been made, and direct the cancellation of all entries from the date of such location, while the matter of preparing the notices and limits of the legislative withdrawal is in progress, and hold all the lands from that date absolutely subject to the right of selection by the company.

X That this is true of the granted lands, "in place," is now settled law as construed by the judicial tribunals, the latest decision being that of Van Wyck *v.* Knevals (106 U. S., 360). As to these lands there can be no question of the duty of this Department to give timely notice of the date and extent of this appropriation by prompt withdrawal, not alone for the protection of the company, but *for the protection of the settlers*, who can no longer acquire them.

Respecting the indemnity belt, it is to be observed that the object of the law is to give within its entire limit just what has been lost in place,

by other appropriation within the granted limits to the amount of lands intended to be granted, *and no more*. If by reason of such appropriation after the date of the act and prior to definite location the whole of the first belt shall be exhausted, *in that event* resort may be had to the second belt, under the act of 1870, to supply that particular loss, *and no more*.

Now, with respect to the definite location, the law makes absolute grant, with precision from that date as to particular lands, because those lands are immediately identified as a whole—being the alternate sections on each side of said road. The circumstances or *status* of each tract—whether “vacant” or “appropriated”—can then be ascertained. When ascertained it either falls within the grant as of its date or fails to pass on account of such exception as the law declares.

As to the indemnity the law gives at date of definite location, not title but a right to acquire title by selection—based on the deficiency ascertained as above. And the provision of 1870 rests on a possibility that at date of definite location there may be in some State or Territory a want of sufficient lands in the limits fixed in 1864, on account of subsequent disposals, to make the full original grant; and allows the deficiency thus caused to be supplied beyond the original limits.

This might seem like a legislative reservation of the first limit or indemnity belt from the date of definite location. But the acts place the whole subject “under the direction of the Secretary of the Interior.” The power to direct a proceeding necessarily implies not mere oversight in minor details, but control, supervision, discretion; and in such a matter as the selection and setting apart of public lands for any purpose, out of a body of public lands, where the use of the word “select” implies that there is something left after selection and where other right to acquire the lands already exists, it must, I think, be held that the power resides in this Department to adjudge when, in what manner, and to what extent, the statute requires the exercise of such control and direction as to give to the *public*, as well as the particular grantee, all the rights and privileges granted by law.

While this is so, and while there perhaps may be cases in which a common right of selection with the general public and with settlers would be amply sufficient to enable a company acting with promptness to secure its full grant, thus dispensing with any withdrawal whatever, I am convinced that the persuasive force of the acts passed for the Northern Pacific require such withdrawal to be made as will place beyond reasonable doubt any possibility of a miscarriage of their evident intent with respect to its lands.

The intention of the legislature, as manifest in these land grant acts, must in good faith be carried out by the Land Department. At the same time the rights and interests of settlers must be regarded and the policy of the country in respect to speedy settlement of public lands not unnecessarily restricted.

I cannot shut my eyes to the fact that vast areas of lands—public land for the right of selection—lying within indemnity limits, are barred to settlement, and that the area of arable lands open to settlement is not great when compared with the increasing demand and is rapidly diminishing.

It becomes the somewhat difficult duty of your office and this Department to administer the laws relating to these grants and the public lands, and to the rights of settlers, in such manner as to preserve, as far as possible, the rights and interests of all parties.

It was clearly the intention of the legislature that, within the indemnity limits fixed by the Northern Pacific acts, the company should have the opportunity to take lands, acre for acre, for all those lost in place.

A considerable portion of the road has already been built; the remainder is in rapid progress of construction, and the entire road will probably be completed at an early day. The work of ascertaining what lands in place have been lost to the company ought to go forward as rapidly as possible, and the company be enjoined to make selections in lieu of such lost lands without delay.

If the company neglects to make its selection and takes advantage of the withdrawals heretofore made, or that may be made hereafter, to withhold lands within the indemnity limit from the operation of the settlement laws, not actually needed to make good losses they have sustained, it will be the duty of the Department to revoke such order of withdrawal.

In reply to your suggestion whether "the withdrawals in the indemnity limits of this grant are to stand so far as made," I have to say that I am of the opinion that such withdrawals should, at least for the present, be maintained.

I am further of the opinion that, upon filing maps of approved definite location, withdrawals of lands within the indemnity limits should be made by you to the extent of the first indemnity limits. Such action will be in accordance with the practice heretofore pursued by your office in reference to withdrawals under the grant in question.

I must decline to comply with the request of the company to cause withdrawal of the lands within the second indemnity limits in the Territories. The nearest of these lands are 50 miles and the farthest 60 miles distant from the line of the road. As I am at present advised, I do not think it probable that the company will ever be obliged to resort to those limits for selection of lieu lands. But, if such should be the case, there will doubtless be a sufficient quantity of land left within such limits to enable the company to secure the full amount of its grant.

It will be borne in mind the Northern Pacific Company claim that its land grant, being a grant of quantity, "to the amount of twenty alternate sections per mile on each side," is entitled to lands within the indemnity limits in place of all lands disposed of or to which pre-emption and homestead rights had attached, as well before the passage

of the act as between its date and the time of filing the map of definite location.

This question is not presented by your letter, and I do not deem it necessary now to decide it. If, however, the construction claimed by the company were conceded, I think the indemnity limits withdrawn as indicated herein will afford ample protection to the grant.

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*INDEMNITY LANDS—WITHDRAWAL.***CIRCULAR.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., May 22, 1883.*

**REGISTERS AND RECEIVERS:**

GENTLEMEN: It appears that under certain decisions of this office and the Department a practice has grown up at several district land offices of admitting pre-emption claims or homestead entries for land in sections withdrawn for indemnity under grants to aid in the construction of railroads, to remain of record awaiting the final adjustment of the grant, when, if the land is not needed in satisfaction thereof, such entries or claims may be perfected.

Under date 17th instant, the honorable Secretary of the Interior decided that he had authority to order withdrawals of land within the indemnity limits of the grant to the Northern Pacific Railroad Company under the act of Congress approved July 2, 1864 (13 Stat., 365), and the joint resolution of May 31, 1870 (16 Stat., 378) and that the withdrawals for that purpose should be maintained, at least for the present.

In view of the probability that a large proportion of the land in the indemnity limits will be required to satisfy the several grants in which indemnity is provided, it is evident that a continuance of the practice of allowing entries of such lands will result in detriment rather than benefit to settlers, many of whom would find that the lands entered by them were needed to make up the losses within the granted limits. In such an event the settler must either purchase the land at the price fixed by the company or lose his improvements and the benefits of his labor.

In the decision cited, the Secretary says:

The intention of the legislature, as manifest in these land grant acts, must in good faith be carried out by the Land Department. At the same time the rights and interests of settlers must be regarded, and the policy of the country in respect to speedy settlement of the public lands not unnecessarily restricted.

I cannot shut my eyes to the fact that vast areas of lands (public but for the right of selection), lying within indemnity limits, are barred to settlement, and that the area of arable lands open to settlement is not great when compared with the increasing demand, and is rapidly diminishing.

It becomes the somewhat difficult duty of your office and this Department to administer the laws relating to these grants and the public lands, and to the rights of settlers, in such manner as to preserve, as far as possible, the rights and interests of all parties.

It was clearly the intention of the legislature that within the indemnity limits fixed by the Northern Pacific acts, the company should have the opportunity to take lands, acre for acre, for all those lost in place.

\* \* \* \* \*

The work of ascertaining what lands in place have been lost to the company ought go forward as rapidly as possible, and the company be enjoined to make selections in lieu of such lost lands without delay.

If the company neglects to make its selections, and takes advantage of the withdrawals heretofore made, or that may be made hereafter, to withhold lands within the indemnity limit from the operation of the settlement laws, not actually needed to make good losses they have sustained, it will be the duty of the Department to revoke such order of withdrawal.

The advantage to settlers in awaiting the adjustment of the claims of the railroad companies for indemnity, and the restoration to unconditional entry of the lands withdrawn but not needed for that purpose, over the practice of admitting entries and holding them to await the result of the adjustment of the grants, by which settlers are kept in doubt for an indefinite period, with ultimate loss to many, is too plain for further remark.

The Secretary's decision being applicable to all withdrawals for indemnity purposes under railroad grants, you are directed to refuse applications for lands thus withdrawn, except where the applicant alleges settlement prior to the date of receipt of the order of withdrawal at the local office.

Very respectfully,

L. HARRISON,  
*Acting Commissioner.*

DEPARTMENT OF THE INTERIOR,

May 26, 1883.

Approved:

H. M. TELLER,  
*Secretary.*

**VII.—INDIAN RESERVATIONS.****SETTLEMENTS—WITHDRAWAL.****BROWN ET AL. v. NORTHERN PACIFIC RAILROAD COMPANY.**

No rights were acquired by settlements made while the land was in the Indian reservation, and upon the extinguishment of the Indian title the withdrawal for the grant became effective and prevented the acquisition of any rights by settlement on odd-numbered sections.

*Acting Commissioner Harrison to register and receiver, Miles City, Mont., August 16, 1883.*

GENTLEMEN: Under date September 30, 1882, the register transmitted, for instructions, certain Sioux half-breed scrip, with applications to locate the same, filed in the local office at Helena, and transferred to your office when it was opened, stating that he was unable to adjust the locations to conform to the public surveys, which have now been extended over the land, and the following cases have been considered:

Nos. 592 D and 592 E, 160 acres each, issued to Ellen Brown, filed August 6, 1880, by George B. Wright, attorney in fact.

Nos. 323 D and 323 E, 160 acres each, issued to Roseau Bruguier, filed August 7, 1880, by Benjamin S. Bull, attorney in fact.

No. 310 D, 160 acres, issued to Sophia Huot, filed August 7, 1880, by W. W. Hale, attorney in fact.

The lands to which title is sought to be acquired through the location of said scrip are portions of Secs. 13, 24, 25, and 26, T. 16 N., R. 55 E., and 18 and 19, T. 16 N., R. 56 E.

Said townships are within the limits of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864. (13 Stat., 365.)

A map showing the general route of said company's road was filed in this office February 21, 1872. A withdrawal from sale or entry of the odd-numbered sections, both surveyed and unsurveyed, for 40 miles on each side of the line of route shown on said map was ordered by letter from this office dated April 22, 1872, which reached the local office, then at Helena, May 6. A map showing the definite location of the line of said road through said townships was received in this office October 25, 1880, with a letter from George Gray, esq., general counsel of the company, to the Secretary of the Interior, dated 21st same month. The limits of the withdrawal have not been adjusted to said definitely located line, which through said townships is substantially the same as the line of general route.

If the land in the odd-numbered sections was withdrawn by the order of 1872, it was not subject to location at the date of filing of the applications under consideration.

At the date of the grant to the railroad company, said lands were

within that portion of the Indian country recognized and acknowledged as the territory of the Arickarees, Gros Ventre, and Mandan Indians in the treaty concluded at Fort Laramie September 17, 1851. (Revision of Indian Treaties, p. 1048.) Said treaty was never ratified, but Congress made appropriations in accordance with its provisions.

Under date April 2, 1870, the Commissioner of Indian Affairs submitted to the Secretary of the Interior a statement relative to the matter, and recommended that an Executive order be invoked setting apart a reservation for said Indians, as proposed, and such order was issued on the 12th same month. (See Report of Commissioner Indian Affairs for 1882, pp. 260-262.)

The reservation thus established—known as Fort Berthold Reserve—embraced an estimated area of 8,330,000 acres (about 4,000,000 in Montana and the remainder in Dakota), and included the land in question.

By an Executive order dated July 13, 1880 (*Id.*, 262), the boundaries of said reservation were changed, and that portion in Montana, and the greater part of that in Dakota, restored to the public domain.

A number of townships in the area thus restored have been surveyed and others are under contract. The plats of T. 16 N., R. 55 and 56 were filed in your office June 12, 1882.

The second section of said act of 1864 (*supra*) provides that the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian titles to all lands falling under the operation of said act, and acquired in the donation to the road named.

The grant to the company by the third section of said act is—

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, \* \* \* and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free home pre-emption, or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. \* \* \*

My attention has been called to a letter of the honorable Secretary of the Interior, dated November 1, 1881, in reply to a communication from Geo. Gray, esq., general counsel for the Northern Pacific Railroad Company, claiming that under its grant said company had a right to take from the Crow Indian Reservation, adjacent to the line of its road, material for the construction thereof, and asking permission to take such material, with the consent of the Indians, to whom the company was willing to make satisfactory compensation for the same. This reservation is a part of the territory recognized as that of the Crow Indians by the treaty of 1851, herein referred to. It was established by a treaty concluded May 7, 1868, which was formally ratified and proclaimed August 12, 1868. (Revision of Indian Treaties, p. 237.) Mr.

Gray's application was denied by the Department upon the ground that the land was not public land at the date of the grant to the railroad company, being then occupied by said Indians, who did not acquire title by the treaty of 1868, the effect of which was simply to confirm title already existing.

The question before me is not whether the tracts herein described were public lands at the date of the grant, but were they such at the date of filing of the map of definite location of the road, and not within the exceptions specified in section 3 of the granting act.

As herein shown, the Executive order, which extinguished the Indian right of occupancy, antedated the filing of said map.

No rights were acquired by settlement while the land was in the reservation, and upon the issue of said Executive order the withdrawal of 1872 became effective and prevented the acquisition of any such rights. (*Hoagland v. N. P. R. R. Co.*, 5 Copp's L. O., 107.)

So far, therefore, as the applications under consideration apply to lands in the odd-numbered sections the same are held for rejection subject to appeal within sixty days.

From the plat of the private survey of the claim of Ellen Brown it appears that the claim is intended to cover a tract of land twenty chains in width extending along the right bank of the Yellowstone River for a distance sufficient to make 320 acres, but in attempting to show said claim in connection with the lines of public survey, it is found that following the courses and distances given the greater part of the claim falls in the river. The other claims herein mentioned border on the Brown claim and their boundaries are governed by the surveys thereof, so that until the description of said claim is corrected no part of these claims can be adjusted. Such correction requires a new survey, which will be allowed provided the boundaries of said claim were originally so marked that they can now be found and identified.

After such correction, if the parties so elect, said claims will be adjusted as to the even-numbered sections, and hearings will be ordered to determine their rights as against claimants under the pre-emption and homestead laws and under another scrip location, whose claims for a part of said even-numbered sections appear of record.

If the parties do not desire to have their claims adjusted to the even-numbered sections, they may relinquish the same, and have the scrip returned.

The odd-numbered sections herein described are included in the list of lands selected for the railroad company filed in your office on June 23d last, received in this office on 23d ultimo.

Notify the scrippees of this decision. The railroad company will be notified through its resident attorney by letter from this office.

## VIII.—NEW MEXICO DONATION.

*ACT OF JULY 22, 1854—VOID ENTRY.*

## ATLANTIC AND PACIFIC RAILROAD COMPANY.

A donation claim void on its face does not except the land from the grant to the company.

*Secretary Teller to Commissioner McFarland, December 3, 1883.*

SIR: I have considered the appeal of the Atlantic and Pacific Railroad Company from your decision of August 16, 1882, holding that a certain donation claim to the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 7 N., R. 22 E., Santa Fé, N. Mex., excepted said tract from the grant to said company.

The records of your office show that one Francisca Rael filed donation notification No. 20 for the NE.  $\frac{1}{4}$  of said section on July 29, 1870; that he relinquished the same on December 6, 1870—doubtless because of a misdescription of the tract on which he had actually settled—and filed notification No. 25 on December 7, 1870, for the tract first mentioned. In both said notifications he alleged settlement on March 8, 1863, and claimed under the donation act of July 22, 1854 (10 Stat., 308). He relinquished the tract herein involved on February 21, 1874. Subsequently a homestead entry on it was allowed; but this has been disposed of, and does not enter into the case at bar.

The land is within the limits of the grant to the Atlantic and Pacific Railroad Company, the right to which attached March 12, 1872.

In the case of Juan Rafael Garcia (9 Land Owner, 203) I held that the said donation act required that settlement and cultivation should be commenced on or before January 1, 1858. It is manifest, therefore, that Rael's claim, alleging settlement on March 8, 1863, was void on its face, and did not except the land from the grant to said company. (*Thomas v. Saint Joseph and Denver Railroad*, 3 Land Owner, 197; *Graham v. Hastings and Dakota Railroad*, 9 Land Owner, 236).

Your above decision is therefore reversed.

## IX.—PRACTICE.

## PARTY—REMITITUR—RELIEF.

**TROY'S HEIRS v. SOUTHERN PACIFIC RAILROAD COMPANY.**

The defeated party in a case before the Secretary of the Interior on appeal is a party to it until it is closed by execution of the decree. He has the right to call attention to the manner in which the Secretary's decision is executed by the Commissioner.

After a case has been decided by the Secretary, and a particular relief granted, the Commissioner cannot grant any relief or direct any action he may think the party would have been entitled to upon the record, had he applied for it.

*Secretary Teller to Commissioner McFarland, June 21, 1883.*

SIR: I have examined the proceedings had by your office in the case of the heirs of Daniel Troy *v.* Southern Pacific Railroad Company, subsequent to my decision therein, referred to in your letter of the 25th ultimo.

On the 28th day of February, 1881, the heirs aforesaid made application to purchase the land involved, under section 2 of the act of June 15, 1880. The defendant, the railroad company, resisted the application, claiming the land by virtue of its grant. The local officers rejected the application, but on appeal you granted it; and your decision in that respect was affirmed, on appeal to this Department, by decision of February 6 last, and the application to purchase under the provisions of said act was directed to be allowed.

You state that on February 14, 1883, you transmitted a copy of my decision to the local office (Visalia, Cal.), and directed that said heirs be allowed to purchase said land under the act aforesaid; that the next day the attorney for said heirs filed an application in your office to have the tract in question patented to Daniel Troy (deceased), under his homestead entry; and that on March 12, after a consideration of the facts, you revoked your letter of February 14, and instructed the register and receiver to issue supplemental final certificate, in the name of Daniel Troy, to cover the land in question; that final certificate was accordingly issued April 11, and approved for patent April 23; and that by letter of the latter date the attorney for said railroad company requested your office to recall your said letter of March 12, and to require said heirs to purchase the land under the act of June 15, 1880, aforesaid.

You further state that on May 9 you advised the attorney for said railroad company that the claim of the company to said land having been concluded by the decision of this Department, the question of the subsequent disposition of the land as between the heirs and the Government was one with which the company had nothing to do.

The attorney for the company having addressed a letter to this Department, proceedings have been stayed by my direction until the questions thus raised could be determined.

It is claimed that the company has now no standing in the case, and that the action and motion on the part of the company should be dismissed.

The right of the company to be heard as to the execution of the final decision is evidently misapprehended by your office, and by the counsel for the heirs.

When the record is returned to your office from this Department, with its decision, and direction for the execution of such decision, it is in the nature of a remittitur in the law courts. Can there be any doubt about the right of a party, though defeated in the appellate tribunal, to see that the decree of that tribunal is executed as therein directed? And if the tribunal to which the record is remitted should attempt to execute the decree in a manner different from that ordered, or to substitute another remedy in place of it, would there be any doubt about the right of such party to move the superior tribunal to correct the proposed wrong execution of its decree?

The decisions of the appellate tribunal are of no avail unless they are to be executed as made. If the opposite party is not permitted to move in such tribunal, there is no one that would have that right; for all others would be strangers to the record. It would often happen that the defeated party would suffer from a wrong execution of the decree.

In the present case it may make no difference to the company whether the land in controversy passes to the heirs by virtue of a purchase or under an entry made by Daniel Troy in his lifetime. In another case the rights of the company, in respect to its land grant or the right to indemnity for the land lost by the particular decision, might be affected.

A party, although the judgment is against him, has a standing in the case and a right to be heard, until it is finally closed by an execution of the decree.

I must, therefore, decline to dismiss these proceedings, upon the ground that the defendant has no standing in the case.

From what has already been said it may be inferred that the practice of your office in this case cannot be approved.

The application was to purchase the land under the relief act already cited. The party making it was represented by able counsel, and presumed to know the relief desired and to which the party was entitled. The case was considered upon no other ground, and upon the record furnished by your office, your decision was affirmed, and it was adjudged that the party was entitled to purchase under the act aforesaid.

You now direct upon the same record that the register and receiver issue a final certificate in the name of Daniel Troy, deceased, on his homestead entry made in 1867. That was not the remedy applied for, nor was it considered by you or this Department; and the defendant had not been heard upon that question. The record in this case may disclose sufficient facts to authorize the action now proposed by you;

but after a case has been heard and decided, and a particular relief granted, your office is not at liberty to grant any relief or direct any action which you may think the party would have been entitled to upon the record if he had applied for it.

Such practice as is now proposed would lead to great confusion and uncertainty. This Department could not know whether the action directed by its decision was carried out, or some other action or remedy substituted in its place, except by instituting inquiry in your office. In this case the Department was not asked to modify its decision, and was in no way advised of the proposed change, until its attention was called to it by counsel for the defendant.

Your decision that the applicant had the right to purchase the land in question under said act, affirmed by me February 6 last, should be carried into effect; and your letter of March 12, directing final certificate to issue under the homestead entry of Daniel Troy, and all proceedings subsequent, should be revoked.

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## X.—PRE-EMPTION.

*PUBLIC SALE—ACT OF SEPTEMBER 4, 1841.*

**CENTRAL PACIFIC RAILROAD COMPANY v. ORE.**

As the pre-emption right upon which Orr bases his right was extinguished on the day of public sale described, the land became public land and passed to the company under its grant.

*Secretary Teller to Commissioner McFarland, September 21, 1883.*

SIR: I have considered the case of the Central Pacific Railroad Company *v.* Michael Orr, involving the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 5, T. 12 N., R. 8 E., M. D. M., Sacramento district, California, on appeal by the company for your decision of April 28, 1882.

The tract is within the limits of the grant by act of July 1, 1862 (12 Stat., 489), to the company, the right whereof attached June 1, 1863, and the withdrawal for which was made September 13, 1862.

It appears that one W. B. Wilson filed declaratory statement No. 421, for the tract, June 15, 1856, alleging settlement July 1, 1852.

Under date of January 25, 1877, Orr applied at the local office to make homestead entry of the tract, basing his right upon Wilson's filing, &c.

At Orr's instance citation duly issued the same day to the company to appear at the local office March 6 ensuing. Hearing was accordingly had, whereat both parties appeared. Under date of June 29, 1878 (the record fails to discover the cause of such delay in the rendition of their decision), the register and receiver finally found from the evidence in favor of the company. From such action Orr appealed, but by reason of the contradictory character of certain material testimony, you

were unable to determine as to the validity of Wilson's claim at the date the company's right attached, to wit, June 1, 1863. Wherefore you advised the register and receiver February 24, 1882, to inform appellant that he would be allowed to explain the patent discrepancy of statement in the testimony of one of his material witnesses, after due notice to the company.

This Orr accordingly did, so far as lay in his power, the company's attorney, T. B. McFarland (who was the register at the time the register and receiver decided in the company's favor, as aforesaid), objecting to the admissibility of such testimony at that stage of the proceeding, after the case had been submitted and forwarded on appeal to your office. But, notwithstanding such demurrer, you rendered your decision in question, holding that while the testimony "is not so clear as could be desired," it establishes the fact that Wilson had a valid subsisting claim to the tract at the date of the definite location of the road, June 1, 1863, which, under the terms of the statute (12 Stat., 492), excepted the tract from the operation of the grant.

Without discussing the *minutiae* of the several points of exception specifically raised upon appeal by the company's counsel, touching Wilson's personal qualifications and Orr's, it will suffice to state that your own records discover the fact that the premises were proclaimed for sale under date of June 30, 1858, but that they were not offered by reason of their alleged mineral character. Such being the case, Wilson should have made proof and payment forthwith, pursuant to the express provisions of the original pre-emption act, to wit, the act of September 4, 1841 (5 Stat., 457), the fourteenth section whereof provides—

That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President; nor shall the provisions of this act be available to any person or persons who shall fail to make proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

The record fails to discover that Wilson complied with such requirement. Hence it must be assumed that he failed to do so, and that the provisions of the act cited were not available to him. Thus it appears that the particular claim upon which Orr bases his claim having fallen, Orr's must fall likewise.

I am therefore of opinion that at the date of the definite location, June 8, 1863, there was, so far as the record discloses, no valid subsisting claim to the tract in question, whereby the same was excepted from the operation of the grant.

Your decision is accordingly reversed.

## XI.—RELINQUISHMENTS.

*ACT OF JUNE 22, 1874—LAND IN LIEU.*

## HASTINGS AND DAKOTA RAILROAD COMPANY.

The company has not selected the land, neither has it shown that its grant cannot be satisfied without the same. If it will select the land, and it shall appear that it is needed to satisfy the grant, the claim thereto will be adjudicated, and, if allowed, the land may be relinquished under the act of June 22, 1874, in favor of the settler, and other land taken in lieu thereof.

*Commissioner McFarland to Register and Receiver, June 22, 1883.*

GENTLEMEN: I am in receipt of your letter of March 12, 1883, transmitting a relinquishment by the Hastings and Dakota Railroad Company of the following-described tracts:

N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , and lot 1 of Sec. 5, 112, 34, containing 109 $\frac{57}{64}$  acres, in favor of Moses J. Griffin, homestead entry No. 6472, Redwood Falls series \* \* \* also, N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 29, 114, 36, 80 acres, in favor of John Beckendorf, entry number 1,369.

In making said relinquishment, the company claims in lieu of the tracts relinquished in Griffin's favor, the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 22, 120, 39, and lots 3 and 4 of Sec. 8, 120, 44; and also claims in lieu of the tracts relinquished in Beckendorf's favor the E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 18, 121, 40.

The records of this office show that on March 26, 1880, Griffin was advised that he might relinquish the land embraced in his entry, and make a new entry, or that his entry (6,472) might remain intact upon the records, subject to the right of the company to select the land (embraced in said entry) if it was needed to satisfy the grant. The company through its resident attorneys was advised that if it should relinquish the land embraced in Griffin's entry, under the act of June 22, 1874, Griffin's entry might be perfected and the company given indemnity therefor. The land entered by Griffin is within the 20-mile *indemnity* limits of the grant for the road named. It was reserved at date of Griffin's entry in order that the company might, if found necessary, select it to help satisfy any deficiency occasioned by losses in the granted limits. The company has *never selected* the land for that or any purpose. Neither has the company shown that its grant cannot be satisfied without said land. The right of the company has not in any sense *attached* to said land. If indemnity was now given the company for said land, the indemnity would not represent any loss in the primary limits of the grant. I cannot, therefore, accept the relinquishment by the company of the tracts embraced in Griffin's entry, and to that extent the decision of my predecessor—made in error—is reversed. If, however, the company will regularly select the N.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , and lot 1, of Sec. 5, 112, 34, and if it shall appear that they

are needed to satisfy its grant, its claim thereto will be adjudicated, and if allowed, the company may then relinquish the land and receive indemnity therefor, under the act of June 22, 1874. Pending such action the land in even-numbered sections, named by the company, to wit, SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 22, 120, 39, and lots 3 and 4 of Sec. 8, 120, 44, will be reserved from entry. It will be observed that the act of June 22, 1874, was passed for the relief of actual settlers "whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which by the decision of the Land Office the right of said road was declared to have attached to said lands." \* \* \* For many years prior to the decision by the Supreme Court of the United States in the case of Michael Ryan vs. The Central Pacific Railroad Company, it was the rule of the Land Department that the grant to a railroad company took effect upon lands within the indemnity limits at the same time it did upon lands in the granted limits.

Said rule obtained until April 7, 1879, when the Secretary of the Interior announced (in the Blodgett case) the rule established by the Ryan decision made during October term, 1878. It is clear, therefore, that the act of June 22, 1874, can be applied to the relief of Griffin, provided that such application does not "enlarge or extend" the grant for the Hastings and Dakota Railroad, to avoid which the company must proceed in the manner heretofore directed, and if the company's right to the land (claimed by Griffin) is established, said right will be held to relate back—so far as the act of June 22, 1874, is concerned—to the date of the granting act of July 4, 1866. The case of John Beckendorf, who on March 12, 1883, was allowed to make a timber-culture entry of the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 29, 114, 36, differs from that of Griffin in that the land is within the granted limits of the road, and the entry made by him (Beckendorf) is not of the class for which the act of June 22, 1874, provides relief. He is not an "actual settler" on the land whose entry or "filing has been allowed under the *pre-emption or homestead laws*"; consequently the relinquishment in his favor made by the Hastings and Dakota Railroad Company is rejected. The N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 29, 114, 36, was selected on January 12, 1874, by said company. On December 6, 1881, in the case of the Company v. Charles Beckendorf, the land was awarded to the company, and you should not, therefore, have permitted the entry before submitting the application to this office.

The N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 29, 114, 36, was entered on August 4, 1865, by George W. Whitehurst, and on June 5, 1867, said entry was canceled. Whitehurst's entry, under the rule established in the case of Julia D. Graham, decided February 12, 1883, must be held to have excepted the land from the operation of the grant (of July 4, 1866) to the Hastings and Dakota Railroad Company.

The entry of John Beckendorf will accordingly be permitted to remain intact upon the records of this office, subject to appeal by said company,

which has not acquired title to the land under the award of December 6, 1881.

Notify Griffin and Beckendorf; the company will be notified by this office.

*DEFINITE LOCATION.—WITHDRAWAL.*

**MONAGLE v. NORTHERN PACIFIC RAILROAD COMPANY.**

Where an entry subsisting at the date of filing of the map of general route was canceled for voluntary relinquishment, prior to the definite location of the road, the tracts covered thereby became public land and were subject to the withdrawal for indemnity purposes.

*Commissioner McFarland to register and receiver, Walla Walla, Wash., September 14, 1883.*

GENTLEMEN: I have considered the appeal of Dennis Monagle from your decision of April 24, 1883, rejecting his application of same date to enter under the homestead laws the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 9, T. 10 N., R. 39 E., W. M. The lands in question are within the limits of the grant of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company. The withdrawal of the odd-numbered sections, based upon the filing of the map of general route, took effect August 13, 1870. They also fall within the 50-mile or indemnity limits of the withdrawal on definite location of the road, notice of which was received at the local office November 30, 1880.

The records of this office show that on March 22, 1869, John A. Starms made homestead entry, No. 956, of said tracts, which was canceled for voluntary relinquishment January 2, 1872.

The cancellation of said entry prior to the date of the definite location of the road served to restore the tracts to the public domain, and being within indemnity limits they became subject to the withdrawal. (See *Perkins v. Central Pacific Railroad Company*, 9 Copp. L. O., p. 200.)

Your decision in rejecting said application is affirmed.

You will so notify Mr. Monagle, allowing sixty days for appeal.

The railroad company will be advised by this office.

*SELECTION OF LIEU LANDS.***HITCHMAN ET AL. v. NORTHERN PACIFIC RAILROAD COMPANY.**

The right of the company attached to the tracts relinquished upon definite location, and having constructed its road opposite the same it is in a position to demand patent therefor, were it not for its relinquishments in favor of settlers under the act of June 22, 1874.

The relinquishments were asked for by the Commissioner and were executed, and the selection of other lands made by the company in good faith.

Said selection was a valid claim subsisting at the date of plaintiffs' applications, which claim has since been perfected by construction of the road.

*Commissioner McFarland to register and receiver, Helena, Mont., October 22, 1883.*

**GENTLEMEN:** I have considered the appeal of Isaac Hitchman, Henrietta Reid, and Sarah E. Brown, by their attorney, Massena Bullard, from your rejection of their applications to make additional homestead entries for tracts in T. 9 N., R. 10 W., transmitted with the register's letter of the 14th April last.

The application in behalf of Hitchman is for SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 14.

That for Reid is for SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 14, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 22, and for Brown for S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 22.

Said applications were filed in your office March 8, 1883, and rejected by you for the reason that the tracts described therein were selected by the agent of the Northern Pacific Railroad Company November 4, 1882, under the act of June 22, 1874, in lieu of tracts relinquished in favor of actual settlers, and were not subject to entry.

The records show that the SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  Sec. 14 were selected by the agent of the railroad company, as above stated, in lieu of NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  Sec. 21, T. 5 N., R. 10 W., relinquished in favor of Charles Rivers, who made pre-emption cash entry No. 730 of the same February 23, 1880.

The SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  Sec. 14, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 22, were selected in lieu of SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  Sec. 15, T. 12 N., R. 5 W., relinquished in favor of Samuel F. Ralston, who made homestead entry No. 754, covering the same, April 10, 1872, and the E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  Sec. 19, T. 13 N., R. 11 W., relinquished in favor of John W. Blair, who made pre-emption cash entry No. 558 of same September 29, 1875.

The S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  Sec. 22 was selected in lieu of the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  Sec. 29, T. 11 N., R. 3 W., relinquished in favor of James R. Johnson, who made homestead entry No. 763, covering the same, April 15, 1872.

The foregoing relinquishments were all accepted by this office.

Maps showing the line of said railroad as definitely located were filed in this office June 6, 1882, and the tracts relinquished fall within the 40-mile (granted) limits of said definitely located line.

The road has been constructed, and that portion opposite T. 11 N., R. 3 W., and 12 N., R. 5 W., was accepted by the President September 7, 1883. That portion opposite T. 5 N., R. 10 W., and 13 N., R. 11 W., was accepted on the 4th instant.

At the date when the list of lieu selections was filed in your office there were no claims to the tracts described therein subsisting on the records.

As grounds for appeal, counsel of the applicants asserts that the company had not completed its road opposite the lands applied for, and had not at the date of said applications so far complied with law or with the terms of its grant as to entitle it to any claims to said land.

It is true that the road had not been completed at that time. It had been definitely located, however, and was in rapid process of construction, and has since been completed opposite said lands.

The right of the company to the tracts relinquished attached upon definite location, and but for such relinquishment it is now in a position to demand patent for the same. The relinquishments were asked for by this office for the relief of settlers whose claims could not have been perfected otherwise.

The relinquishments and the selection of lieu lands were made in good faith. In my opinion said selection was a valid claim subsisting at the date of the applications before me, which, now that the lands have been earned, has been perfected, and your action in rejecting said application is affirmed, subject to appeal within sixty days.

Advise the applicants accordingly. The railroad company will be advised through its resident attorney by letter of even date.

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#### PENINSULAR RAILROAD COMPANY *v.* CARLTON AND STEELE.

Status of the lands claimed by this railroad company. Lands having been once relinquished by the company cannot be again claimed by it.

*Secretary Teller to Commissioner McFarland, November 14, 1883.*

SIR: I have considered the appeal of the Peninsular Railroad Company, said to be successor and assignee of the Atlantic, Gulf and West India Transit Company, from your decision of August 15, 1882, holding for patent the homestead entry of McKeen Carlton, made May 29, 1873, for the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 1, T. 11 S., R. 22 E., Gainesville, Fla., upon which final proof was made January 30, 1879, final certificate No. 1905, and also holding for patent the homestead entry of Archy Steele, made October 25, 1875, for the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 5, T. 13 S., R. 22 E., in the same land district, upon which final proof was made December 4, 1880, final certificate No. 2128.

The tracts named lie within the 6-mile limits of the Tampa Bay portion of the Atlantic, Gulf and West India Transit Company, and your decision holds that the rights of the company did not attach until March 16, 1881, when withdrawal of lands was made for the benefit of the company, under Secretary Schurz's instructions of January 28, 1881, and hence that the entries being of prior date to the withdrawal must be sustained. The company claims that its rights attached upon the filing of the plat of survey in your office in 1860.

The act of May 17, 1856 (11 Stat., 15), granted to the State of Florida to aid in the construction of certain railroads in that State—of which that herein named is or is supposed to be one—every alternate odd section of land for 6 miles in width on each side of each of said roads and branches. And in case the United States had, when the lines or routes of said roads and branch are definitely located, sold any of the granted land, or the rights of pre-emption had attached to the same, the State might select, subject to the approval of the Secretary of the Interior, so much land in alternate sections or parts of sections as should be equal to the lands so sold or otherwise appropriated, or to which the rights of pre-emption had attached; and if either of the roads named should not be completed within ten years, no further sale of land should be made by the State, and the lands unsold should revert to the United States.

The facts involved in this and other like cases are fully set forth in the papers and exhibits accompanying my letter of January 12, 1883, in answer to the resolution of the Senate of December 27, 1882, asking information relative, among other things, to contested homestead entries in the State of Florida. It appears therefrom that a withdrawal of lands on the line of the road in question was ordered by your office on September 6, 1856, which was so modified September 12 following as to permit pre-emption settlement and entries until the line of road should be definitely located. On April 25, 1857, the local officers of the land district were instructed not further to permit any such filings or entries. This inhibition continued in force for some years, but was subsequently disregarded in consequence of the failure of the company to locate its line, and the expiration of the period within which the road should have been constructed under the grant. In 1875, the Atlantic, Gulf and West India Transit Company applied to file, as a map of definite location, a map purporting to be a copy of a map of definite location prepared in 1860. It appears that the original of this map was sent to your office in 1860, but was not accepted by reason of the non-signature of the governor of the State of Florida thereto; and it being lost or mislaid, a copy thereof was offered in December, 1875. But April 29, 1876, Secretary Chandler refused to accept it, because the act of definitely locating the road could only be performed by or under authority of the State within a reasonable time after the date of the grant—which did not appear—and, in all cases, before expiration

of the time for completing the road. From the date of that decision to the withdrawal in 1881, the odd-numbered sections within the limits of the grant were treated as public lands, and settlements and entries were allowed thereon, and a large number have been held for patent by your office, but await action on the company's appeal.

On November 10, 1879, you submitted to Secretary Schurz the company's application for review of Secretary Chandler's decision, claiming that material facts which went to show the authority of the company to locate the line and file the map, were not before him—much of the matter being newly discovered—which if presented and considered would have led him to a different conclusion. In his ruling of January 28, 1881, Secretary Schurz held that the correspondence of the map of 1860 with the copy filed was sufficiently shown, and that there was no doubt that the line exhibited by the copy was surveyed and marked as the definite location of the road; that it was recognized as such by the officers of the company and the State authorities, and having the approval of the Governor of the State, the only question was whether or not the lands could be legally certified to the State, in view of the limitation of the time contained in the granting act; and holding that this question was settled by the case of *Schulenberg v. Harriman* (21 Wallace, 44) in favor of the company, he transmitted the map for your files, and directed the necessary withdrawal of lands. He also said—

Your attention is also particularly invited to the formal waiver of the company in favor of actual settlers prior to December 13, 1875, and you are instructed to make respectful request for a like waiver covering the time since that date, and up to the time when formal notice of the withdrawal can be communicated to the district land office.

On March 16, 1881, you advised the company of Secretary Schurz's decision and request, and April twenty-first following again addressed it, stating that as questions relating to the company's lands were already arising, asked that your office be advised at once what course the company intended to pursue as to the relinquishment referred to by Secretary Schurz. Replying under date of April 26 to your two letters, the president of the company requested from you a list of the actual settlers, the particular tract occupied by each, and when the entry was made, and said—

You may rely upon it that the company will do what is equitable in respect to *bona fide* settlers, and upon receiving the information above asked, it will at once submit for your consideration what appears to it consistent with justice applied in a liberal spirit.

You replied, May 10, that the company having previously made a waiver of like effect, covering a period from the date of the grant up to December 13, 1875, if the one now asked for is made, proper credit would be given the company in every case in which they are entitled to indemnity under the act of June 22, 1874, and therefore no question of "loss" was involved in the relinquishment asked for, which you hoped would be made at an early day.

On June 25, 1881, the president of the company advised you that, having previously decided to relinquish in favor of actual settlers prior to December 13, 1875, and to accept substitute lands—that 941 homestead entries had been made on lands between Waldo and Tampa Bay, 628 of which were since December 13, 1875, it had now decided, in consideration of all the circumstances “to extend the relinquishment or waiver, heretofore made, to all actual *bona fide* settlers who made improvements prior to March 16, 1881.” \* \* \* 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. In making this relinquishment the company reserves the right to select under the act of June 22, 1874, equal quantities of other land in lieu of tracts embraced in such entries as may be relieved hereby,” and under date of September 28, 1881, the company filed separate relinquishments covering 161 entries, comprising 15,589.21 acres in odd sections, within said six miles, and in January 1881, and in March and April, 1882, selected other lands in lieu of relinquished tracts, aggregating 49,801.95 acres. These selections appear not yet to have been acted upon by your office, and the right of the company has not been determined.

The relinquishment of April 1, 1876, was as follows: “*Resolved*, That this company hereby waives all claim to so much of the land on each side of their line of road between Waldo and Tampa Bay to which this company is entitled by law, as may be found by the General Land Department at Washington to be occupied by settlers who may be entitled to equitable relief up to December 13, 1875, saving and reserving to this company any and all rights of indemnity vested in the company under existing laws.”

Neither question as to the time when the company’s map was legally and in fact filed, nor as to the date of withdrawal of lands for its benefit, nor as to the company’s right to indemnity for lands relinquished, is involved in the present cases. Those questions are not raised by the appeals, and the present entrymen are not interested therein, but the only one is whether the tracts have been relinquished by the company; and this I cannot doubt. These relinquishments, made under full knowledge of the law and the facts, are absolute and unconditional. That they are coupled with a reservation of the company’s right to indemnity cannot affect their validity. Indemnity undoubtedly follows relinquishments under the act of June 22, 1874; but these are separate and distinct questions, each to be determined under the law. I concur with Secretary Schurz in the opinion that the company made a “formal waiver” of lands in favor of actual settlers prior to December 13, 1875, and with your opinion to the same effect. This waiver embraces the lands covered by the entries in question; and there being no other claimant to the tracts, they must be sustained.

Your decision is affirmed for the reasons stated.

*WITHDRAWAL—WAIVER.***ATLANTIC, GULF AND WEST INDIA TRANSIT RAILROAD COMPANY  
v. MARTIN.**

June 25, 1881, the company filed a formal extension of the relinquishment or waiver theretofore made in favor of actual *bona fide* settlers who had made improvements prior to March 16, 1881—the date when the withdrawal was ordered.

The waiver embraces the land covered by the entry; the settler comes within the terms of the relinquishment. Entry sustained.

*Secretary Teller to Commissioner McFarland, November 14, 1883.*

SIR: I have examined the case of the Atlantic, Gulf and West India Transit Company *v.* Charles Martin, involving the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 29, T. 10 S., R. 23 E., Gainesville, Fla., on appeal by said company from your decision of July 12, 1882, holding said Martin's cash entry for approval.

The tract in question lies between the 6-mile limits of said company's railroad, between Waldo and Tampa Bay.

The facts relating to the filing of the map of the route of said road on December 14, 1860, which was lost or destroyed, the filing of a duplicate, and the respective decisions of my predecessors, Secretaries Chandler and Schurz, and other facts connected therewith, are fully set forth in my decision of this day in the nearly parallel cases of the entries of McKeen Carlton and Archy Steele.

The order of withdrawal was made on March 16, 1881, and notice thereof received at the local office March 26, following.

June 25, 1881, the company filed a formal extension of the relinquishment or waiver theretofore made in favor of actual *bona fide* settlers who had made improvements prior to March 16, 1881—the date when the withdrawal was ordered.

The waiver embraces the land covered by the entry, the settler comes within the terms of the relinquishment, and there is no other claimant to the tract.

You state in your decision that—

Mr. Martin's entry having been initiated under the provisions of the homestead laws prior to March 26, 1881, his said cash entry, under act of June 15, 1880, made after that time, was properly allowed, and the company will not be entitled to indemnity under the act of June 22, 1874.

The question whether the company will be entitled to indemnity for the tract aforesaid is not now before me. It will be proper to consider that question when the company makes application, under the act of June 22, 1874, for land in lieu of said tract.

It is clear that the tract is within the terms of the relinquishment, and it is unnecessary now to consider whether without such relinquishment the entry could have been maintained under the act of June 15, 1880, as stated by you.

For the reasons stated, I affirm your decision allowing the entry.

*DEFINITE LOCATION—FILING MAP OF ROUTE.***TALBERT v. THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.**

Where an entry existed at date of filing map of general route, which was, after such filing and before definite location of the road, canceled for voluntary relinquishment, the land covered thereby becomes public land, is not to be held to await the definite location of the road, but is open to the first legal applicant.

*Secretary Teller to Commissioner McFarland, March 10, 1884.*

SIR: I have considered the case of John A. Talbert *v.* The Oregon and California and the Northern Pacific Railroad Companies and John Fitzgibbons, involving the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lot 1 of Sec. 3, and lot 1 of Sec. 10, T. 2 S., R. 2 E., Oregon City, Oreg., on appeal from your decision of June 16, 1880, rejecting the application of Mr. Fitzgibbons and the claim made by the Oregon and California Company, and holding Talbert's filing for cancellation so far as it relates to the said NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , but permitting him to hold lot 1 in Sec. 10 and lot 1 in Sec. 3.

You did not, however, at the time of your decision, award to the Northern Pacific said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , because the line of its road was not then definitely fixed.

Talbert appeals from so much of your decision adverse to him as relates to said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and the Northern Pacific Company from that part of your decision adverse to said company which relates to said lot 1 in Sec. 3.

Map of general route of the said Northern Pacific Company was filed August 13, 1870, and withdrawal followed. June 3, 1863, one Noble N. Matlock made homestead entry No. 94, of said lot 1, Sec. 3, and lot 1, Sec. 10, and, as the papers show, probably intended to include said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ . No correction, however, was made, and the old entry was canceled for voluntary relinquishment December 16, 1867. May 4, 1868, Thomas J. Matlock made homestead entry No. 1,046 for all of said tracts. This entry was also canceled January 5, 1872, for voluntary relinquishment.

April 2, 1872, said John A. Talbert filed declaratory statement No. 2,633 for all of said tracts, alleging settlement March 30 of same year. He made some improvements and bought others previously made by Matlock. He or his family occupied the land continuously, with the exception of a few months, from the date of his filing to the time he made his proof. The Oregon and California Company and John Fitzgibbons not having appealed from your decision, no recitation of facts is necessary to show the claims made by them.

The land grant to the Northern Pacific Company was made July 2, 1864. As we have seen, said lot 1 in Sec. 3, claimed by said company, was at the date of the act granting lands thereto covered by the exist-

ing homestead entry of Noble N. Matlock. The same lot was, however, embraced in homestead entry No. 1046, subsequently made by Thomas J. Matlock, which also included said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ . The last-named entry had a valid existence at the time of filing the map of general route. The disposition of lot 1 aforesaid will therefore follow that of the said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , if I shall reach the conclusion that the last-named tract should be awarded to Talbert.

Such a conclusion would make it unnecessary at this time to consider the question as to the status of a tract of land covered by a homestead entry at the date of the grant, and canceled before filing map of general route.

As to the said NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , you hold Talbert's filing for cancellation, but state that, "as the Northern Pacific Railroad is not definitely located, no award of the land will be made at this time."

For this tract a valid homestead entry was made May 4, 1868, and remained until January 5, 1872. At the time this entry was made no map of general route affecting this land had been filed, and no withdrawal made. It was clearly the intent of the act that, notwithstanding the fact of the grant, homestead entries and pre-emption filings could be made, and the settlement of the country continue unobstructed until the general route was fixed by the company, and the grant, as indicated by the lines of such route, protected by withdrawal. Until that was done it could not be known where on the face of that region of the country, then an almost unbroken wilderness, the zone of the grant would be marked out. This homestead entry having been made while the country remained in that condition, it was not disturbed by the grant, and was found to have a valid existence at the time of filing the map of general route, and of the withdrawal thereunder.

When, therefore, at a time subsequent to the filing of the map of general route, this homestead entry was relinquished, what was the status of the land? Did it become public, and subject to Talbert's pre-emption, or did it in some manner inure or attach to the grant, so that, as held by your office, no award could be made of it until the line of the road was definitely fixed?

The sixth section of the granting act provides for a survey, after the general route is fixed, of all lands within its limits, and then declares that the "odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." That is, after the general route was fixed, the odd sections embraced within its limits, whether surveyed or unsurveyed, were to be no longer subject to sale, entry, or pre-emption. The grant, although in terms *in præsenti*, acquired no precision until the general route was fixed. It might be located anywhere within the United States north of the forty-fifth degree of latitude, with terminal points on Lake Superior and Puget Sound.

The sixth section prohibited any sale, entry, or pre-emption after the

general route was fixed ; and the third section declared what lands the company should have, viz, those to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat filed."

In *Thomas v. Railroad* (*supra*), decided by this Department in 1877, it was held that a homestead entry existing at the time of filing the map of definite location was an appropriation of the land ; and although subsequently canceled for abandonment, the lands were excluded from the grant.

In the case of *Trepp v. The Northern Pacific R. R.* (2 Copp's P. L. L., 908), decided by my predecessor in 1881, it was held that—

If there was a pre-emption claim (not since abandoned) attaching to the land in question at the date of the withdrawal (upon filing map of general route), it excluded the land from the withdrawal, and from the grant, as effectually as if the map of definite location had been filed and accepted at the same time as and instead of the map of general route.

If, as held in the Thomas case, abandonment subsequent to definite location was immaterial, then it is immaterial if subsequent to location of general route ; otherwise the doctrine in the Trepp case (that the existence of the pre-emption claim at the time of the general route location "excluded the land from the withdrawal and from the grant as effectually as if the map of definite location has been filed and accepted at the same time as and instead of the map of general route") is not correct.

The Trepp decision was made upon recalling a decision adverse to Trepp, and seems to have been well considered. It simply recites the fact that the pre-emption claim existing at the time of filing the map of general route had not been since abandoned. It was not, therefore, necessary to consider what would have been the legal result if it had been abandoned. But from the principle laid down in the case, I think it must follow that abandonment would have been immaterial.

The recitation of that fact may have been thought to be necessary because it had been held in *Gates v. Railroad* (5 Copp's L. O., 150) that a pre-emption claim existing and capable of being perfected at the date of the grant, if subsequently abandoned, did not except the land from the grant.

This case was, however, overruled in my decision in the case of *Perkins v. The Central Pacific Railroad Company* (9 C. L. O., 201).

It is well settled that if Matlock's entry No. 2,633, made May 4, 1868, and existing at the time of filing the map of general route, August 13, 1870, had not been cancelled for voluntary relinquishment, the land would have been excepted from the grant, because such entry was a legal appropriation of the land.

That proposition being established, does it not follow that subsequent cancellation because of relinquishment is just as immaterial in the case

where the land is excepted from the grant because of being otherwise legally appropriated at the time of filing the map of general route as where it is legally appropriated at the date of the grant, or on filing map of definite location, and then subsequently abandoned?

The point, in each instance, upon which the question turns, is the fact that a legal appropriation of the land existed at the time of the happening of the particular event.

When the line of road was definitely fixed the grant would relate back, and take the lands reserved by filing the map of general route, so far as the line of definite location corresponded with the line of general route. But I see no reason why the grant should by relation take lands which were not reserved because of being otherwise appropriated at the time the general route was fixed.

The existence of the valid homestead entry at the time of filing the map of general route excluded the land from the operation of the withdrawal which took place upon filing such map; and being so excluded, it did not upon subsequent abandonment fall to the grant, but was subject to be awarded to the first legal applicant.

You refer to the case of *Fleetwood v. The Northern Pacific Company*, decided by your office February 14, 1877, to the effect that a claim initiated by settlement prior to withdrawal "must be carried beyond the date of definite location to defeat the operation of the grant"; and you state that it was based upon the opinion of March 22, 1873, of the assistant attorney-general. That opinion, however, related only to entries made after the filing and approval of the map of general route, and is not an authority upon the question under consideration.

In the later case, however, of *James Conley v. The Northern Pacific Railroad Company et al.*, and several other cases now before me, you hold that a homestead entry made after the date of the grant, and existent at the time of the withdrawal under the map of general route, excepted the land from the grant.

It is not necessary in this case to consider what would be the effect of the provisions of the third section of the granting act in case the land, without regard to its previous condition, was found, at the time the location of the road was definitely fixed, to be "free from pre-emption or other claims or rights," and to which the United States might then "have full title, not sold, granted, or otherwise appropriated."

The precise question presented by the present case is as to the disposition which should be made of a tract of land covered by a valid homestead entry at the time the general route was fixed—whether it shall be awarded to the first legal applicant, before such definite location, or withheld from settlement to await such definite location.

I am of the opinion that the land in such a case should be awarded to the first legal applicant.

Any other construction would fall with severity upon settlers who have occupied and made valuable improvements upon lands of the char-

acter under consideration, acting upon the belief that they were excepted from the railroad grant—a belief not without support found, as I think, in the decisions of this Department. On the other hand, this construction entails no special hardship upon the company, which takes lands within the indemnity limits in lieu of those lost in place.

I reverse your decision so far as it relates to said NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , and award said tract to Talbert; and I affirm your decision awarding to him said lots 1 and 1, for the reasons aforesaid.

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*BEFORE SELECTION—ACT OF JUNE 22, 1874.*

**HASTINGS AND DAKOTA RAILROAD COMPANY v. BAILEY.**

A relinquishment of a specified tract, properly executed by the grantee, must be filed before, or concurrently with, a selection in lieu thereof under the act of June 22, 1874.

*Secretary Teller to Commissioner McFarland, April 25, 1884.*

SIR: I have examined the case of the Hastings and Dakota Railroad Company *v.* Andrew J. Bailey, involving lots 1, 2, 3, and 4 of Sec. 26 north of Minnesota River, T. 121, R. 46, Benson, Minn., on appeal by said company from your adverse decision of March 12, 1883.

It appears from the affidavit of Bailey, made December 19, 1882, and filed in the case, that said lots contain about 172 acres; that he moved thereon with his family in the summer 1878, built a good frame house 20 by 20, with L's, walled up a cellar thereunder, built granaries, stables, and barns, has a curbed well, 50 acres of land under cultivation, has planted five hundred forest and shade trees, and has set out in small fruits about one acre; also, that he has resided continuously on said land, with his family, ever since he moved thereon in 1878; that he has never had the benefit of the homestead law, and that he moved on said land and made the improvements in good faith.

In September, 1879, he applied to make homestead entry of said lots, but his claim was rejected at the local office because said company had applied for said lands under the act of June 22, 1874. Bailey took no appeal from such action of the local office.

Your office took action because of Bailey's affidavit aforesaid, which was received by this Department and duly referred to you. You found that the company selected the lands in question June 19, 1879, in lieu of the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 23, T. 113, R. 35, entered as a homestead entry, No. 3,180, August 9, 1866, by Andrew Hunter, to whom final certificate No. 1 was issued at Redwood Falls July 22, 1872. You further found that the land was within the ten-mile limits of the grant for said railroad, which grant became effective March 7, 1867, and that since the Hunter entry was then valid and subsisting, it excepted the lands in that entry from the grant, and there-

fore the company had no claim for indemnity therefor; and accordingly you rejected its claim to the lands in question, and directed that Bailey's application to enter the same should be permitted.

Counsel for the company except to your decision, alleging error in that you hold that the "company was not entitled to select said tracts under act of June 25, 1874."

The ground of the appeal stated in the argument is "that the land in Sec. 23, 113, 35 was absolutely withdrawn for said railroad grant in July, 1866, prior to Hunter's entry thereof in August, 1866." This fact does not appear in your letter nor in the record transmitted, but I find upon examination that such was the case.

It does not appear that said company has ever made any relinquishment of the land in Sec. 23, in place of which the selection is sought: The act of June 22, 1874, provides that in certain cases in the adjustment of railroad grants "the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof, from any of the public lands not mineral, within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted."

The Land Department, under said act, cannot approve of a selection except "upon a proper relinquishment of the lands" in lieu of which the selection is made. This is clearly provided for in the act, and it means the execution by competent authority of some proper written release of such lands—such a release as may be made a matter of record.

While it is true that the approved selection (or at least the title which the act provides for making to the company of the lieu land) would forever estop the company from asserting title to the land in place of which the selection was made, there are, however, many reasons for requiring the execution and delivery of the "proper relinquishment" clearly provided for in the act.

The company asks that a selection of lieu land made without a relinquishment of the land claimed to be granted should be maintained against an application to enter. The making of the relinquishment under the act under consideration is a condition precedent to a recognition of the selection by your office; at least, the making of such relinquishment should be an act concurrent with that which you are asked to perform. But the Department is now requested to act in advance of a relinquishment, thus reversing the evident intention of the act.

For these reasons the selection should be rejected, and Bailey's application to enter be allowed.

The right of the company to make a selection is asserted because the Hunter entry was allowed in the face of an existing withdrawal. That withdrawal was made before the grant was conferred upon the company by the act of the legislature of Minnesota; and when, by that act,

the grant to the company became effective, the Hunter entry stood against the tract.

Upon this state of the case I do not undertake now to decide whether the company would have the right to make any selection for the tract so included in Hunter's entry upon the tender of a proper relinquishment of such tract.

Your decision, for the reasons before stated, is affirmed.

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BEFORE SELECTION.

DUBUQUE AND SIOUX CITY RAILROAD COMPANY.

Act of June 22, 1874. The land relinquished by the company is within the indemnity limits of its grant, but has not been selected. Held:

That as its right in said limits does not attach until selection, it had no claim to relinquish, and its selection in lieu thereof was properly rejected.

*Acting Secretary Joslyn to Commissioner McFarland, April 28, 1884.*

SIR: I have considered the case presented by the appeal of the Dubuque and Sioux City Railroad Company from your decision of May 28, 1883, rejecting such company's selection of the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 12, T. 90, R. 47, Des Moines, Iowa.

The selection described was made as part satisfaction for the SW.  $\frac{1}{4}$  of Sec. 33, T. 88, R. 31 W., relinquished under the act of June 22, 1874 (18 Stat., 194). The tract relinquished is within the indemnity limits of the grant made to the State of Iowa for the benefit of the company by the act of May 15, 1856 (11 Stat., 9), and was withdrawn for the purposes of the grant in 1856.

You state that the records show that said relinquished tract was located March 1, 1869, with agricultural college scrip, 1914, Ohio, register and receiver's No. 122, by A. M. Dawley, and that patent issued on said location September 1, 1869. This tract was not selected by the company as lieu land.

The act of June 22, 1874, provides—

That in the adjustment of all railroad land grants, \* \* \* if any of the lands granted be found in the possession of an actual settler whose entry of filing has been allowed under the pre-emption or homestead laws of the United States, subsequent to the time at which, by the decision of the Land Office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands, not mineral, and within the limits of the grant, not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted.

The right of the company to specific tracts within the indemnity limits did not attach prior to selection (*Ryan v. Railroad Company*, 99

U. S., 382). Hence, under the act of June 22, 1874, the company had no claim to relinquish as against said tract, and you therefore properly rejected the selection made in lieu thereof.

Your decision is affirmed.

## XII.—RIGHT OF WAY.

### *TRANSFER OF RIGHT—FILING MAPS.*

#### **NORTHERN PACIFIC, FERGUS AND BLACK HILLS RAILROAD COMPANY.**

Where a railroad company, which has filed maps and secured a right of way through the public lands, has transferred its rights to another company, no approval of the maps of the same line filed by the latter company is necessary.

*Secretary Teller to Commissioner McFarland, December 18, 1883.*

SIR: On the 17th of September last you transmitted for my examination and action a map, showing the line of route of the Northern Pacific, Fergus and Black Hills Railroad Company's road from a point in the center of the channel of the Bois des Sioux River, on the boundary line between Minnesota and Dakota, in Sec. 9, T. 132 N., R. 47 W., to a point in Sec. 11, T. 132 N., R. 57 W., Dakota, a distance of 39.25 miles. The map was submitted by the company for approval under the provisions of the right-of-way act of March 3, 1875 (18 Stat., 482). In your letter reporting upon the matter you stated that the line of road, as presented by the map, does not pass through any Government reservation of any kind; but you found that for a distance of about 35 miles the line is upon the previously located line of the Saint Paul, Minneapolis and Manitoba Railway Company, as represented upon a map which was approved by this Department December 23, 1881, under the act of 1875, and you express the opinion that, in view of the identity of the two lines and of the practice in similar cases, the map under consideration should not be approved.

Upon an examination of your report of September 17, I, on the 18th of the same month, directed you to notify the Saint Paul, Minneapolis and Manitoba Company of the conflict in routes, and to request information whether any objections existed on the part of said company to the approval of the map under consideration.

I am now in receipt of your letter of October 11, in which you state that, as a result of inquiry made as directed, you have a letter from R. B. Galusha, solicitor for the Saint Paul, Minneapolis and Manitoba Railway Company, setting forth that the line from Wahpeton, Dak., west, partly constructed by the company last mentioned, has been transferred to the Northern Pacific, Fergus and Black Hills Railroad, and consequently no objections are raised to the map in question.

You now recommend the approval of said map. In the light of the

above information, I see no necessity for the action asked by the company and recommended by you. The transfer of the line of road, as mentioned, naturally and necessarily carried with it whatever right of way had attached to said line. As already stated, it had the right of way, duly approved under the act of 1875. This, therefore, passed by the transfer, and nothing would be added by the approval of the map presented by the Northern Pacific, Fergus and Black Hills Railroad Company.

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### XIII.—SWAMP LANDS.

#### DRY BED OF LAKE.

CEDAR RAPIDS AND MISSOURI RIVER RAILROAD COMPANY v. RAGAN ET AL.

On the authority of State of Indiana *v. Milk* (11 Bissell, 197), the bed of a lake, at date of swamp grant unsurveyed and covered by non-navigable water, which has since receded, is awarded to the State as swamp land, notwithstanding no selection thereof has been made by the State under the swamp act.

*Secretary Teller to Commissioner McFarland, May 16, 1884.*

SIR: I have considered the case of The Cedar Rapids and Missouri River Railroad Company *v. William Ragan et al.*, involving title to certain lots lying in Secs. 28, 29, 32, and 33, T. 83 N., R. 5 E., Iowa, on appeal from your decision admitting the applications of Ragan and Tiedemann to enter, and rejecting the claims of said railroad company and of the county of Clinton as grantee of said State.

These lots constitute the bed of what was known as "Goose Lake," in said Clinton County, as shown by survey of the township made in 1837.

At that time the parts of the sections above named lying adjacent to said lake were surveyed, the margin of the lake being meandered, and the lands and lake lying within the margin excluded from the survey.

In 1875, the waters having receded, an application was made for a survey of the land forming such bed. Survey was made, and the plat approved by your office March 21, 1876.

This land, as subdivided, forms lots 4 and 5 in Sec. 28, lots 5, 6, and 7 in Sec. 29, lot 3 in Sec. 32, and lot 3 in Sec. 33, and containing in the aggregate 301.55 acres.

On the 30th day of March, 1876, the said railroad company, by its agent, William Ragan, made application to select all of said lands for said company. On the same day, but after making such application for the company, and after taking an appeal because of the rejection of such application, said William Ragan applied to enter as a homestead for himself lots 4 and 5, Sec. 28, and lot 7, Sec. 29, containing 154.60 acres. He was at this time a duly appointed agent of said company, and as such had authority to make such selection.

April 13, 1879, Claus Tiedemann made application to enter as a home-stead lot 3, Sec. 32, and lot 3, Sec. 33, containing in both lots 68.10 acres.

June 13, 1878, the county of Clinton also made claim to all of said land under the swamp land act of September 28, 1850, as grantee under the act of the legislature of Iowa, approved January 13, 1853, which granted to the several counties the swamp lands situated in such counties.

Charles A. Corning offered to buy the land, but he did not appeal from the rejection of his offer. E. W. Templeman, who applied by said Ragan as attorney to enter lots 5 and 6, Sec. 29, as an additional home-stead, gave notice, April 10, 1882, of the withdrawal of his claim.

A large amount of testimony has been taken to show the condition of the water constituting the lake at different periods. This testimony proves that at the time the swamp grant act of September 28, 1850, was passed, the bed of the lake within the meandered lines was mainly covered with shallow water. It was entirely dry in 1842, and again in 1849. One of the witnesses, who lives near the lake, and who knew it before 1850, and has known it well ever since, describes the condition of the bed when he first knew it as "overflowed, flooded, marshy ground." The water which formed the lake was all, or nearly all, surface water, flowing from the watershed of the surrounding country. In 1864 the county of Clinton constructed extensive ditches, which had the effect to drain a greater portion of the lake. Since that time during dry seasons the bed of the lake has been entirely dry; at other seasons about one-third of the bed is covered with water. Only a few acres of the bed have at any time been dry enough to plow or cultivate. A portion of the land not covered by water has been useful for pasture, and other portions have grown up to reeds and flags.

The act of September 28, 1850, granted to the States "the whole of those swamp and overflowed lands made unfit thereby for cultivation," to enable such States "to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein."

In the case of *State of Indiana v. Milk* (7th U. S. circuit, 11 Bissell, 197), decided in April, 1882, since your said decision, Gresham, justice, speaking of the passage and intent of the swamp-granting act, says:

There were at this time in many of the States swamp and overflowed public lands, which were of no value to the Government for any purpose, present or prospective, unless drained. It has never been the policy of the Government to reclaim such lands with a view to their sale. They were unfit for cultivation and useless for habitation. The drainage of these sections would promote settlement by rendering them more healthful, and no system of drainage could be successful that did not embrace the lakes and ponds. Here, then, was a grant by the Government of the United States to a number of the States of lands of designated classes to secure objects of public interest. In interpreting such a grant, no rigid rules of construction should be allowed to defeat the plain object and purpose of the parties.

The lands in controversy in that suit constituted the bed of Beaver Lake, Indiana. That "lake, at the time of the grant by the United States and long prior thereto, was a shallow, non-navigable fresh-water pond, containing 14,000 acres of land, with no outlet, 40 feet above the Kankakee River, and between four and five miles from it."

All the lands surrounding the lake were surveyed by the United States in 1835, but the lake was never surveyed nor the bed offered for sale. A meander line was run by the surveyors around the lake, which line and the lake are represented on the Government surveys and plats.

The State drained the lake by constructing a ditch from it to the Kankakee River. The court held that the State "acquired title to the bed of the lake under the swamp-land grant," and that "by accepting the grant the State assumed the duty and obligation of draining the lands acquired by it, including Beaver Lake."

Under the authority of that well-considered decision, and under the proofs showing the situation and condition of said Goose Lake at the time the swamp-grant act was passed, there can be no doubt that the title to its bed passed to the State.

Some stress has been laid upon the fact that at the time selections of swamp lands were made in Clinton County in 1853 these lands were not included in the list. Such omission cannot, however, have the effect to release the title of the State, which passed to her by the *in praesenti* grant of 1850.

The application of said railroad company to select and the several applications to enter said land will be rejected. The claim of said Clinton County, as grantee of the State of Iowa, will be allowed.

I reverse your decision for the reasons stated.

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#### XIV.—TIMBER CULTURE.

*WITHIN PRIVATE CLAIM—APPLICATION—HEIRS OR LEGAL REPRESENTATIVES.*

SOUTHERN PACIFIC RAILROAD COMPANY, BRANCH LINE, *v.* STURM.

The tract in question having been within the claimed limits of an unadjusted private grant at date of definite location of the railroad, was subject to the timber-culture application of Sturm. As he tendered the fees and commissions, his heirs or legal representatives are entitled to make entry in view of his subsequent death, notwithstanding his said application was rejected by the local officers.

*Secretary Teller to Commissioner McFarland, January 21, 1884.*

SIR: I have considered the case of the Southern Pacific Railroad Company, Branch Line, *v.* T. Jefferson Sturm, involving the SE.  $\frac{1}{4}$  of Sec. 5, T. 1 S., R. 8 W., S. B. M., Los Angeles district, California, on appeal by the company from your decision of March 21, 1883.

The tract is within 20 miles or granted limits of the grant by act of

March 3, 1871 (16 Stat., 579), to the company, the right whereof attached (upon filing the map of designated route in your office) April 3 ensuing, and the withdrawal for which was made May 10 ensuing.

The tract was also formerly within the exterior or claimed limits of the Rancho San José, as surveyed by U. S. Deputy Surveyor Thompson in August, 1868, but was subsequently excluded therefrom by Reynolds' survey thereof in the year 1874 (made pursuant to departmental decision of September 20, 1872), which was approved and patented January 20, 1875, to Henry Dalton *et al.*

The township plat was filed in the local office March 13, 1876.

It appears that Sturm applied at the said office December 10, 1881, to make timber culture entry of the tract; but the register and receiver rejected his application upon the ground that the tract was within the company's withdrawal. Whereupon he appealed from their action, alleging that the tract was within said rancho at the date the company's right attached, and therefore excepted from the operation of the grant.

January 3, 1882, one Lyman Ayer also applied at the local office to make timber-culture entry of the tract; but the register and receiver rejected his application, whereupon he appealed to your office.

By letter dated February 3, 1883, Mrs. Sturm advised your office that her husband (the defendant) had died January 23 preceding.

Under authority of the United States Supreme Court's decision in the case of *Newhall v. Sanger* (92 U. S., 761), you held that the tract was excepted from the operation of the railroad grant; that the register and receiver properly rejected Ayer's application, because Sturm's had not been disposed of by your office; but that no benefit can inure to his widow by virtue of his application, his right to make entry having died with him, and she not having made application herself since his decease.

I do not concur with you, however, in such view; for it should be observed that the last proviso to the third section of the act of June 14, 1878 (20 Stat., 113), expressly provides that if at the expiration of the alternative limitation of time prescribed for the issuance of patent, the entryman or entrywoman, "or, if he or she be dead, his or her *heirs* or *legal representatives*, shall prove by two credible witnesses that he or she or they have planted," &c. And under the California laws governing descent and distribution of decedents' estates, and those defining the rights of husband and wife, the wife is a tenant-in-common with her husband in all property acquired by either during coverture, and she is also an heir, entitled as such to inherit share and share alike with their children, if any.

But it may be urged that the proviso contemplates an entry under the enacting clause of the statute, inasmuch as the said limitation of eight or thirteen years, at the expiration whereof patent may issue, is fixed "from the date of such entry."

Although Sturm did not actually make an entry of the tract, he nevertheless applied in good faith so to do and tendered the requisite

fees, as is evidenced by the register and receiver's note of rejection indorsed upon his application. And just as there is no difference in principle between a case where the filing was recorded and one where the filing was offered and rejected, neither is there any difference in such a case as this, so far as the applicant's rights are concerned, for they inure to the benefit of the heirs. That the tract was subject to his entry cannot, in the light of the aforesaid state of facts, be questioned. His right to enter the tract was not prejudiced by the register and receiver's denial of his application. See *Duffy v. Northern Pacific Railroad Company* (2 Copp, 51), and *Shepley et al. v. Cowan et al.* (91 U. S., 330).

But inasmuch as he was prevented by death from perfecting his application, entry will be allowed in proper form in the name of his heirs, provided the same is made within ninety days from receipt of notice hereof.

Barring the foregoing modification, I affirm your decision touching the company's rights, and Ayer's, for the reasons stated by me in the analogous case of the *Atlantic and Pacific Railroad Company v. Fisher* (9 Copp, 80).

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#### XV.—WITHDRAWALS.

##### DANERI *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

The rancho claim having been finally rejected in the year 1855, the tract in question was not excepted from the operation of the railroad grant, and the temporary suspension pending the consideration of application to purchase the tract, embracing the one in question, did not affect the railroad withdrawal, since which date the lands thus withdrawn have been in a state of reservation and not, therefore, subject to disposal under the pre-emption or other laws. This may be a case of hardship for the settler, but unfortunately the executive has no option in the matter.

*Secretary Teller to Commissioner McFarland, May 22, 1883.*

SIR: I have considered the case of *Emanuelle Daneri v. The Texas and Pacific Railway Company*, involving the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , and the NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 19, T. 18 S., R. 1 W., S. B. M., Los Angeles district, California, on appeal by Daneri from your predecessor's decision of February 5, 1881, rejecting his application to file a pre-emption declaratory statement for said tract.

The record shows that the tract in question is within the limits of the withdrawal under the act of March 3, 1871 (16 Stat., 573), granting lands to said company, which was made October 15, 1871, upon a preliminary line not as yet definitely located. The said tract was also within the limits of the supposed Rancho Millijo or La Punta, which was finally rejected by the United States district court of California, September 20, 1855, no appeal having been taken to the United States Supreme Court.

By decision of Acting Secretary Cowen, rendered under date of October 28, 1873, the application of Guadaloupe E. de Arguello to purchase the land formerly supposed to have been embraced within the limits of said rancho, under the provisions of the seventh section of the act of July 23, 1866 (14 Stat., 218), was rejected. Pending this action the lands embraced in Mrs. Arguello's claim were suspended from sale by your office October 29, 1872.

The records of your office show that the township plat, embracing the tract in question, was filed in the local office October 28, 1879.

On December 26, 1879, Daneri made application at said office to file a declaratory statement for such tract, alleging settlement thereon January 29, 1879, but the register and receiver refused the same on the ground that said tract was embraced in the withdrawal for the railroad. From this action Daneri appealed, basing his appeal upon the ground that the tract in question was suspended from said withdrawal by reason of the pendency of the Millijo grant claim, and that upon its rejection said tract reverted to the United States.

I am of the opinion, however, that the rancho claim having been finally rejected in the year 1855, as aforesaid, the tract in question was not excepted from the operation of the railroad grant, and that the temporary suspension pending the consideration of Mrs. Arguello's application to purchase the tract, embracing the one in question, did not affect the railroad withdrawal, since which date the lands thus withdrawn have been in a state of reservation, and not, therefore, subject to disposal under the pre-emption or other laws.

This may be a case of hardship for the settler, but unfortunately the executive has no option in the matter. The Supreme Court in Schulenberg *v.* Harriman (21 Wall., 44), having laid down the rule that there could be no effective executive declaration of forfeiture, even upon condition broken, the grant to the company must be held intact until the legislative or judicial branch declares the grant to be inoperative because of failure to construct within the time prescribed.

The attention of Congress has been called by some of my predecessors, as well as by myself, to the fact that large tracts of public lands are reserved for the benefit of certain railroad companies under the provisions of acts of Congress donating lands to States and corporations, and that many of these companies—including the Texas and Pacific—have not complied with the law which provides for the completion of their roads within a specified time. No action having been taken by Congress, I can but accept its failure to act as an expression of the legislative will that the decisions of the courts and the opinions of attorneys-general bearing upon the points involved shall be my guide in administering the law. This being the case, I do not find any sufficient reason for refusing to affirm your decision, and it is accordingly affirmed.

*BURDEN OF PROOF—PRE-EMPTION FILING.***FREEMAN v. TEXAS AND PACIFIC RAILWAY COMPANY.**

The burden of proof rests upon a party applying to make a pre-emption filing for land within the limits of a withdrawal for a railroad grant covered by pre-emption filings at the date of the grant and of the withdrawal to show affirmatively that at said dates a valid subsisting adverse right had attached to the premises, and a hearing should be ordered that he may have an opportunity to establish the validity of such filings. In the event of such a showing he would be entitled to enter the land in question.

*Acting Secretary Joslyn to Commissioner McFarland, June 28, 1883.*

SIR: I have considered the case of Webster Freeman *v.* the Texas and Pacific Railway Company, involving the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 29, T. 18 S., R. 2 W., S. B. M., Los Angeles district, California, on appeal from your predecessor's decision of February 3, 1881, rejecting Freeman's application to file pre-emption declaratory statement for said tract.

The record shows said tract to be within the limits of the withdrawal under the act of March 3, 1871 (16 Stat., 573), granting lands to said company; such withdrawal having been made October 15, 1871, upon a preliminary route not yet definitely located.

The tract was also within the limits of the supposed Rancho Millijo or La Punta, which was finally rejected by the United States district court of California, September 20, 1855, no appeal having been taken to the United States Supreme Court. One Guadalupe E. de Arguello having made application to purchase the lands embraced within the limits of the said rancho under the seventh section of the act of July 23, 1866 (14 Stat., 218), your office temporarily suspended the tract in question from sale October 29, 1872, pending the consideration by this Department of such application, which Acting Secretary Cowan rejected October 28, 1873.

On the 4th day of October, 1879, Freeman applied at the local office to file a declaratory statement for the tract, but the register and receiver rejected such application because the land was within the railroad withdrawal aforesaid.

It appears from the records of your office that one Charles F. Francisco filed declaratory statement No. 137, March 30, 1870, for the NE.  $\frac{1}{4}$  of said Sec. 29, alleging settlement December 1, 1869; that one William H. Storm filed declaratory statement No. 136, April 5, 1870, for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 29, and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 20, alleging settlement August 1, 1869; that one Rollin C. Anderson filed declaratory statement No. 134, April 4, 1870, for the NW.  $\frac{1}{4}$  of Sec. 29, alleging settlement March 26, 1869; and that one S. S. Nichols filed declaratory statement No. 88, March 3, 1870, for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 29, alleging settlement April 15, 1869.

Barring the memoranda filed in the case touching said filings, I would

be justified in affirming your decision, but as such paper advises me of the condition of the record I deem it expedient to take cognizance of the same.

Although it thus appears that the premises in question were covered by pre-emption filings both at the date of the grant and of the withdrawal thereunder, the record fails to discover that these pre emptors possessed the prerequisite personal qualifications or that they had made such settlement as would operate to withhold the land from the operation of the railroad grant. The burden of proof rests upon Freeman to show affirmatively that at said dates a valid subsisting adverse right had attached to the premises. Such a state of facts cannot be presumed.

You will therefore direct that a hearing be ordered to the end that he may be accorded an opportunity to establish the validity of said filings. In the event of such showing, he would be entitled to the tract in question.

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#### NORTHERN PACIFIC RAILROAD COMPANY *v.* PRESSEY.

In 1873 a withdrawal was made for the benefit of the railroad company's branch line in Washington Territory, on a map of general route; in 1879 a second withdrawal was made on a map of an amended line of said branch.

Pressey settled in 1878, prior to the survey of the land.

Held, that he acquired no right as against the railroad company to the land found upon survey to be part of an odd-numbered section, the same having been continuously withdrawn since 1873; and that he was charged with notice of the withdrawal of the odd-numbered sections at the date of his settlement.

*Secretary Teller to Commissioner McFarland, October 2, 1883.*

SIR: I have considered the case of the Northern Pacific Railroad Company *v.* George W. Pressey, involving the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 14, the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 13, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 24, T. 16 N., R. 16 E., Yakima, Washington Territory, on appeal as to the tract in the odd section by the said company from your decision of June 13, 1882, adverse to said company, and permitting Pressey to make homestead entry of the tract in the odd as well as the even sections.

The proofs show that Pressey settled upon the land May 21, 1878, and made improvements which are worth some \$500. At the time of making such settlement the lands were unsurveyed, and until after the survey Pressey did not seem to be aware that any part of his settlement was upon an odd section; and it was evidently not his intention to make a settlement on an odd section.

He made his application to make homestead entry January 31, 1882. The register and receiver rejected the application as to the tract in the odd section because it was within the limits of the withdrawal for said company, made August 15, 1873. The map of general route upon which

such withdrawal was made was filed with the Secretary of the Interior August 15, 1873, and order of withdrawal thereunder was made November 1, 1873, notice of which was received at the local office on November 17, 1873. Since then the tract in the odd section has been continuously withdrawn.

November 18, 1876, the company applied to amend said (branch) line and filed a new map. Secretary Chandler approved the amended map, but on motion to reconsider the matter was referred to the Commissioner for a report, which was made January 17, 1877. October 15 following Secretary Schurz reviewed the whole subject and declined to disturb the action of his predecessor. Action was again suspended by direction of the Assistant Attorney-General.

In 1879 the company filed still another map showing a route quite different from that represented by the map of 1876. The route designated by the last map—that of 1879—was from 25 to 50 miles south of the original line, and greatly shortened that line, forming, as stated by Commissioner Williamson in his letter of May 21, 1879, “with the exception of a few miles a new location.”

June 11, 1879, Secretary Schurz returned the last map approved, and directed the withdrawal of the lands along the new line, calling attention to the fact that said company had relinquished, by letter of its attorney dated June 9, 1870, all claim to lands withdrawn under the original map. The terms of such relinquishment were as follows:

All claim and interest to any and all lands heretofore withdrawn for its branch line in the Territories of Idaho and Washington, except so far as the same may be within the limits prescribed by the charter and amendments, applicable to the amended line of general route of the branch in Washington Territory, according to the map thereof presented on the 13th ultimo.

Secretary Schurz further provided, in approving such amended line, that “the rights of settlers upon the lands included within the limits of the withdrawal to be made under this amended route, must be protected if settlement and entries be made before receipt of notice of withdrawal at the local office.”

It is evident that the restoration of lands withdrawn in 1873, made by Secretary Schurz in 1879, was not broader than the company's relinquishment, and that the lands which were common to both maps were not restored.

Upon a full review of all the facts in this respect, you reach the following conclusion, viz: “The lands embraced in the former withdrawal and not embraced in the new withdrawal were restored September 1, 1879. This tract, of course, was not restored.” There was no withdrawal under the map of 1876.

The register and receiver rejected the application in this case for the reason that the tract in the odd section “falls within the limits of the withdrawal made for the Northern Pacific Railroad Company, of August

15, 1873." You reverse the decision of the register and receiver, and approve of the application upon the ground that "the route of 1873 was entirely abandoned by the company."

I am unable to reach this conclusion, and think it is not supported by the record. The lands were relinquished except so far as they were common to both maps and both withdrawals. The old route was abandoned except so far as it was embraced in the new.

The settlement and application to enter were made long after the notice of the withdrawal which followed the map of 1873 was received at the local office. When the settlement was made Pressey was charged with actual notice that the odd sections were withdrawn for the benefit of the grant; and when he applied to enter his application was refused for that reason.

In *Wolsey v. Chapman* (101 U. S., 768), it was held, citing *Riley v. Wells*, that the withdrawal of "lands from private entry \* \* \* was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal."

The settlement by Pressey upon the odd section was clearly in violation of the order of withdrawal, and he could acquire no rights or equities under such a settlement. If it had been a fact that the route of 1873 was entirely abandoned, or the land in question had been found outside of the route of 1879, then the withdrawal would have been a question between the settler and the Government, and the Government could have waived the violation of its order and awarded the land to the settler. But the withdrawal of 1873 was for the benefit of the grant; and so far as the lands were common to both the withdrawal of 1873 and 1879, they have never been released; hence, as stated by you, "this tract was not restored" in the restoration of lands to the public domain which followed the filing of the map of 1879.

It was Pressey's misfortune that his settlement was made in part upon an odd section, but it is not in the power of this Department to relieve him from the consequences of his mistake.

I reverse your decision, and affirm the action of the local office rejecting the application as to the tract in the odd section.

*TRIAL LINES—ENTRIES IN GOOD FAITH.***HAYES v. PARKER ET AL.**

There can be but one legislative withdrawal under a map of general route. Where, therefore, several trial lines, treated as such by the company, have been made before the general route is finally fixed and determined, withdrawals made under such trial lines will be regarded as executive withdrawals. Entries made in good faith upon odd sections before notice of withdrawal under such trial lines was received at the local office, will be maintained, and lands covered by such entries held to be excepted from the grant.

*Secretary Teller to Commissioner McFarland, October 2, 1883.*

SIR: I have considered the case of Daniel Hayes v. Hollon Parker and the Northern Pacific Railroad Company, involving the SE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 2, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, T. 7 N., R. 3 E., in the Walla Walla land district, Washington, on appeal by Parker from your decision of August 5, 1880, holding his private cash entry, No. 1,480, of said tracts for cancellation.

The tracts are within the limits of the grant of July 2, 1864 (13 Stat., 365), to said company.

On August 13, 1870, said company filed a map of general route, including within its limits the lands in question.

The lands along that portion of this general route lying west of the Columbia River were, on September 20, 1870, ordered to be withdrawn; but as to lands lying east of that river no order was made until November 21, 1870. Notice of the order made at that date was received at the local office December 8 following. The tracts now in contention lie east of said river. Until the receipt of the notice (December 8, 1870), the local officers continued to dispose of the lands in both odd and even sections situate east of the river.

Entry of Parker aforesaid was made October 26, 1870, at the rate of \$1.25 per acre.

Your office inadvertently erred in finding that Parker's entry was made subsequently to the time when notice of the withdrawal was received at the local office. The error arose from overlooking the fact that the withdrawal received at the local office October 17, 1870, was confined to lands lying west of the Columbia River.

Many entries were made between the time of filing said map (August 13, 1870) and the time of the receipt of the order of withdrawal at the local offices, the validity of which is depending generally upon the result of the present case.

Under date of February 16, 1872, said company transmitted to this Department "a map of the preliminary line of said road of this company from the Red River of the North to the Columbia at the mouth of the Walla Walla River," and requested "that the lands pertaining to said route may be withdrawn from settlement and sale." This map

was transmitted to your office by Secretary Delano February 21, same year, "for appropriate action," and subsequently a withdrawal of lands based thereon was ordered.

The preliminary line presented by this map shows a great departure from the line of 1870. The point where the line in the last map enters the eastern boundary of the territory is about 108 miles north of that at which the former line entered. The lines westward from such eastern boundary, however, converged, so that at the Columbia River they are substantially the same.

The tracts in question lying not far east of that river are within the limits of and covered by both maps.

It is claimed by counsel for Parker that the preliminary line established by the map of 1872 was in legal effect an abandonment of the former line, and operated to release the lands from any right or claim which the company may have acquired by filing the map of 1870.

This case and those kindred to it relate to entries made after the first map of general route was filed, and before notice of the filing was in fact received at the local office. The persons who made these entries are innocent parties, having acted in entire good faith, and their entries were allowed by the local officers, who were alike ignorant of the fact that a map had been filed.

It is well settled that the filing of the map of general route under section 6 of the act in question operates as a legislative withdrawal of the lands within its limits; and if the general route as marked out upon the diagram of August 13, 1870, had been regarded and treated by the company as the real, permanent, and fixed general route of the road, it would probably not have been within the power of this Department to afford any relief to parties making entries before actual notice of the withdrawal.

The line of 1870, however, as respects the section of country in which the lands in controversy are located, was not in fact the general route of said road. It was at most a trial line; and a very large portion of the country included in it was not included in the general route of the road as finally fixed. The map of 1872 was substantially a new location of that part of the road. The act in question provides for but one line of general route and one of definite location. It is certainly a very grave question whether legislative withdrawal operates under any preliminary map other than the one which the company finally determines shall be the settled and fixed general route of the road. If legislative withdrawals operate upon preliminary lines not finally fixed as lines of general route, then we have in this instance a legislative withdrawal of a section of the country almost entirely different from that which was finally included in the lines of the general route.

And a further question is presented, whether lands withdrawn by legislative will can be restored to the public domain by executive action.

While recognizing the fact that a legislative withdrawal takes effect

upon filing map of general route, this Department has exercised executive control in respect to territory included in preliminary maps other than the maps of general route as finally fixed. My predecessor, Secretary Schurz, in permitting an amended line of general route on the Northern Pacific road, limited the withdrawal in the following terms, viz:

The rights of settlers upon lands included within the limits of the withdrawal to be made under this amended route must be protected, if settlement and entries be made before the receipt of notice of withdrawal at local offices. (Land Office Report, 1879, p. 111.)

And it is the general practice, in permitting an amendment in the line of general route, to direct that the lands included in the first and not in the second map shall be restored to the public domain, and that the lands included in the new line be withdrawn from sale and settlement. Until the general route is finally determined and fixed, the lands included in the first preliminary map have, I think, been regarded and treated as subject to executive control as respects the withdrawal.

If it be held, as I have indicated, that when the general route is finally fixed the legislative withdrawal takes effect, and prior to that time the lands are within the control of the Executive Department, then the questions presented by this case are readily solved.

The character of the country was such that the company could not readily fix a final line of general route, and in several instances, as in the present, the first preliminary line was little more than an experimental or trial line. The company did not regard itself as bound by such first line, or at least did not wish to be so regarded by the Department, and might properly have considered it a hardship to have been held to the first location. This Department, recognizing the difficulty of fixing in the first instance a permanent line even of general route, has in this respect shown great liberality in every instance, I think, when requested, permitting a change and adjusting the withdrawal accordingly. Such trial lines, not having been held to be binding upon the company, ought not to be held to bind persons who in good faith made entries and settlements before notice of withdrawals under such lines was in fact received.

Since it has proved that the map of August 13, 1870, did not in fact fix and determine the general route of said road, and the general route as to that part of the country was not finally determined and fixed until the filing of the map of February, 1872, I am of the opinion that the withdrawal under the former map can not be held to take effect as to persons who in good faith were permitted to make entries, in other respects valid, upon the lands, until notice of the withdrawal was received at the local office.

The remaining question is between Parker and Hayes. Hayes applied March 15, 1879, to make pre-emption filing for tracts embraced in Parker's said entry; and May 29, 1880, he also applied to make timber-

culture entry for part of tract embraced in Parker's entry, and part in the cash entry of one T. P. Denny, made November 1, 1870. These applications were rejected by the local officers because they were so embraced. I approve of this action of the local officers, and reverse your decision allowing Hayes's pre-emption filing. I also reverse your decision holding Parker's cash entry for cancellation, because the tracts in the odd section were "reserved for railroad purposes," and because those in the even sections "were rated at \$2.50 per acre."

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TAYLOR v. SOUTHERN MINNESOTA RAILWAY EXTENSION COMPANY.

Mrs. Taylor had no valid claim to the land, for the reason that it had been withdrawn for the benefit of said company both at the time of the settlement made by her husband and of that made by herself.

The Department does not interfere with the settler; if he chooses to remain on the land he must do so with the knowledge that the Department cannot help him, and he is at the mercy of the railroad company should the company select the land under the grant.

*Secretary Teller to Commissioner McFarland, November 5, 1883.*

SIR: I have considered the matter of the location of military bounty land warrant No. 113,210, register and receiver No. 11,347, made June 19, 1875, by Valina Taylor on the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 7, T. 109, R. 45, Tracy, Minn., on appeal from your decision of June 25, 1881, holding said location for cancellation.

The land is within the 20-mile indemnity limits of the grant to the Southern Minnesota Railway Extension Company, the withdrawal for which became effective September 10, 1866.

William Taylor filed declaratory statement No. 21,977 for said land May 24, 1872, alleging settlement May 22, 1869.

June 19, 1875, Valina Taylor located the warrant aforesaid, basing her claim on declaratory statement No. 21,977, and at the same time submitted pre-emption proof.

Because of a discrepancy in the description of the land, new proof under order of your office was made April 30, 1881. From this proof it is shown that Mrs. Taylor was a qualified pre-emptor; that she had resided on the lands about twelve years, and had made improvements thereon. The proofs did not show that said William Taylor was dead, or that Valina Taylor was his heir or "one of his heirs." Since your decision, however, proof has been filed showing the death of said William Taylor and that Valina Taylor was his widow.

You hold, however, that Mrs. Taylor had no valid claim to the land, for the reason that it had been withdrawn for the benefit of said com-

pany both at the time of the settlement made by her husband and of that made by herself.

I see no escape from this conclusion. Taylor settled upon the land before it was surveyed, and, as the proof indicates, undoubtedly settled upon an odd section by mistake. From the consequences of such mistake this Department cannot afford relief.

Counsel for the claimant requests that the filing be permitted to stand subject to the right of the company to select the lands, in case they are required to satisfy the grant.

I have had occasion before to express my disapproval of such a practice, a practice which if permitted would be productive of irreparable injury to settlers. Such a permission is an approval of settlement upon lands which this Department cannot convey to the settlers in case they are selected by the company. It encourages a belief that the lands will not be required to satisfy the grant. A quasi indorsement of such a belief and such a practice by this Department could but result in thousands of settlers being ultimately expelled from their settlements with the loss of valuable improvements.

To prevent such pernicious consequences I directed some time ago that instructions should be issued to all land offices, ordering the local officers to refuse all such applications, and pursuant to that direction you, with my approval, issued the circular of May 22 last.

The Department does not interfere with the settler. If he chooses to remain on the land, he must do so with the knowledge that the Department cannot help him, and that he is at the mercy of the railroad company should the company select the land under the grant.

For these reasons I must refuse the application now made by counsel in behalf of the claimant.

Under the facts in this case, I affirm your decision holding the location for cancellation.

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*ACT OF APRIL 21, 1876—CONDITIONAL OCCUPANCY.*

*FOX v. THE SOUTHERN PACIFIC RAILROAD COMPANY.*

The joint resolution of June 28, 1870, affords plaintiff no relief, as he was not an actual settler on the land at that date.

As there was no valid claim existing on the land at the date when it was withdrawn, and it has not been re-entered under decisions and rulings of the Land Department, he is not entitled to the benefits of the second section of the act of April 21, 1876. Permission for Fox to remain on the land with a view to making entry for the same, in the event that it should not be required in the final adjustment of the grant, refused.

*Secretary Teller to Commissioner McFarland, November 12, 1883.*

SIR: I have considered the case of Edward T. Fox *v.* The Southern Pacific Railroad Company, involving lots 5, 6, 11, and 12 of Sec. 17, T.

8 S., R. 8 E., M. D. M., California, on plaintiff's appeal from your decision of November 12, 1881, rejecting his application to make pre-emption filing for said land.

These lots are within the indemnity limits of the grant to the said company, and were withdrawn for the benefit of the same May 7, 1867.

It is alleged by the plaintiff that in the summer of 1869 George A. Ester settled on this land and remained in occupation thereof until August 10, 1874, at which time he sold his possessory right to plaintiff, who has since that date resided on said land and cultivated the same continuously.

March 7, 1881, the township plat was filed, and May 19, 1881, Fox applied to file his declaratory statement for the land in question, but his application was rejected by the local office for the following reason:

The records of this office show said land to be a portion of an odd section, and within the limits of withdrawal for the Southern Pacific Railroad Company.

The plaintiff's attorney alleges among other grounds of exception:

1. That the right of the company to said land did not attach until the passage of the joint resolution of June 28, 1870.

2. That plaintiff should be allowed to file his declaratory statement under the second section of the act of April 21, 1876.

The joint resolution of June 28, 1870 (16 Stat., 382), authorized the Southern Pacific Railroad Company to construct its road on the route indicated by the map filed in this Department January 3, 1867, "expressly saving and reserving all the rights of actual settlers."

It was held by this Department in the case of *Tome v. Southern Pacific Railroad Company* (Copp's Land Laws, 1882, 758), that although a grant of lands was made to the company by the act of July 27, 1866, the lands upon which it would operate were not identified until the date of the passage of the joint resolution, and that the rights of all persons who were at that date actual settlers were thereby saved. In the case of the *Southern Pacific Railroad Company v. McCarthy* (Copp's Land Owner, Vol. 9, p. 176), this Department also held that where the land is within the indemnity limits the right to indemnity is only a float, and attaches to no specific tract until actual selection, and, following the rule laid down in Tome's case, decided that an actual settler, after the withdrawal of the land and prior to the passage of the joint resolution, should be protected.

The case now under consideration does not, however, come within the provisions of said joint resolution, for Fox did not settle on the land until August 10, 1874, and he cannot avail himself of the rights acquired by Ester's earlier settlement. Pre-emption rights are not the subject of sale or transfer, such disposition of the same being expressly inhibited by law. (Rev. Stat., section 2262.) See also *Myers v. Croft* (13 Wallace, 291), and *Quinby v. Conlan* (104 U. S., 420). The right

of Fox to pre-empt the land in question must depend on his own act of settlement, which is a pre-requisite to pre-emption, his pre-emption rights being in no manner enlarged by the settlement and occupation of Ester. This being true, the joint resolution affords him no relief, as he was not "an actual settler" at the date of the passage of the same.

The second section of the act of April 21, 1876, provides:

That when at the time of such withdrawal as aforesaid, valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterwards were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto. (19 Stat., 35.)

It will be observed that by the provisions of the section above quoted three distinct conditions must be shown to exist before the pre-emptor or homestead claimant can perfect a title thereunder.

1. There must have been a valid existing claim on the land at the date of the withdrawal for the railroad company.

2. The land must have been re-entered under decisions and rulings of the Land Department.

3. The claimant must show in his final proof a full compliance with the law.

As there was no valid claim existing on this land at the date when withdrawn, and said land has not been re-entered under decisions and rulings of the Land Department, Fox is not entitled to the benefits of said section.

The permission accorded to Fox, in your decision, to remain on the land with a view to making entry for the same, in the event that it should not be required in the final adjustment of the grant, is not approved. The land not being subject to entry while the grant remains unsatisfied, a consideration of the interests of the public as well as the rights of the company precludes the Department from any act looking toward a disposition of the land until such time as it may become public land. As bearing upon this subject your attention is directed to my letter of instructions dated May 17, 1883.

With the modification indicated, your decision is affirmed.

*DEFINITE LOCATION—CONTINUING WITHDRAWAL—RELINQUISHMENTS  
—INDEMNITY.*

**ATLANTIC, GULF AND WEST INDIA TRANSIT RAILROAD COMPANY.**

The map of 1860 as filed, taken in connection with actual surveys in the field, was valid and sufficient to fix and locate definitely the line of the road and to bring home to the Interior Department notice of such location. A legislative withdrawal followed the filing of that map.

Such results were not destroyed or annulled by the voluntary delivery of the map by the General Land Office for the purpose of procuring thereto the governor's certificate.

The order of withdrawal made in 1856 and reaffirmed in 1857 because of its prior modification was existent at the time of the withdrawal ordered upon filing the duplicate map in 1881.

Relinquishments became necessary to protect settlers who had made entries and settlements in violation of the withdrawal. The company is entitled to indemnity. Final action is delayed until further direction, in view of pending Congressional legislation.

*Secretary Teller to Commissioner McFarland, January 30, 1884.*

SIR: I have considered your letter of December 4, 1883, submitting for my action three lists (numbered 1, 2, and 3, indorsed as filed in the local office January 18, March 29, and April 14, 1882) of selections made by the Atlantic, Gulf and West India Transit Railroad Company, of lands in even-numbered sections, under the act of Congress approved June 22, 1874 (18 Stat., 194), in lieu of lands in odd-numbered sections within the limits of the grant to Florida for railroad purposes by act of May 17, 1856 (11 Stat., 15).

You state that the tracts selected are within the limits of said grant by the withdrawal for said company's railroad, as fixed by letter of your office of March 16, 1881, and accompanying diagram received at the local office the 26th of same month; and that the lists show the lands in odd-numbered sections within same limits covered by settlements and entries made before the withdrawal aforesaid, in lieu of which the tracts in the even-numbered sections are claimed under the act of 1874 aforesaid.

The act of May 17, 1856, aforesaid, granting to the State of Florida (*inter alia*), to aid in the construction of a railroad "from Amelia Island, on the Atlantic, to the waters of Tampa Bay, with a branch to Cedar Key, on the Gulf of Mexico, \* \* \* every alternate section of land designated by odd numbers for six sections in width on each side of said road and branch," together with indemnity for lands lost to the grant within said limits, to be taken from alternate sections within 15 miles, *i. e.*, between 6 and 15 miles from the said lines, as they should be definitely fixed. Since the grant did not designate either "even" or "odd" sections within the indemnity limits as those which were to be selected, an election was made by the company to take the odd-numbered sections.

The selections in the lists now presented are upon even-numbered sections; but the act of June 22, 1874, aforesaid, under which these selections are made, provides that the railroad company, "upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof, *from any of the public lands* not mineral and within the limits of the grant not otherwise appropriated at the date of the selection."

Before the line of the road was definitely fixed, in anticipation of the probable limits of the grant, a withdrawal of the lands from sale and settlement was ordered, September 6, 1856, along both branch and main line; but six days afterwards this order was modified so as to permit pre-emptions until the line of the road should be definitely located. On April 25, 1857, however, the local officers were directed by telegraph not to permit any further pre-emption filings or entries on said lands. Such instruction was adhered to for some years, but, you state, was subsequently "overlooked or ignored, and many entries have been admitted."

This company was formerly known as the Florida Railroad Company, and by act of the Florida legislature, made in anticipation of the grant, said company became the beneficiary of the grant. In 1872 the name of the company was changed to the Atlantic, Gulf and West India Transit Company. The route of the road from Amelia Island to Cedar Key was definitely located in 1857, and the road was constructed in 1860, such construction being that of all of the branch line, and that part of the main line from Fernandina to Waldo.

On the 14th day of December, 1860, M. L. Smith, chief engineer of said Florida Railroad Company, filed in your office a map of the definite location of said road from Waldo (the junction of the Cedar Key branch) to Tampa Bay. When said map was filed, the route of the road covered thereby had been actually surveyed and located in the field, and said map was filed in good faith as evidence before this Department of the definite location of said road. This map remained on file until the 22d day of January, 1861, when it was delivered to said Smith for the purpose of procuring and attaching thereto the certificate of the governor of Florida as evidence that it was filed by authority of the State. This map was never returned to your office, and it is conceded that it was lost or destroyed. Secession ensued, and during the war, and the unsettled condition of affairs which followed in the Southern States, no action seems to have been taken looking to the construction of said road.

On the 6th day of October, 1870, your office, in a letter addressed to Hon. A. N. Zevely (who had made inquiry as to the status of the grant), stated that as to the line from Waldo to Tampa Bay, it was held that by reason of failure to complete the road within the time named in the granting act "it would require enactment by Congress to make the grant effective."

October 10, 1875, Mr. Yulee made a similar inquiry respecting the status of the grant; and in reply your office, by letter of October 22, 1875, referring to the opinion expressed in the letter of October 6, 1870, aforesaid, stated that "since the announcement of the view of this office as above quoted, the question involved has been considered by the Supreme Court of the United States (*Schulenberg v. Harriman*, 21 Wallace, 44), and the conclusion reached that acts of Congress containing provisions and restrictions such as found in the act approved May 7, 1853, impart a present grant to the extent of passing over to the State the legal title to the odd sections designated. \* \* \* It seems, therefore, now to be settled that the view of the office as announced in its letter of October 6, 1870, was erroneous."

On the 7th day of December, 1875, the acting president of said company presented for filing at your office a map of the definite location of said road over the same route, purporting to be a duplicate of the 1st map. At the same time said president of the road asked to have reserved from entry the odd sections within the grant, if such action had not already been taken. The map and papers not being satisfactory to your office, they were returned for (among other things) a sworn statement to be made by the engineer and president of the company, to be attached to the map, explaining the loss of the field-notes of survey, and affirming that said map was a true and accurate transcript of the map of original survey filed in your office December 14, 1860, and "an explanation, by official statement under oath, of the non-production of the original map filed on December 14, 1860, and rejected by the Commissioner's letter of December 28, 1860, for want of the governor's certificate."

On the 3d day of April, 1876, Mr. Yulee returned the map, amended as required, and transmitted the papers called for. This map was transmitted from your office to this Department April 20 following. Secretary Chandler, in a decision rendered on the 29th of the same month, declined to receive or approve said map, and directed that it be returned to the president of the road "with the information that this Department cannot permit the company, after so great a delay, to file a map designating the route of its road." In this decision no reference is made to the fact that said route had been surveyed and definitely fixed, nor to the filing of the map in 1860; and it appears that the facts relating to such acts were not presented to the Secretary. He states in his decision that twenty years have elapsed since the passage of the act making the grant, and that "the important act of definitely locating the road \* \* \* should be done within a reasonable time after the date of the grant, and in all cases before the expiration of the time fixed for completing the road." The purport of the decision was that no act having been done to give precision to the grant, it must be regarded, after the lapse of so long a period, as having been abandoned.

On the 10th<sup>th</sup> day of November, 1879, your office submitted to this Department an application on behalf of said company for a review of the decision of Secretary Chandler aforesaid; and in a decision rendered on such review, January 28, 1881, by Secretary Schurz, the survey, definite location of the route, and filing of the map of 1860 were fully considered. The decision states:

The application for review is made upon the ground that material facts which go to show the authority of the company to locate the line and file the map were not before my predecessor, and which, had the same been presented and considered, would, in the judgment of the applicant, have contributed to a different conclusion, much of the matter being newly discovered, and not within the reach of the company at the date of the original application.

The opinion then considers the question whether the granted lands could be certified to the State, in view of the limitation in the granting act that if the road "is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States"; and it was held under the authority of *Schulenberg v. Harriman* that the proviso was a condition subsequent, and that "no reversion could take place by mere operation of law."

The duplicate map thus presented was approved, and your office was directed to make "the necessary withdrawals of lands to protect the rights of the company and secure the proper adjustment of the grant upon the line designated."

At the time the duplicate map and papers were transmitted to your office by Mr. Yulee, president of the company, April 3, 1876, as before recited, he also transmitted a waiver or release by said company in the following terms, to wit:

At a meeting of the board of directors of the Atlantic, Gulf and West India Transit Company, convened on the 1st day of April, 1875, the following resolution was unanimously adopted:

*Resolved*, That this company hereby waives all claim to so much of the lands on each side of their line of road between Waldo and Tampa Bay, to which this company is entitled by law, as may be found by the General Land Department at Washington to be occupied by settlers who may be entitled to equitable relief up to December 13, 1875, saving and reserving to this company any and all rights of indemnity vested in the company under existing laws.

Secretary Schurz, in his decision of January 28, 1881, before cited, calls the attention of your office to such waiver, and requests a further waiver in the following terms, to wit:

Your attention is also particularly invited to the formal waiver of the company in favor of actual settlers prior to December 13, 1875, and you are instructed to make respectful request for a like waiver covering the time since that date, and up to the time when formal notice of the withdrawal can be communicated to the district land office.

In response to the request made under that instruction, said presi-

dent, on the 25th day of June of the same year, transmitted to your office the further waiver of said company, as follows :

In due consideration of all the circumstances, the company has decided to extend the relinquishment or waiver heretofore made to all actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881, upon which date your instructions were issued to the local land officers. The Department can accordingly apply this waiver or relinquishment in its action upon the cases of all actual settlers who shall have entitled themselves to patents. In making this relinquishment the company reserves the right to select, under the act of June 23, 1874, equal quantities of other land in lieu of tracts embraced in such entries as may be relieved hereby.

This somewhat prolonged history of said land grant, and of the action of the road and of the Land Department in relation thereto, I have found necessary in order to present clearly the questions which I am now called upon to decide.

It will be observed that the company, under the act of June 22, 1874, asks for the lands included in the three lists before me, in lieu of the lands lying within granted limits relinquished by action of the company, as before recited.

The act aforesaid provides :

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found to be in the possession of an actual settler, whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands, in lieu thereof, from any of the public lands not mineral.

Secretary Schurz approved the duplicate map by his decision of January 28, 1881, and the order of withdrawal directed in the same decision was made March 16, 1881, and reached the local office the 26th day of same month.

The entries for which indemnity is claimed were made before the filing of the duplicate map approved by that decision, and before the withdrawal aforesaid. It is obvious, therefore, that the claim cannot be allowed unless the right of the company had attached to that part of the grant within which the entries were made prior to the filing of the last-named map.

The claim for indemnity must therefore depend upon one of two questions, viz :

First. Whether the line of the road had been definitely fixed at the time of filing the map of 1860, and sufficient notice thereof given to the Land Department by filing the map in your office December 14, 1860.

Second. Whether the withdrawal of 1856 was extant at the time the entries were made in such manner as to render a relinquishment by the company necessary and proper to be made.

It is abundantly proved (and, indeed, is not questioned) that the line of the road had been actually surveyed and definitely fixed upon the ground at the time such map was filed. It will be remembered that the map we are now considering was filed in your office December 14, 1860, and remained on file until January 22, 1861, when it was delivered to the engineer of the company for the purpose of procuring the certificate of the governor of Florida as evidence that it was filed under authority of the State. The company was the beneficiary of the grant by act of the State, passed, as before stated, in anticipation of the grant being made by the United States. There is no question that the map was a perfect diagram of the route of the road as definitely fixed by actual surveys. Upon this point Secretary Schurz says, in his decision before cited :

The exact correspondence with the map of 1860 of the duplicate plat now filed appears to have been sufficiently shown, and there remains no doubt that the line exhibited was surveyed and marked as the definite location of the road, that it was recognized as such by the officers of the company and the State authorities, and that the map was filed in the same manner as the surveys of previous portions of the line had been filed in the office of the secretary of state of Florida.

There was no imperfection in the map itself. It was not rejected because of any infirmity in the diagram of route, but was sent out of the Department for the purpose of having the governor's certificate attached. It was on file more than a month without objection. Its examination gave to the office undoubted information of the exact location of the route of the road. The office desired only to be further informed that it was filed by authority of the State. The practice of your office probably required such proof, and I do not desire to question the propriety of the rule. Upon this point Secretary Schurz says, in his decision :

The return of the map for the governor's certificate in 1860 appears to have been an act of due caution on the part of your office to place beyond question the fact of State authorization; but I do not understand that the approval of the governor was the only means by which such authority might be established, or that it was essential to the validity of the survey fixing the line upon the face of the ground of which the plat filed was intended to be made the proper notification and evidence for the Department.

Since the granting act does not provide for the filing of a map, the rules relating to its authenticity and governing its reception must depend upon a judicious practice in your office. While the certificate of the governor was proper, it formed no part of the map, and was not essential to its validity as a diagram of route. As the map was complete in itself in that it designated and fixed the definite location of the road, it should not have been taken from the files; and if the authority of the State was desired, the company should have been called upon for proof that the State authorized the filing of the map. As said by Secretary

Schurz, the approval of the governor by a certificate attached was not the only means by which such authority might be provided.

Upon this point I call your attention to the case of *Gilbert v. McGregor and Missouri River Railroad Company* (9 Copp., 134), decided by this Department June 11, 1878. The act in that case, which made a grant to Iowa to aid in the construction of a railroad in that State, provided:

That as soon as the governor of said State of Iowa shall file, or cause to be filed, with the Secretary of the Interior, maps designating the routes of said road, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

A map of general route, certified by the president and chief engineer of the company, was filed in your office, but no map was filed or certified by the governor, or other evidence that it was filed by authority of the State. The decision holds that "the filing of this map was to designate the lands to which the company would be entitled under the granting act. This was obtained by the map filed by the officers of the company, for it concluded the company, and notified the government and all persons interested of the required designation"; and that "the omission of the governor to file a map designating the route of said road was matter of form rather than essence."

Under this authority it is difficult to see how the map in the present case, which was made and duly certified by the officers of the company, and filed by its chief engineer, can be held to be invalid because the practice of your office, without statutory direction, required, as a matter of "due caution," that there should be the governor's certificate attached. The train of evils which has followed the taking of the map from the files does not flow from the act of the company, but from an unnecessary if not unauthorized act on the part of the office—done, however, with no improper motive.

The decision of my predecessor of January 28, 1881, does not in exact terms hold that the filing of the map of 1860 was valid, but it will be seen from citations already made from it that no other conclusion can be reached from the decision. The instruction contained in it, directing your office to request of the company further relinquishment of all entries made within granted limits to date of formal withdrawal ordered by the decision, has no meaning if the filing of the map of 1860 was not valid.

If the filing of that map was invalid, there was no ground for requesting and making relinquishments, unless the relinquishments were based upon the executive withdrawal before referred to, made September 6, modified September 12, 1856, and reinstated so as to prohibit entries April 25, 1857. That withdrawal is not, however, even referred to in the decision, and the map of 1860 is almost the only subject of consideration.

In this connection, and as having a bearing of some importance upon the subject, I refer briefly to the second question before stated, relating to the withdrawal of 1856 aforesaid. That order of withdrawal was never vacated; but your letter states that the "reservation" made thereby was "overlooked or ignored, and many entries have been admitted."

I need not cite authority to show that such an executive withdrawal of land within the probable limits of the grant was entirely valid, and had the effect to reserve from entry and sale all public lands within the limits of the withdrawal; and I hardly need say that a valid withdrawal once made by this Department cannot be gotten rid of by "overlooking or ignoring" it, or admitting entries at the local offices in violation of it. If expedient that it should be no longer maintained, it should be vacated by the authority that made it. The order of withdrawal made by Secretary Schurz upon filing the duplicate map is not inconsistent with the idea of the withdrawal of 1856 being still extant, because the last-named withdrawal of lands was within the probable limits of the grant, and the new one conformed the withdrawal to limits defined by the map; nor was such withdrawal, especially when taken in connection with the request for relinquishment, inconsistent with the idea of a legislative withdrawal under the map of 1860, because no notice of such withdrawal conforming to the limits of that map had ever been given.

From the foregoing considerations I derive the following conclusions:

First. That the map of 1860, as filed, taken in connection with actual surveys in the field, was valid and sufficient to fix and locate definitely the line of the road, and to bring home to this Department notice of such location.

Second. That a legislative withdrawal followed the filing of that map (*Van Wyck v. Knevals*, 106 U. S., 360).

Third. That such results were not destroyed or annulled by the voluntary delivery of the map by your office for the purpose of procuring thereto the governor's certificate.

Fourth. That the order of withdrawal made in 1856, and reaffirmed in 1857 because of its prior modification, was existent at the time of the withdrawal ordered upon filing the duplicate map in 1881.

Fifth. That in order to protect the settlers who had in good faith made entries and settlements, relinquishments became necessary, because such entries were in violation of the executive withdrawal of 1856-'57, and of the legislative withdrawal which followed the filing of the map of 1860.

Sixth. The relinquishments come within the provisions of the act of June 22, 1874, and the company is therefore entitled to lands in lieu of those "found in the possession of actual settlers" at the time of relinquishment.

The relinquishments were made by the company upon the solicitation

of this Department, evidently upon the belief that they were necessary. I am of the opinion that the title of the settlers would not be complete without them. A great number of entries have been made, and the titles upon which the entrymen rely ought not to be involved in doubt and uncertainty.

You will at the proper time cause the lists to be examined in the usual manner, with a view to the correction of all errors and the elimination of conflicts, and to ascertain that the lands have been earned by the construction of portions of the road contiguous to the lands selected. After such examination you will submit them in regular form for my approval. In view, however, of the fact that the time has expired within which the railroad in question was to have been completed, and that legislation is pending in the present session of Congress relating thereto, you will take no action in the matter until further direction.

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*PRIOR ENTRY—PRIOR RIGHT—RELINQUISHMENT.*

**THE NORTHERN PACIFIC RAILROAD COMPANY v. PARKER AND HOPKINS.**

The withdrawal for the main line of the Northern Pacific Railroad took effect August 13, 1870. Parker made homestead entry the same day. His entry was canceled in 1875 for voluntary relinquishment. The withdrawal for the branch line of said road took effect July 19, 1879. Held—

That as Parker entered the same day the withdrawal of 1870 took effect, his entry must be regarded as the superior right.

That the existence of such entry excluded the land covered thereby from the withdrawal of 1870.

That upon the cancellation of Parker's entry in 1875 the land covered thereby passed to the United States, and was included in the withdrawal of 1879.

*Secretary Teller to Commissioner McFarland, April 15, 1884.*

SIR: I have considered the case of the Northern Pacific Railroad Company *v.* John G. Parker and Robert M. Hopkins, involving lots 1 and 2 and E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 31, T. 21 N., R. 5 E., Olympia, Wash., on appeal by said company from your adverse decision of August 1, 1883, and by Parker from that of October 29, and also that of August 1, 1883, adverse to him.

Parker made homestead entry No. 1,126 of said tracts August 13, 1870, and filed his relinquishment thereof July 11, 1873. His entry was canceled July 22, 1875.

Said tracts are within the granted limits of the grant of July 2, 1864, to said company, withdrawal of which took effect on filing map of general route August 13, 1870. They are also within the limits of the withdrawal for the amended location of the general route, which took effect July 19, 1879, and you state were not restored by the order restoring the lands along the main line made September 1, 1879.

Parker's entry was made the same day that the right of the company attached; and in such case the entry must be regarded as the superior right. (*Saint Paul, Minnesota and Manitoba R. R. Co. v. Gjuve*, 9 C. L. O., 119.)

The existence of Parker's homestead entry at the time of filing the map of general route excluded the tracts from the withdrawal of 1870. (*Talbert v. Northern Pacific R. R. Co.*, 2 Brainerd's Legal Precedents, p. 32.)

Parker admits that he abandoned the lands in question and has not resided thereon since he relinquished, July 11, 1873. He applied to purchase said tracts July 9, 1883, under the act of July 15, 1880.

Hopkins applied to enter the same tracts as a homestead April 2, 1883.

You reject the application of Parker because of the adverse claim of Hopkins. You find that, "so far as the record discloses, at date of Hepkins's application the lands applied for were public lands, and had been since July 22, 1875," the time when his entry was canceled; and therefore you approve of Hopkins's application to enter.

It is claimed that Parker filed the relinquishment because of the erroneous ruling of the local officers.

Upon the facts related the case falls within my decision in the case of said Company *v. Hess* (10 C. L. O., 260), wherein I held that—

If the tract in controversy was actually abandoned, though upon erroneous information as to the fact of withdrawal in 1873, it passed to the United States and was included in the withdrawal of 1879.

Upon the ground that the tracts in question were embraced in the withdrawal of 1879, I reverse your decision, and affirm that of the register and receiver, rejecting the application of Parker and Hopkins.

## DIVISION G.—PRE-EMPTIONS.

- I.—ABANDONMENT.
- II.—AGENTS.
- III.—AMENDMENT.
- IV.—APPEAL.
- V.—CONTEST.
- VI.—ENTRY.
- VII.—FINAL PROOF.
- VIII.—FORFEITURE.
- IX.—MARRIED WOMAN.
- X.—MILITARY RESERVATION.
- XI.—NATURALIZATION.
- XII.—PRACTICE.
- XIII.—QUALIFICATION.
- XIV.—RELINQUISHMENT.
- XV.—RESIDENCE.
- XVI.—SELECTION.
- XVII.—SETTLEMENT.
- XVIII.—TIMBER LANDS.
- XIX.—TOWN SITES.
- XX.—TRANSMUTATION.
- XXI.—UNLAWFUL INCLOSURES.

### I.—ABANDONMENT.

*AGREED STATEMENT—HEIRS—OSAGE LANDS.*

*TYLER v. DUNCAN ET AL.*

An agreed statement of facts precludes a contradiction or variation of such statement.

*Secretary Teller to Commissioner McFarland, October 10, 1883.*

I have considered the case of Salena Tyler *v.* George Duncan *et al.*, involving the SW.  $\frac{1}{4}$  of Sec. 27, T. 29 S., R. 1. W., Wichita district, Kansas, on appeal from your decision of July 15, 1882, holding Duncan's filing for cancellation.

It appears that Duncan filed declaratory statement No. 14,589 for the tract October 30, 1877, alleging settlement the same day; that the tract was subsequently involved in a contest between Duncan and one Jahalen Tyler *et al.*, wherein the register and receiver awarded the land to Duncan upon his showing full compliance with legal requirements to the date of his application to enter the same; that although the defendants were duly notified of such decision they failed to appeal; and that your office accordingly declared the same to be final December 3, 1881,

and closed the case. Duncan having been assassinated upon his claim on or about January 22, 1880, Salena Tyler initiated contest against his filing January 19, 1881, alleging in her affidavit that decedent's heirs had abandoned his claim, and that as personal service could not be had upon all of them, notice should be given to such heirs by publication. Such notice was accordingly given, as also personal service where the same could be had, whereby all parties in interest were cited to appear at the local office February 28, 1881. This is a case stated, wherein the agreement between the parties litigant discovers the following state of facts, to wit: That the heirs have neither lived upon nor cultivated the tract in question; that John Duncan, one of decedent's brothers, by and with the consent of his father, Cornelius Duncan, removed decedent's improvements from the land soon after his decease; that Cornelius Duncan had theretofore resided and did then reside in New Jersey; and that Salena Tyler is a qualified pre-emptor, and has actually resided upon and improved the land.

It further appears that she filed declaratory statement No. 21,692 for the tract January 6, 1882, alleging settlement October 25, 1880. (Her attorney alleges, however, upon appeal, that she applied to file January 22, 1881, but that the register and receiver rejected such application).

You held Duncan's filing for cancellation upon the ground that as George Duncan was a single man, his father, Cornelius Duncan, upon his son's decease, became his sole heir by operation of law, and therefore the only person who under the law could have preserved decedent's right and finally completed his entry; that it having been nowhere shown that Cornelius Duncan is dead, it is not competent for any other relatives of decedent to assert a claim in the premises, as only in the event of his demise would it be competent for them to so claim; that instead of his complying with legal requirements he permitted his son John to remove all of the improvements from the land, which act must be regarded as an abandonment of his right thereto.

The question to be determined, therefore, is whether such removal should be so regarded.

If it were not for said agreed statement of facts, it would be competent for the heirs to verify their allegations touching duress (*per minas*), by reason whereof their lives, limbs, and property would seem to have been placed in jeopardy by the Tyler family, through whose instrumentality Duncan was murdered, as the heirs allege. But they having agreed to such a state of facts, are thereby estopped from denying the truth of said statement thereof, and precluded from setting up or alleging anything contrariwise.

Furthermore, it should be observed that it appears from the published notice of contest that Duncan's declaratory statement was an "Osage filing"; *i. e.*, the tract in question forms a part of the Osage Indian trust or diminished reserve lands in the State of Kansas. Hence this case would seem to come within the purview of the first section of

the act of May 28, 1880 (21 Stat., 143), by virtue whereof it would have been competent for these heirs, or rather it behooved them, to make proof of and payment for their claim within the sixty days prescribed by the act; and this notwithstanding their failure to comply with legal requirements in point of settlement and improvement.

But the record fails to discover that they have availed themselves of the statutory remedy prescribed by the act cited. I therefore concur with you in the opinion that their entire claim, if any, in the premises, should be adjudged forfeited.

Your decision is accordingly affirmed.

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VOLUNTARY—EXHAUSTS RIGHT.

CYRUS W. LOHR.

Where a pre-emptor voluntarily abandons his claim, in the face of an adverse claim which he could successfully contest, he thereby exhausts his pre-emption rights

*Secretary Teller to Commissioner McFarland, December 6, 1883.*

SIR: I have considered the appeal of Cyrus W. Lohr from your decision of March 31, 1883, rejecting his application for restoration of his pre-emption rights. Lohr filed declaratory statement for the SE.  $\frac{1}{4}$  of Sec. 11, T. 123, R. 61, Aberdeen, Dak., August 17, alleging settlement August 15, 1881. Charles W. Sheldon made homestead entry for the tract January 9, 1882, which entry was relinquished and canceled July 12, 1882, when one Robinson made homestead entry of the tract.

The proofs show that Lohr settled as alleged, made improvements and resided on the land until October 10, 1881, when he went to the State of Michigan for the purpose of bringing his family and effects to Dakota. He was detained in Michigan until the middle of March, 1882, by sickness in his family and a serious accident to his son. Upon his return at the latter date he found Sheldon in possession of the land under his homestead entry, with additional improvements thereon. Instead of contesting his rights as against Sheldon he abandoned the land, but February 27, 1883, nearly one year after his abandonment, asked leave to enter it, or, otherwise, that he be permitted to make another filing.

I concur with you in the opinion that had Lohr contested his rights instead of abandoning the land, the facts, as they appear in his affidavits, would have shown his continued right to the land, but that his voluntary abandonment thereof exhausts his pre-emption rights.

Your decision is affirmed.

## II.—AGENTS.

*SETTLEMENT BY—INEFFECTIVE.**MCLEAN v. FOSTER.*

No one can acquire a settlement right to public land by virtue of plowing or other acts performed by an agent.

*Acting Secretary Joslyn to Commissioner McFarland, April 7, 1884.*

I have considered the case of James McLean *v.* Margaret J. Foster, involving the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 3, T. 156, R. 54, Grand Forks, Dak., on appeal by McLean from your decision of August 25, 1883, awarding the tract to Foster.

It appears from the record that this land was surveyed in the spring or summer of 1880, but that the plats were not filed until May 12, 1881. About the time of the survey the Foster family—father, mother, brother and sister—made arrangements to apply for this whole section and part of another. On several parts of it they made individual settlement and residence, but not on the NE.  $\frac{1}{4}$ . On that tract, in May, 1880, Foster's brother, at her request, he testifies, plowed a few acres of ground, and hauled some logs for a future house. She was not on the land at the time, but was then and continually afterward living in the town of Grand Forks. In the early part of April, 1881, McLean went upon the section and began to build a house on the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ . While so building, Miss Foster's brother began to build her house on the west half of the NE.  $\frac{1}{4}$ , and was notified by McLean of his claim to the entire quarter; nevertheless, he continued to build, and Miss Foster took personal possession of the house on May 5, 1881. Both parties appear to have complied with the law since.

Whatever right McLean has to this land he acquired on the day he settled; and there is no doubt that he is entitled to the entire quarter, unless Miss Foster then had a superior right to it. At said date she had no right to it whatever against the United States or against him; for she had not made a legal settlement, nor even taken possession of the land. No one can acquire a settlement right to public land by virtue of another's acts, and the plowing or other work done for her by her brother was ineffectual for any purpose. This is the settled rule. And, indeed, if she had actually settled in person in May, 1880, her failure to follow it up by establishing a residence would have divested her of all right acquired by the settlement. In my judgment Miss Foster has neither a legal nor an equitable claim to the tract in question, and her entry should be canceled.

Your decision is reversed.

**III.—AMENDMENT.***MISTAKE—DILIGENCE.***SEDERQUIST v. AYERS.**

Where a party homesteads one tract of land by mistake and settles on another tract, but does not apply to amend the entry, so as to properly describe the tract settled on, until after a valid adverse right has intervened, such amendment will not be allowed, and the homestead claimant cannot invoke the retroactive provisions of the act of May 14, 1880, in order to acquire priority over the adverse claimant.

*Acting Secretary Joslyn to Commissioner McFarland, August 28, 1883.*

I have considered the case of J. W. Sederquist *v.* D. C. Ayers, involving 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. 26, T. 7, R. 16 W., Bloomington, Nebr., on appeal by Ayers from your decision of July 24, 1882, holding his entry for cancellation.

It appears that on September 4, 1879, Ayers made homestead entry No. 7,496, for the NE.  $\frac{1}{4}$  of Sec. 20, in said township, and that about the 15th of the same month he went to make settlement upon it, but finding the land which he intended to enter to be in Sec. 21, and already appropriated, and not being pleased with the land in Sec. 20, he moved upon the tract in contest in Sec. 26, without any notice to the local office, or effort to rectify the mistake, built a house there, in which he has since resided with his family, and broke a couple of acres in its vicinity. It appears further that Sederquist went to the local office and was officially informed that said tract was not covered by an entry; that on January 21, 1880, he filed declaratory statement No. 5,893 for it, alleging settlement on the 20th of the same month: that he at once began to erect a house and was promptly notified by Ayers that he claimed the land as a homestead, and that he nevertheless persisted in improving it, has resided there since, and has a house, stable, and 18 acres under cultivation. On October 30, 1880, Ayers filed an affidavit in which he alleged that he had settled on the tract in Sec. 26 by mistake, believing it to be in Sec. 20, and the land which he had originally selected, and asked to have his entry amended to cover it; your office allowed the amendment April 2, 1881, and it was made at the local office September 30, 1881. He swears now that he applied to an attorney as early as October, 1879, with the view of effecting the amendment, but of this desire it appears that neither your office nor the Land Office had knowledge.

At that time Ayers' settlement on the tract in contest could inure to his benefit only by force of Sec. 2273, Rev. Stat., and since a preferred right is therein made dependent upon the prior settler's conforming to the other provisions of law, and since he did not conform to the said provisions, he acquired no right by the settlement. He might have ef-

fected an amendment of his original entry by the exercise of due diligence, but he failed to exercise it. Consequently Sederquist's settlement was valid (*Belk v. Meagher*, 104 U. S., 279), and Ayers' notice to him of a prior claim was of no legal effect, because Ayers himself having failed to initiate his homestead settlement as the law provided that he should initiate it, was without a valid claim and was a mere trespasser on the public land. His good faith in settling, which is insisted upon, could avail him only when accompanied by a compliance with other provisions of the law and a due application to enter, otherwise a person might actually settle on a tract of the public domain, and without acquiring a title himself, prevent all others from acquiring title to it.

Granting the retroactive effect of the act of May 14, 1880, which counsel claim in his behalf, it cannot apply to a case where a valid adverse interest had attached prior to its passage; and the amended entry which was permitted by your office, being founded on a misrepresentation of the facts, is void for the same reason, and should be canceled.

Your decision is accordingly affirmed.

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GOYNE *v.* MAHONEY.

*INTERVENING RIGHT—QUALIFICATION.*

An amendment of a filing upon one tract cannot be allowed to embrace a different tract, so as to defeat an entry made in good faith upon the latter tract, subsequently to the original filing, but prior to amendment.

Goyne "removed from his own land," as the sale of said land did not take effect until delivery of the deed, which was subsequent to date of his filing.

*Secretary Teller to Commissioner McFarland, March 11, 1884.*

I have considered the case of *Noah Goyne v. Stephen Mahoney*, involving the NE.  $\frac{1}{4}$  of Sec. 34, T. 152, R. 55, Grand Forks, Dak., on appeal by Mahoney from your decision of July 17, 1883, holding his entry for cancellation.

It appears that Goyne filed declaratory statement for the NE.  $\frac{1}{4}$  of Sec. 24, in this township, August 8, alleging settlement March 1, 1881. He applied *May 9, 1882*, to amend his filing to embrace the NE.  $\frac{1}{4}$  of Sec. 34, alleging that his settlement was on this section, and that his filing on Sec. 24 was through mistake; and June 9 following you allowed the amendment.

Mahoney made homestead entry of the tract on *Sec. 34, August 6, 1881*.

The township plat was filed *May 11, 1881*.

Mahoney applied to make proof *July 12, 1882*, to which Goyne objected, alleging his own prior settlement; and Goyne applied to make proof *August 15, 1882*, to which Mahoney objected, alleging his own entry, and that Goyne removed from his other land in Dakota to settle

on that in dispute, and hence was not a qualified pre-emptor, and that also, if Goyne ever made settlement on Sec. 34, he forfeited his rights by failure to file thereon within the limited period, or until after his own (Mahoney's) right had attached. The hearing on the two applications was in October following. The testimony shows that Goyne settled on Section 34 as alleged, and has valuable improvements, and has continuously resided thereon; that Mahoney has also valuable improvements on the land (but less than those of Goyne), and has continuously resided thereon since January following his entry. Each has sufficiently complied with the law under which his claim was made to entitle him to the land in the absence of the other; but it should be awarded to Goyne as the first settler (if a qualified pre-emptor), had he originally filed upon the tract in dispute, or had his amendment been allowed prior to an intervening adverse claim. But when Mahoney made his entry, the tract was unappropriated on the records, and he does not appear to have known of Goyne's settlement until December following, when he took lumber to the tract for erection of his house. Then first ascertaining that fact, he returned to the land office for information as to the status of the tract, and learning that it was vacant, proceeded with his improvements and residence.

Your decision presents the question whether an amendment of a filing upon one tract can be allowed to embrace a different tract so as to defeat an entry made in good faith upon the latter tract subsequently to the original filing, but prior to the amendment, the land at the date of the entry being vacant public land on the record, and the entryman ignorant of the prior settlement at the date of his entry. Undoubtedly such an amendment is allowable as between the party and the Government merely; but I know of no principle or decision which will authorize it to oust an intervening adverse right made in good faith, and in this case Goyne had no better right to an amendment which would give him precedence over Mahoney's entry than he would have to make an original filing on land covered by the same entry, except subject thereto. The tract being unappropriated public land, was subject to the first legal applicant. This was Mahoney, and so long as he complies with the law his rights must be respected. It is immaterial that the improvements of Goyne are more valuable than those of Mahoney, or that his original filing was not upon the tract he settled upon, but by mistake on another. It is sufficient that the mistake was through his own laches. In such case he whose negligence causes the mistake, though innocently and against his own interests, must suffer the loss, and not he who has acted in compliance with the law and is not guilty of negligence or wrong.

That amendments of filings and entries can only be allowed subject to intervening adverse rights, counsel for Mahoney cite the rulings in 1st Lester, pp. 391, 397, 401, 402, and 5th Copp, 148. (See also case of Burkett, Copp, March, 1882; Milam *v.* Favrow, *Ib.*, September, 1881;

French *v.* Tatro, *Ib.*, January, 1877; Dillon *v.* Burke, *Ib.*, June, 1882; case of Wilson, *Ib.*, November, 1874; Ward *v.* Ernst, Brainard's Precedents, January, 1884; and Richard Griffith, Copp, February, 1884.)

In support of your decision upon the question of amendments, you refer to the cases of University of California *v.* Block (Copp, November, 1874), and Newcomb (*Ib.*, February, 1876). In the former, Block having filed for 160 acres, without alleging any error or mistake in his filing, made an amended declaratory statement abandoning 80 acres of the land embraced in his original filing claimed by another settler, and took 40 acres to which he was advised there was no valid claim, but which appears to have been claimed by the University under a State selection prior to the amendment. His claim to the 40 acres was rejected by the Acting Secretary, upon the ground that his amendment was invalid as against the State's selection, thus in effect ruling that an amendment cannot be allowed to defeat an existing adverse claim. In the course of his decision he said, "no subsequent amendment, except for error or mistake, can operate to defeat a right previously initiated." As the case raised no question of error or mistake in Block's original filing, I cannot consider it as authority for your ruling, but as *obiter dictum* merely, especially as he did not in terms rule that such an amendment, even for error or mistake, could be allowed to defeat an adverse claim.

In the case of Newcomb, Secretary Chandler held that a pre-emptor, who has misdescribed the land embracing his residence and improvements, may amend his filing to cover his settlement, *unless* by his laches or negligence he has barred his right in favor of an adverse claimant. This ruling does not support your decision, but rejects the amendment of Goyne in so far as it defeats Mahoney's entry.

Mahoney also alleges that Goyne did not file his declaratory statement on the tract in Sec. 34 within the time required by law, but that claiming settlement March 1, 1881, and the land not having been proclaimed for sale he should have filed upon it within three months from the filing of the township plat, which was on May 11, 1881, or prior to August 11, 1881, where, as he made no record claim to it until he applied to amend his filing May 9, 1882, after Mahoney had been for several months resident upon and improving the tract. Under sections 2265 and 2266 of the Revised Statutes, one failing to file a declaratory statement within three months from the filing of the plat under a prior settlement, forfeits his right in favor of the next settler who complies with the law. Had Goyne filed after expiration of said three months, but prior to the adverse claim of Mahoney, his filing would be sustained under the ruling in Johnson *v.* Towsley; but Mahoney's entry made long prior to the application to amend, and when the tract was vacant and unappropriated, must take precedence, and Goyne cannot, under the statutes referred to, defeat his rights and deprive him of his improvements by reason of his own laches or mistakes.

Mahoney further claims that Goyne is not a qualified pre-emptor,

under section 2260 of the Revised Statutes, because he removed from his other land in Dakota to settle on that in dispute.

It appears that Goyne entered a tract in Dakota under the homestead laws, and made final proof thereon February 6, 1881. He conveyed the tract to one Fox, who conveyed it to Goyne's wife. The testimony as to the actual date and delivery of Goyne's deed to Fox, although wholly submitted by Goyne, satisfies me that it did not become operative until long after he settled on Sec. 34, under his pre-emption filing, and hence that he was owner of the homestead land at the date of such settlement and removed therefrom to the land in dispute. There was an arrangement between Goyne and Fox (his brother-in-law), by which Goyne was to convey the land to Fox and Fox was to reconvey it to Goyne's wife. Goyne states his object was to satisfy and discharge his indebtedness to his wife for \$2,000, the consideration named in each deed. But, seemingly inconsistent with this, are his further statements that Fox paid him \$2,000 in money for the land; that his wife paid Fox the same amount for it (thus making it a money transaction, purely); and that his wife paid him \$2,000 in money for it. Mrs. Goyne did not testify. Goyne, his attorney, and Fox, state that the transaction took place about February 1, 1881; the attorney that it was not later than February 3, when Goyne signed and acknowledged the deed; that the dates of the deed and the acknowledgment were left in blank for insertion, when Mrs. Goyne should sign and acknowledge it, which she did within a week later; that he retained the deed in his own possession for delivery to Fox, when Fox delivered to him a deed of the same land to Mrs. Goyne, and that this was not done, and Goyne's deed delivered to Fox, until July or August following, when the dates were inserted. That the actual dates of the deed and its acknowledgment, and its delivery to Fox, were on August 6, would seem to appear from the fact that the county records show such date, thus corroborating the attorney's statement in this respect; and that it was not a completed transaction between either of the parties prior to February 3 would also seem to appear from the fact that Goyne had not then made his final homestead proof, and was without title to the tract, and also that his deed was made subject to a mortgage which was not executed until February 16.

Aside from the suspicion, under the facts, that these conveyances were for the purpose of enabling Goyne to evade the provisions of section 2260 of the Revised Statutes, which forbade removal from his homestead land to settle on the pre-emption land, I am of the opinion that Goyne's deed to Fox did not take effect until its delivery to the latter in August, 1881, and hence that he was owner of the homestead land at the date of his settlement on the pre-emption land, and not qualified to settle on the latter tract in March preceding.

In view of these several matters, I reverse your decision, direct cancellation of Goyne's filing, and allow the entry of Mahoney to stand.

**IV.—APPEAL.****CONTEST—NOTICE—INTERLOCUTORY MATTER.****MANDERFIELD AND O'CONNOR v. MCKINSEY.**

This hearing was not the initiation of a contest within the contemplation of the act of June 3, 1878 (20 Stat., 91), and no further publication was necessary, as that had already been done pursuant to the provisions of the act of March 3, 1879 (*Ibid.*, 472).

Appeal does not lie from an order interlocutory, upon matter resting clearly in discretion.

*Secretary Teller to Commissioner McFarland, July 13, 1883.*

SIR: I have considered the case of Anton Manderfield and A. H. O'Connor *v.* H. C. McKinsey, involving as between McKinsey and O'Connor the W.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 32, and as between McKinsey and Manderfield the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 32, T. 1 N., R. 26 E., Bozeman district, Montana, on appeal by McKinsey from your decision of February 10, 1883.

McKinsey filed declaratory statement No. 240, for the SW.  $\frac{1}{4}$  of Sec. 32, April 27, alleging settlement March 1, 1881.

O'Connor made homestead entry No. 319, December 9, 1881, of the W.  $\frac{1}{2}$  and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 32.

Manderfield made additional homestead entry No. 317, December 6, 1881, of the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 32 and lot 1 of Sec. 4, T. 1 S., R. 26 E.

May 16, 1882, McKinsey published notice of his intention to make final proof June 21 ensuing, before the clerk of the court at Canyon. He accordingly appeared with his witnesses and submitted such proof; whereupon O'Connor appeared in his own behalf and in Manderfield's and filed an affidavit protesting against the admission of said proof and alleging non-compliance with legal requirements on the part of McKinsey. Such protest was also filed at the local office and a hearing asked for. The parties were accordingly duly cited to appear before the register and receiver August 21 ensuing. McKinsey appeared and moved to dismiss "the contest," on the following grounds:

1. That the case had already been tried and concluded.
  2. That the notice was not printed in a newspaper, as prescribed by the act of June 3, 1878.
  3. That the contest was brought jointly by the contestants.
- The register and receiver overruled the motion upon the first and third grounds, but sustained it upon the second ground, and dismissed the case accordingly. The reasons stated for such action were, that the sufficiency of the proof had not been decided by them when the motion was made; and that the joining "of the contestants" in the notice was merely *pro forma* and could not operate to preclude a severance of the cases at the hearing.

You sustained the local officers in their action as to the first and third grounds, but overruled such action upon the second ground, returning the case and instructing them to proceed with the hearing. It was not competent for said officers to dismiss the case, such action being in contravention of Rules 41 and 42 of Practice.

It should be observed that the publication of McKinsey's notice to prove up operated as a citation to all parties in interest to appear at the time and place fixed therefor and test the validity of his claim. It was competent for said parties to so appear, as by so doing they were simply acting in accordance with the terms of such notice. This hearing was not the initiation of a contest within the contemplation of the act of June 3, 1878 (20 Stat., 91), and no further publication was necessary, as that had already been done pursuant to the provisions of the act of March 3, 1879 (*Ibid.*, 472).

This appeal was taken from your decision, or order for a hearing. Such order was interlocutory and matter resting clearly within your discretion, from which no appeal lay. It is therefore dismissed.

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#### V.—CONTESTS.

##### *ACT OF MAY 14, 1880—PREFERRED RIGHT.*

###### *FIELD v. BLACK.*

A contest against a pre-emption filing is not recognized, and no preferred right is conferred by the act of May 14, 1880, for procuring the cancellation of a filing.

*Acting Secretary Joslyn to Commissioner McFarland, August 21, 1883.*

I have considered the case of Golson S. Field *v.* Henry Black, involving the SE.  $\frac{1}{4}$  of Sec. 26, T. 11 N., R. 39 E., Walla Walla, Wash., on appeal by Field from your decision of May 10, 1882.

It appears by the record that said tract has been covered by the declaratory statement, No. 3,503, of one T. W. Whetstone, and that, on application by said Field, your office held such filing for cancellation on January 21, 1882, subject to the usual right of appeal. It also appears that Black procured Whetstone's relinquishment of his filing, and on February 13, 1882, made homestead entry No. 2,303 for the tract; and that on February 17, 1882, said Field applied to make a timber-culture entry for it, and his application was rejected by the local officers. The rejection is now affirmed by your office, on the ground that Field had no preferred right of entry by virtue of his application for the cancellation of Whetstone's filing, and that at date of his timber-culture application the tract was reserved by the homestead entry aforesaid.

In my judgment your decision is correct. That the filing of a declaratory statement, which is "a declaration of one's intention to claim a tract

of land," confers a mere preferred right of pre-emption against third persons, and confers no rights against the United States, and that, therefore, land covered by such a filing is public land, and open to either settlement or entry by any qualified person, subject only to the right of the pre-emptor, is thoroughly settled by the decisions of the courts and of this Department. The timber-culture law permitted Field to make entry upon "any of the public lands of the United States," and his right of entry on the tract in contest was not postponed by any law or ruling to the date of cancellation of the filing, or of expiration of the period allowed for appeal from your decision. By entering at the date of filing his application for the cancellation, he would have thereby acquired a preferred right to the land; and, since his own *laches* have deprived him of said right, he has now no ground of appeal.

Black's privileges were coextensive with those of Field, and the exclusion of one of them by the other was a simple question of superior diligence, which the former settled by making his entry first. The fact that he procured Whetstone's relinquishment prior to entering has no relevancy to the issue, for the relinquishment was not a prerequisite to his entry; and therefore counsel's argument, founded on the mode and motive of his entry, can have no weight in the adjudication.

Counsel, however, urged that, as Field had contested the Whetstone filing and paid the office fees, his entry was preferred by section 2 of the act of May 14, 1880 (21 Stat., 140). The record fails to show said contest and payment, but conceding them, if they were made by reason of his ignorance of the law, he thereby acquired no rights. Does the section cited accord him the preference claimed? It gives a preferred right to the land to a person who "has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry," and as Field did not contest an "entry," but a mere "filing" of a declaratory statement, his case does not come within the letter of the act. Does it come within its spirit? On the theory that the act is remedial, its correct construction is to arise from a consideration of "the old law, the mischief, and the remedy," and when these are well understood, as in the present instance, there can be no doubt of the correctness of the conclusion. Under the old law an entry of any kind absolutely reserved the land. No one could acquire a right to land so appropriated, and hence no one could acquire a preferred right to it, by contesting the entry, otherwise than by statute; the mischief was the deprivation of the Government for a time of the benefits of a knowledge of forfeited entries, because persons were discouraged from giving the information by reason of the lack of such an inducement; and the obvious remedy was the reward of the successful contestant by a preferred right to the land. Such a remedy the section cited provides by its letter, in the case of a contested "entry," and its spirit, viewed with extremest liberality, cannot be made to cover the

case of a contested "filing," where there was no mischief, as shown above, and where consequently there was no need of a remedy.

I concur in your opinion that section 2 of the act of May 14, 1880, gives a preferred right to a person instituting contest only when its issue is the restoration of the land to settlement by the cancellation of an entry, and your decision is accordingly affirmed.

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*TO CLEAR RECORD—NOT ALLOWABLE.*

**NICHOLS v. BENOIT.**

Contests between pre-emptors to clear the record should not be permitted unless in exceptional cases.

*Secretary Teller to Commissioner McFarland, January 21, 1884.*

I have considered the case of Stephen Nichols *v.* Pierre Benoit, involving the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 9, T. 3, R. 7, Deadwood, Dak., on appeal from your decisions of July 15 and September 5, 1882, and March 31, 1883.

The township plat was filed September 27, 1881.

Nichols filed declaratory statement September 30, 1881, alleging settlement July 7, 1877, and Benoit filed declaratory statement October 1, 1881, alleging settlement April 1, 1877. Benoit was cited December 9, 1881 (under the affidavit of Nichols), to respond and furnish testimony January 12 following, relative to his declaratory statement, that the record might be cleared of his (Benoit's) adverse claim. He thereupon retained one McKenna as his attorney, to whom he paid \$25, agreeing to pay him the further sum of \$50 upon determination of the suit, and took to Deadwood, upon the day preceding that assigned for the trial, four witnesses with whom he conferred with McKenna. He also conferred with him upon the morning of the 12th; but when the case was ready for hearing McKenna did not appear, and could not, after diligent search, be found. The local officers thereupon proceeded with the trial—Benoit not defending—and upon the testimony submitted awarded the land to Nichols. Benoit then employed another attorney, and applied for a rehearing, upon the ground of collusion between McKenna and Nichols. Upon the local officers' request for instructions, you affirmed their decision, and overruled the motion for rehearing, upon the ground that the charge of collusion was not sufficiently established; but you also held that if additional corroborative proof touching the charge should be filed, the motion would be further considered. Benoit filed further affidavits, in view of which the local officers ordered the rehearing. On the day assigned Benoit again appeared with his witnesses and his new attorney. Nichols protested against the hearing and appealed from the decision which ordered it. March 31, 1883, you ruled

that the appeal was well taken, because the conditions upon which the rehearing might be granted had not been satisfactorily complied with, and dismissed the case, leaving the land under award to Nichols.

Both of the parties appear to have settled prior to the filing of the plat, and to have valuable improvements upon the same subdivision—their respective declaratory statements also embracing other tracts. Undoubtedly a party duly notified in a regular contest loses his rights on failure to appear and defend them. But it is not strange that an ignorant man, little acquainted with the English language, as Benoit is shown to be, and unaccustomed to legal proceedings, should, when deserted by his attorney upon the hour of trial, whether collusively or otherwise, have failed to protect them by due appearance before the proper tribunal. This much, however, is evident, that there has been no trial upon the merits of the case, and that Benoit has endeavored in good faith to secure his rights to the land in dispute. Although the affidavits do not conclusively show the alleged collusion, they are sufficient to raise a suspicion of their truth, and Benoit should have further opportunity to offer proof touching the same, as also of his priority of settlement, and more especially so as, in my judgment, the contest was erroneously allowed. In the case of *Hanson v. Berry* (Copp, March 1, 1882), my predecessor held that where two homestead entries had been allowed subject to a prior pre-emption claim, it was improper to allow a contest on the application of the pre-emptor to clear the record of the homestead entries, but that his rights should have awaited consideration when he made his final proofs. I see no reason why the same ruling should not apply to a case between two pre-emptors; because, notwithstanding an award to one of the parties under a contest, he must still make the final proof required by statute, which the other party may oppose, and final decision must rest thereon, regardless of that offered at the contest. It would therefore seem useless to encumber the records with vain proceedings, which also involve the expenditure of time and money which the parties are usually unable to bear. As a pre-emptor may at any time offer his final proof upon due advertisement, and obtain his title whenever his good faith and compliance with the law are manifest, the better practice would be not to permit contests between pre-emptors to "clear the record" (unless in exceptional cases), but that they await their final proofs, which open all questions touching the rights of the party applying to offer them. I therefore modify your decision, and dismiss the proceedings in contest, leaving the rights of the parties for consideration when either offers his final proof.

## VI.—ENTRY.

*JOINT PRE-EMPTION AND HOMESTEAD.***BURTON v. STOVER.**

Where two parties settled on a forty-acre tract of land before survey, agreeing upon a boundary line between them, and after survey one claimed it under the pre-emption law, and the other claimed it under the homestead law, a joint entry may be allowed.

*Secretary Teller to Commissioner McFarland, October 1, 1883.*

I have examined the case of W. C. Burton *v.* Cyrus Stover, involving the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, T. 3 N., R. 7 E., B. H. M., Deadwood, Dak., on appeal by Burton from your decision of August 12, 1882, awarding the land to Stover.

It appears that the township plat was filed September 27, 1881. On the same day Burton filed his declaratory statement No. 1325, for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of said section, alleging settlement in October, 1879; and on the next day Stover made homestead entry No. 219, for the NE.  $\frac{1}{4}$  of said section, alleging settlement in July, 1877. At date of the Government survey, Stover had one to ten acres of breaking on the tract in contest, and Burton had on it houses, &c., estimated at from \$500 to \$1,200. Your decision is founded on the alleged fact that Burton settled within the claimed lines of Stover, after due notice; but, after careful examination of the evidence taken at the hearing, I find myself unable to concur in this judgment.

In the first place, the testimony of McIntyre, Blood, and other witnesses relative to an alleged pre-emption claim by Burton covering an additional 40 acres, on which he now has a timber-culture entry, must be excluded as irrelevant to the issue, and as failing to show any want of *bona fides* on his part in making his present claim. It is in evidence that said tract was included in a prior claim by one Shoemaker, of 160 acres, lying west of the tract in contest, which was purchased by Burton in 1879. One hundred and forty acres of it are now included in Burton's filing, and Valentine, Stover's own witness, swears that he settled on the remaining 40 acres in January, 1880, and then removed from it, because, "Mr. Burton, after I had been there two or three days, came and told me I was on his timber-culture." It thus appears that before the official survey, and probably before there was any dispute between the parties to the record, Burton had intended to make a timber-culture and not a pre-emption entry on said 40 acres; and there is no direct evidence showing that he ever had any other intention in regard to it.

Again, all the testimony concerning the several compromises offered and discussed between the parties must be excluded, because there is

in it no admission by Burton of Stover's right to the land covered by his improvements, and it only goes to show that both parties were willing to avoid expense and contention.

Further, the testimony of Valentine, jr., and others to the effect that, long after Burton's settlement and improvements, he pointed out a stake which he said was the corner of Stover's claim, and which included said improvements, must be excluded, because it only goes to show that after the dispute between the parties began Burton admitted that Stover claimed the land on which he (Burton) had settled; it does not show that at date of his settlement there was any such claim or admission.

The controversy between the parties originated in the following manner. When Stover settled in 1879, the southern boundary of his homestead was a line known as "Stover's and Miller's south line," which was duly staked and recognized until September, 1879, at least. Stover alleges that in said month and prior to Burton's settlement, he made a new south boundary line running to a stake which is very close to the southeast corner of the tract in contest, as subsequently established by the official survey. The southeast corner of the Stover and Miller line was some 300 feet north of the official southeast corner, and on the land between the Stover and Miller line and the Government line Burton made his settlement and improvements. Whether Stover established this new line before Burton's settlement, and whether Burton had notice of it, are the questions to be determined by the evidence. If the new line was so established, and if Burton had notice of it, Stover is entitled to the tract in contest, for his claim would extend substantially to the lines of the official survey. If Stover did not so establish the new line, or if Burton did not have notice of it, then Stover is not entitled to the tract.

Now, the only direct testimony concerning the new line is a positive denial of Stover's allegation that he established it in September, 1879. It is shown that Miller, whose claim joins Stover's on the east, being doubtful about his own boundaries, ran a line from the meridian in September, 1879, that he found his southwestern corner very close to where the official corner was afterwards established, and that the stake subsequently claimed by Stover as the corner of his new line was then driven. Stover was present, and Miller swears positively that he then disclaimed the new line by declaring his belief that it was erroneous, and that the old line was correct. This testimony Stover, when on the stand, did not deny; and he produced no witness to show that then, or prior to Burton's settlement in October, 1879, he laid claim to the land bounded by a line from this new corner. This adverse testimony, and his failure to produce any direct testimony contradicting it, is fatal to his case, unless the circumstantial evidence in his favor is unusually strong.

The circumstantial evidence on this point, and the only evidence con-

cerning notice to Burton, appears in the testimony of one Vener. Vener swears that he was riding along the public road in October, 1879, on a day not stated, and overheard Stover tell Burton that he must move his foundation and logs from the land where they then were, and to the south of said road, which appears to have followed the present quarter-section line at that point. How far Vener was from the parties does not appear, but he states that they were in loud and presumably excited conversation, and it appears that he could not distinctly hear the words uttered, for he checked his horse in order to catch them. Opposed to this is the testimony of the aforesaid Miller, who swears that he helped Burton to haul his logs and to build his house, was present during all working hours, and heard no such conversation; but that, on the contrary, Stover was present at times and perfectly friendly to Burton. On this evidence I do not think the fact of notice prior to Burton's settlement is proved, for the facts are at least doubtful, and, as it is clearly shown that Stover for years did not claim the land where Burton placed his house, and that Burton was advised of the position of the old claim line, the burden was on Stover to show the new claim line and the notice affirmatively, which he has not done.

Further, an intentional intrusion by Burton upon Stover's land is strongly rebutted by the circumstances attending his settlement. It is stated by him, and admitted by Stover, that prior to settling he went to Stover and offered to buy his claim, and, failing in that, requested Stover to point out his own boundaries. What boundaries were then pointed out is of course in dispute, but it is evident that Burton's object in seeking the boundaries was that he might settle without and not within them. It is, therefore, very hard to believe that he deliberately crossed those boundaries the next day, in violation of his manifest prior good faith.

And, finally, it is proved that before Burton settled he and Stover ran a new line from what is called the "ox-bow corner," and near to the old Stover and Miller line, between their claims. Miller swears distinctly and circumstantially to this fact; Stover admits that he was there, assisting; and Bartlett, one of his own witnesses, swore on cross-examination that he saw them running it. On this line Burton afterwards set his north fence; just beyond it was run a new public highway, and on the north side of the highway Stover built his fence. On this evidence there is no doubt in my mind that Stover did not, in October, 1879, claim the land on which Burton settled, and consequently that he has no right to it now as a prior settler.

The question remaining concerns the proper disposition of the tract in controversy. It is the smallest legal subdivision, and hence cannot be divided between them; and yet, as at date of Burton's settlement Stover undoubtedly laid claim to the larger part of it, and as Burton recognized his prior rights, the facts strongly point to equitable claim by Stover to the land bounded by the ox-bow line. It is also in evi-

dence that Burton has, from the beginning of the contention, stated that if after survey their improvements were found to be on this 40 acres, the law would allow them to make joint entry and subsequent division; and this seems to be the proper basis for deciding the controversy. In *Warren v. Van Brunt* (19 Wallace, 646), where the question was between two pre-emptors who had improved the same 40 acres prior to survey, the court conceded their right to apply for a joint entry. Here we have a pre-emption and a homestead claimant, it is true; but I think the case comes within the spirit of section 2274, Rev. Stat., which has in view the settlement rather than the nature of the claim when it provides for the joint entry.

You are directed, therefore, to give the parties notice of their right to make a joint cash entry of the tract in contest, and, failing consent to this by either party within a reasonable time, say ninety days, the said tract is hereby awarded to the other.

Your decision is modified accordingly.

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*EXCESS OF QUANTITY—SETTLEMENT BY ALIEN.*

*HART v. GUIRAS.*

In case of unsurveyed lands, where a party notifies a subsequent settler to keep his stock away from the land covered by the prior party's improvements, it is sufficient notice that he claims the subdivision upon which his improvements may appear to be when survey is made, notwithstanding his improvements are afterwards found on five forty-acre tracts.

It is not the claim, but the facts in such a case, that must be considered.

An alien can claim nothing by a settlement prior to his declaration to become a citizen.

*Secretary Teller to Commissioner McFarland, December 27, 1883.*

I have considered the case of *George A. Hart v. Ramon Guiras*, involving the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 34, T. 11 S., R. 2 E., Los Angeles, Cal., on appeal by Hart from your decision of February 14, 1883, holding his filing for cancellation as to said tract.

It appears from the record that Hart settled on 160 acres of land in 1876, and within a few months thereafter had a well, corral, and apiary wholly, and an orchard and vineyard partially, on the tract in contest, where they have since remained; that his house was built, or believed to be built, on the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , or about the center of the land which he now claims; and that he cultivated more than 160 acres, there being no survey lines to guide him, and has plowed and cropped the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 34, the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, and for a short distance upon the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33. It also appears that Guiras settled on the land in dispute in 1879, and has a cabin and some cultivation thereon. Township plat was filed July 8, 1881. Guiras

made homestead entry No. 799 for the tract in contest on July 28, 1881, and Hart filed declaratory statement No. 2071 on October 3, 1881, for the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 34, and the tract in contest.

It is evident that whatever rights Guiras acquired by virtue of his entry (he acquired none by his settlement, for he was an alien until date of his entry) were subject to the prior rights acquired by virtue of Hart's settlement on the disputed 40, if he made such settlement. Whether he made settlement is the controverted point. Hart and his wife allege that he did make it, and swear that they personally notified Guiras of their claim at his first appearance. Guiras denies this, but admits that Hart ordered him to keep his stock away from the land covered by his improvements. In my judgment, this was a sufficient notice that Hart claimed the subdivision upon which his improvements should appear to be when survey was made. Guiras introduces testimony tending to show that, after date of the survey, Hart made verbal claim to a tract a mile long, that is to say, the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 33 and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 34, and did not then claim the tract in controversy. To this the reply is, in the language of the Supreme Court: "It is not important for us to know what the *claims* of the parties have been; we must look to the facts as they actually existed." (Warren v. Van Brunt, 19 Wall., 653.) The facts are that Hart had in 1876, and has ever since had, valuable and permanent improvements on the said tract; and hence when the plat of survey was filed he was entitled to claim it under the pre-emption law. Since he filed a declaratory statement covering it within the legal period, he should be allowed to prove up, and the homestead entry should be canceled.

Some confusion has been introduced into the discussion of this case by the fact that Hart has been for some years using a part of a fifth 40, as aforesaid, which is explained by the absence of the lines of survey. The legal effect of said use will best appear by supposing that this contest concerned said tract, namely, the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33. The contestee would then be able to show that Hart had valuable and permanent improvements on the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 33; that he had regularly cultivated three other 40's, making the 160 acres to which he was entitled, and that it was only by accident that he had passed over the west line of his settlement and upon the fifth 40. There is, therefore, no doubt that Hart could not maintain a claim to the last-named 40; and, if so, then his accidental use of it cannot be urged as a reason for defeating his right to the tract in contest.

Your decision is therefore reversed.

*WITHIN LIMITS OF NEW MEXICO PRIVATE LAND CLAIM.*

## RAFAEL CHACON ET AL.

Private claim of Leitensdorfer having been rejected by register and receiver, and appeal taken to General Land Office and entertained, decision of register and receiver held final, and patent to Craig, contestant of Leitensdorfer, issued by order of President, on opinion of Attorney-General; patent to Craig set aside for fraud by United States circuit court, and decision of register and receiver held not final, but appealable; appeal from decree of circuit court to United States Supreme Court taken and pending. Held—

That the order of the President is still in force, and the claim of Leitensdorfer therefore stands finally rejected, and entries in question should be allowed.

*Secretary Teller to Commissioner McFarland, June 18, 1884.*

## CASE OF RAFAEL CHACON—STATEMENT.

Mr. Rafael Chacon, June 29, 1883, offered to file pre-emption declaratory statement on W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  Sec. 7 and NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  Sec. 18, T. 33 S., R. 63 W., 6th P. M., Colorado, and tendered fees.

The register refused the filing, for the reason that the land was included in the claim of Thomas Leitensdorfer, one of the derivative claimants under the Vigil and Saint Vrain grant, his office having been directed to allow no filings or entries upon lands embraced in said claim.

Appeal was taken by Mr. Chacon to General Land Office from said refusal, July 6, 1883.

A relinquishment by John Hallum, Josephine Farnsworth, and Thomas Leitensdorfer of all interests in the land in question to the United States, dated November 6, 1881, accompanies the case.

## CASE OF JESUS MA. GARCIA—STATEMENT.

March 18, 1882, Jesus Ma. Garcia made application to enter, under homestead laws, the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  Sec. 7 and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  Sec. 8, T. 33 S., R. 63 W., 6th P. M.

Final proof having been made, final certificate was issued March 22, 1882, and afterwards case "suspended for conflict with Leitensdorfer claim."

## CASE OF RICHARD DE PALMA—STATEMENT.

With the papers in the Chacon case is a letter from Rev. Father Gubitosi to the register at Pueblo, and letter from the register inclosing it to General Land Office, from which it appears that a relinquishment from Leitensdorfer and others had been given for the S.  $\frac{1}{2}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 8, T. 33 S., R. 63 W.; that said relinquishment was forwarded to said office January 16, 1882, and the reverend father begs to be informed of the cause of delay "in letting Richard de Palma to make his application for patent."

The whole of sections 7, 8, and 18, in which are the several subdivis-

ions in question in the above cases, *are included in the Leitensdorfer claim*, as is shown by the plats filed with the register and receiver designating the land claimed.

But it is suggested that they are not within the exterior limits of the grant to Vigil and Saint Vrain, and therefore not reserved from entry. It is therefore necessary to examine as to the boundaries of said grant.

Vigil and Saint Vrain petitioned for "the land embraced within the Huerfano, Pisipa, and Gucharas Rivers, to their junction with the Arkansas and Animas."

The grant merely directed the possession referred to by the petitioners to be given, which was done by José Miguel Sanchez, justice of the peace, who designated the boundaries of the land granted, as follows:

Commencing on the line (north of the lands of Beaubien and Miranda), at 1 league east of the Animas River, a mound was erected; thence following a direct line to the Arkansas River, 1 league below the junction of the Animas and the Arkansas, the second mound was erected on the banks of said Arkansas River; and following up the Arkansas to  $1\frac{1}{2}$  league below the junction of the San Carlos River, the third mound was erected; thence following in a direct line to the south until it reaches the foot of the first mountain, 2 leagues west of the Huerfano River, the fourth mound was erected; and continuing in a direct line to the top of the mountain to the source of the aforementioned Huerfano, the fifth mound was erected; and following the summit of said mountain in an easterly direction until it intersects the line of the lands of Miranda and Beaubien, the sixth mound was erected; from thence following the dividing line of the lands of Miranda and Beaubien in an easterly direction, I came to the first mound which was erected. Closing here the boundaries of the grant, &c.

A diagram or sketch of the Vigil and Saint Vrain grant, understood to have been made by Mr. Dallas, chief of the surveying division of the General Land Office, in 1872, is found in that division. As the south line of the grant is located upon that diagram, T. 33 S., R. 63 W., in which the subdivisions in question are situated, is not included within the exterior limits of the grant.

But it will be seen by the description in the act of juridical possession given above that the south boundary of Vigil and Saint Vrain is the north line of Beaubien and Miranda; and connecting that line, as located on the official map of New Mexico in this office, with the east boundary on Mr. Dallas's sketch, the whole of T. 33 aforesaid is included within said limits.

The Beaubien and Miranda grant was not officially located until May 19, 1879. The survey, which was finally approved and patented, was made in September and October, 1877, and approved by the surveyor-general and returned to this office December 20, 1878. At the time, therefore, when Mr. Dallas made his sketch, he had nothing to guide him as to the true location of the southern boundary, and indicated it by an arbitrary line, which does not conform to the boundary as officially determined.

It being settled that these lands are within the exterior boundaries of said grant, the next question to be considered is the effect of the relinquishments referred to.

It had been the uniform practice of the General Land Office to accept relinquishments until the ownership of the Leitensdorfer claim became complicated, and for that reason, in a decision dated June 27, 1883, to the register and receiver at Pueblo, Colo., which is pending on appeal in the Department, the practice was discontinued. From the evidence produced it was held in said decision that—

In form Mrs. King was the purchaser of the whole interest; but in the deposition of Mrs. Farnsworth, introduced on the part of the motion, in which she deposed that she held nine-sixteenths of the claim in trust for Leitensdorfer, she also deposed that Hallum conveyed a small interest therein to John F. Darby, which interest she bought in her own right, and then held in her own right; and the deed introduced on the part of Leitensdorfer shows conveyance by Hallum to Mrs. Farnsworth, without reserve or condition, after the date of said deposition, of an undivided twelfth interest in the claim.

If the action of the General Land Office is to control, these relinquishments will not be accepted.

From the foregoing it would thus appear that these cases can only be passed upon the theory that the Leitensdorfer claim stands finally rejected so far as executive action goes.

What are the facts in this respect?

Several of the derivative claimants under Vigil and Saint Vrain, Leitensdorfer being one, appealed from the decision of the register and receiver upon their claims. The General Land Office entertained the appeal against objection by Craig, one of said claimants, and on appeal to the Department its decision was sustained.

Craig then made application to the President, who, upon the opinion of the Attorney-General that the decisions of the register and receiver in those cases were final, directed that evidence of title, upon the award to Craig, should be issued to him, notwithstanding the appeal therefrom, which was accordingly done. This being regarded as an authoritative denial of the jurisdiction of the Land Office and the Department over said appeals, no action has since been taken by either in regard to them.

Afterward, in a suit by Leitensdorfer against Craig to set aside the award to the latter, the United States circuit court for the district of Colorado held, in opposition to the opinion of the Attorney-General, that the decisions of the register and receiver upon the derivative claims aforesaid were subject to appeal to this Department. The decree in which this decision is embraced has been taken on appeal to the Supreme Court of the United States, and is pending, undecided. The order of the President is still in force, and the claim of Leitensdorfer, therefore, stands finally rejected.

The Leitensdorfer claim was rejected by the register and receiver.

Appeals were taken to the Department, and the Attorney-General determined that the finding of the register and receiver was final, and by order of the President this was held to be the law of the Department. This appears to conclude the Department as it now stands, and the tracts outside of the limits of lands allowed by the register and receiver ought to be treated as public lands. You will therefore allow entry and issue patents in accordance with this view of the case, and the parties herein named should be allowed to file and make final proof.

The opinion herein expressed shall only be considered as applying to the three cases under consideration, so far as the Leitensdorfer claim may have a bearing upon them. All similar cases will be considered upon their own merits.

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#### VII.—FINAL PROOF.

##### *INTERVENING ADVERSE RIGHT.*

##### *LUNNEY v. DARNELL.*

A pre-emptor who fails to make final proof within the time prescribed by law loses his right to do so after a valid adverse timber-culture claim intervenes.

*Acting Secretary Joslyn to Commissioner McFarland, July 25, 1883.*

I have considered the appeal of William Darnell from your decision of June 3, 1882, in the case of Lunney *v.* Darnell, canceling his timber-culture entry, No. 1385, Grand Forks district, Dakota.

It appears that Lunney filed declaratory statement No. 3988, May 4, 1879, alleging settlement on the tract in question April 6, 1879, and gave notice, January 30, 1882, that he would make final proof April 8, 1882. Darnell made final entry January 13, 1882.

Lunney having failed to make final proof within the period required by law, and an adverse right having intervened and been properly asserted, lost his right to complete the entry. (*Johnson v. Towsley*, 13 Wallace, p. 90.)

I refer you to the case of *Molyneux v. Young* (C. L. O., Oct., 1880), which decides the points involved herein.

Your decision is reversed.

*NOTICE—SECOND CONTEST NOT ALLOWED—DECISION IN TROY v. SOUTHERN PACIFIC RAILROAD COMPANY CONSTRUED.***MOORE v. HORNER.**

Although a pre-emptor's notice of final proof is an invitation to all persons, with or without interest, to object to the entry, it cannot operate to renew a controversy settled by formal decision of the Land Department. The decision in the Troy case held only that a defeated party might so far follow it as to see that the ruling of the Interior Department was enforced by the Commissioner of the General Land Office, and executed as ordered, and not otherwise. It did not authorize a new hearing on matters once determined.

*Secretary Teller to Commissioner McFarland, December 10, 1883.*

On February 6, 1883, on appeal by Horner, I affirmed your decision of October 15, 1881, in the case of Robert S. Moore v. John W. Horner, involving the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 10, T. 49, R. 4 E., Lake City, Colo., and awarded the tract to Moore, subject to his showing compliance with the pre-emption law on his final proof. This decision involved the merits of the controversy between the parties and settled the litigated questions. Moore then gave notice of his intention to make final proof on May 1 following, which he did, and on the same day Horner filed a protest against allowance of Moore's entry upon substantially the same grounds involved in the decided contest, and asked a hearing thereon. The local officers refused to entertain either the protest or the motion for hearing, on the ground that my decision of February 6 determined the controversy in favor of Moore, and that Horner had no rights as a contestant. Horner appealed from this ruling, and on July 3 following you affirmed their decision, but August 10 reversed it, holding that under my ruling of June 21, 1883, in the case of *Troy v. Southern Pacific Railroad Company* (Copp, July, 1883), Horner had a right to be heard on the question of Moore's compliance with the law, to cross-examine his witnesses, and to introduce counter-proof; in other words, that he might reopen the litigation and try his case a second time. Moore appealed therefrom. You rejected his appeal, and he applied for a certification of the papers to this Department, under practice rules 83 and 84, which was granted.

My decision of February 6 found, after full consideration of the testimony, that Moore was a settler on the land involved and entitled to entry thereof, subject to his final proof, and that Horner's subsequent location of Valentine scrip on the same tract was not authorized by the act of April 5, 1872. (17 Stat., 649.) The rights of the parties were thereby determined, and Horner became a stranger to the case, without the rights of a contestant, and with no greater legal interest than that of any other person; and although a pre-emptor's notice of final proof is an invitation to all persons, whether with or without interest, to object to the entry, it cannot operate to renew a controversy settled by formal decision of this Department, nor is such the fair construction of

the ruling in the case of Troy. That case held only that a defeated party might so far follow it as to see that the ruling of this Department was enforced by the Commissioner of the General Land Office and executed as ordered, and not otherwise, but it did not authorize a new hearing upon matters once determined.

I am of the opinion that after my decision against Horner, and he became a stranger to the record, he was without the right of appeal from the decision of the local officers refusing to entertain his protest and to grant him a hearing on matters once determined, and that the appeal being thus improperly allowed, your decision thereon and any subsequent proceeding based thereon were without legal effect.

The case is also *res judicata* under the general doctrine that a decision by a competent tribunal reaches not only the points upon which decision was actually required under the issue between the parties, but any point which properly belonged to the issue which the parties might by reasonable diligence have litigated. Said Chief Justice Shaw (*Greene v. Greene*, 2 Gray, 361), "where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible." (See also *Gould v. R. R. Co.*, 1 Otto, 526; *U. S. v. Flint*, 4 Sawyer, 42; and *U. S. v. Throckmorton*, 8 Otto, 61).

The merits of the controversy between these parties having been once considered and adjudicated, and Moore having made satisfactory final proof, the case cannot be reopened under Horner's protest and application for further hearing, but Moore must be allowed to enter the tract in dispute.

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#### INSTRUCTIONS—ADVERSE CLAIMS.

Action to be taken by parties seeking to make proof on pre-emption claims, where there are adverse claims of record.

*Commissioner McFarland to register and receiver, Olympia, Wash., December 22, 1883.*

GENTLEMEN: In your letter of the 5th instant you ask to be instructed upon the following point, to wit: Where a pre-emptor or homesteader presents his notice of intention to make final proof upon his claim, and an examination of the records discloses the fact that there exists upon the same tract an uncancelled homestead entry or declaratory statement, is it necessary for the party thus seeking to make final proof to give other notice to such adverse claimant than the ordinary notice of his intention to make final proof; or, should such pre-emptor or homesteader be required to clear the record of any adverse claim by procuring the relinquishment of same, or by filing contest affidavit, &c?

In reply I have to state that the form of action will depend entirely upon the *record status* of the respective claims.

If the record shows that the party applying to make proof has priority in the matter of the inception of his claim, his method of procedure is regulated by the act of March 3, 1879, and the instructions thereunder. (See General Circular, October 1, 1880.)

A prior adverse claimant of record is not bound to take notice of the application of another party to make proof. The time within which he is required to make proof is fixed by law, and the only action of an adverse claimant of which he is bound to take notice is one impeaching the merits of his claim—his good faith in compliance with the requirements of the law; and said action is regulated by the act of June 3, 1878, and the rules of practice in relation to contests. (See Rules of Practice, pp. 1, 2.)

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*NOTICE—HEARING—RIGHT OF ADVERSE PARTY.*

*HOUGE v. TREMAIN.*

Publication of notice of intention to make proof is invitation to all persons, whether with or without interest, to appear and contest entry.

*Commissioner McFarland to register and receiver, Mitchell, Dak., January 15, 1884.*

**GENTLEMEN:** The records of this office show that Matilda O. Houge filed declaratory statement No. 15,659 October 24, settlement October 20, 1881, for the NE.  $\frac{1}{4}$  Sec. 33, 105, 58; that she made cash entry No. 7,234 for said tract May 29, 1882.

William D. Tremain made homestead entry No. 18,771 March 30, 1882, embracing the same land. April 24, 1882, Houge filed notice of her intention to offer proof and payment May 29 following, which notice was published the usual period, and specially cited Tremain to appear at the time and place mentioned therein, and show cause why her entry should not be allowed and his homestead entry canceled for conflict with the declaratory statement. Tremain appeared, and requested in writing the privilege of cross-examining Houge and her witnesses, which request you denied. From your action Tremain appealed. It has been repeatedly held by the Department that "a pre-emptor's notice of final proof is an invitation to all persons, whether with or without interest, to object to the entry. (*Manderfield and O'Connor v. McKinsey*; *The Reporter*, August, 1883, 225; *Moore v. Horner*, decided December 10, 1883.)

It was competent, therefore, for Tremain to make his objection either by cross-examining Houge and her witnesses, or by introducing counter-proof, or both. Nor was it proper for you to allow Houge's entry under the circumstances of this case.

Tremain's appeal is sustained; and you will appoint a time and place for a hearing, with notice to both parties. Transmit the testimony

taken, with your joint opinion thereon. Houge's entry is suspended, awaiting the final determination of the case.

Under date of August 6, 1883, Edward Devy, esq., of Mitchell, Dak., inquired why patent does not issue on Houge's entry. Please inform him of the contents of this letter as the reason.

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*GOOD FAITH—DECISION IN ATHERTON v. FOWLER.*

*DICKSON v. SCHLATER.*

Notwithstanding failure to properly apply for the land involved, the Supreme Court decision in *Atherton v. Fowler* is held to protect Dickson's rights.

*Acting Secretary Joslyn to Commissioner McFarland, March 19, 1884.*

I have considered the case of *J. R. Dickson v. Gervais Schlater*, involving lot 1 of Sec. 7, and lots 1 and 2 of Sec. 8, T. 26 S., R. 37 E., Gainesville, Fla., on appeal from your decision of November 8, 1883, adverse to the latter.

Dickson, on the 15th of March, 1883, presented his pre-emption declaratory statement for the tracts described, alleging settlement January 1, 1883.

On January 6, 1883, one Enoch Bolles had filed homestead application for the same tracts. The local office rejected Dickson's pre-emption filing, for the reason that it was not made within the statutory period of thirty days after settlement, and because at the date of filing there existed an adverse claim to the land. The adverse claim (which was Bolles's homestead entry) was canceled for relinquishment April 23, 1883, and on the same day Gervais Schlater, the appellant, made homestead entry for the land. Subsequently Dickson filed in the local office an affidavit setting forth that he settled on the tract in question in July, 1881; that he has erected a dwelling-house and made other valuable improvements, such as clearing ground and planting orange trees and pine-apple plants; that he has resided on said tract ever since his settlement in 1881; that he made application to enter under the homestead laws, tendering fees, but was refused, on the ground that the land was not then subject to homestead or pre-emption; that as soon as he ascertained that it was subject to entry he applied to file his declaratory statement, believing that as an actual settler his claim would relate back so as to take effect when the land became subject to entry, which was December 14, 1882.

He also claims that whatever of objection there may have been to his filing because of Bolles's homestead application having been filed before he presented his declaratory statement, such objection was removed by the cancellation of Bolles's entry, and his declaratory statement should then have been recognized.

He further avers that his claim has been recognized by the local

authorities to the extent of exacting taxes on his improvements, which taxes he has paid. His petition, containing the foregoing averments, which are fully corroborated, and praying that he be allowed to substantiate his claim and secure the land which he has selected and occupied as his home, was by the register and receiver forwarded to your office, with their joint opinion that relief should be granted the petitioner.

You considered the case not as on appeal, the petition not having been filed within the time prescribed by the rules of practice relative to appeals, but as one involving rights which were entitled to attention and consideration, even though tardily asserted. Upon a full examination of the case you find that the petitioner had a home and valuable improvements upon the land long before any adverse claim attached, and that his good faith was in a measure evinced by his homestead application, which could not be accepted because presented before the tracts were subject to entry; and in view of all the facts and circumstances, including the good faith of the petitioner on the one hand and the apparent want of good faith of the homestead applicant on the other, you conclude that Dickson's filing should be allowed as of the date of presentation, and you have given directions accordingly. It is from this finding and conclusion that the appeal is brought.

Upon a careful consideration of the case in all its phases, I am convinced that your decision is correct and your action proper. Under the rule laid down by the Supreme Court in the case of *Atherton v. Fowler* (96 U. S., 513) Dickson undoubtedly had the superior right to the land by reason of his settlement, continued occupancy, and improvements. Your decision is affirmed.

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## VIII.—FORFEITURE.

### *FRAUD—PAYMENT BY SCRIP—REPAYMENT.*

R. F. PETTIGREW ET AL.

Where a pre-emptor swears falsely, and his entry is canceled because of fraud, the Supreme Court scrip used in payment of his claim is forfeited, and cannot be returned even to innocent vendees of the claimant.

*Commissioner McFarland to Drummond & Bradford, Washington, D. C., August 8, 1883.*

I have considered the application filed by you, as attorneys for R. F. Pettigrew and Thos. N. Brown, for return of Supreme Court scrip, Nos. 154 and 155, located March 19, 1880, by Charles Curtis, upon the NE.  $\frac{1}{4}$  Sec. 28, T. 111, R. 56, Dakota. Said locations were canceled by this office February 10, 1883, on the ground that the pre-emptor's affidavits and testimony were false and fraudulent.

Sec. 2262 Revised Statutes provides in substance that if any person making oath, as therein provided, 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.

You insist that said scrip cannot be declared forfeited under said section, as the same is not money within the meaning thereof.

Said scrip was issued by this office pursuant to the decrees of the Supreme Court, where it has been adjudged that the United States has sold as public lands or otherwise appropriated lands covered by grants to individuals; and, by act of January 28, 1879 (20 Stat., 274), is required to "be received from actual settlers only, in payment of pre-emption claims or in commutation of homestead claims in the same manner and to the same extent as is now authorized by law in cases of military bounty land warrants."

Section 2277 Revised Statutes provides that "all warrants for military bounty lands which are issued under any law of the United States shall be received in payment of pre-emption rights at the rate of \$1.25 per acre for the quantity of land therein specified, but where the land is rated at \$1.25 per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof."

I am inclined to the opinion that for the purpose of making payment for a pre-emption or commuted homestead claim, such scrip is money within the meaning of Sec. 2262. The language used in the act is, "shall be received in payment \* \* \* at the rate of \$1.25 per acre."

Under the pre-emption law, land might be entered upon the payment of a price. (Sec. 2259, Rev. Stat.)

Price without further explanatory words means money.

Money has been defined to mean a legal tender, so made by law.

This scrip was made receivable in payment for lands in pre-emption cases at the price of \$1.25 per acre; it possessed all the attributes of a legal tender for this purpose. It was the price of the land.

It would seem, therefore, that whenever a given thing is by law made receivable in payment for lands at a stated price, the consideration is the equivalent of money within the meaning of the statute, and that if the entry is fraudulent the consideration is forfeited. It is certain that the reason of the law is as strong in one case as in the other.

You also urge that Pettigrew and Brown are innocent purchasers, "and as such were undoubtedly exempt from either a forfeiture of the land or the scrip."

In this you err. The doctrine of "bona fide purchaser" does not apply to one who purchases of a pre-emptor before patent issues. The rule "*caveat emptor*" is particularly applicable; and if the entries are fraudulent or void, the purchasers acquire nothing.

They take no better title than their vendors have, and this Department has full authority to cancel their entries for invalidity or fraud. They purchase only an equity, and must abide the disposition made of

the cases by this Department. (*Whittaker ex rel. v. Southern Pacific R. R.*, Copp, 1882, v. 2, p. 924, and authorities there cited.)

The application is denied, subject to appeal within the usual time.

*Affirmed by Secretary, May 9, 1884.*

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## IX.—MARRIED WOMAN.

### DIVORCE—REMARRIAGE.

#### UNDERWOOD *v.* EVES.

The marriage of the defendant to the man from whom she had previously been divorced is held to be valid under the Dakota code. As a married woman she cannot enter the land in question.

*Secretary Teller to Commissioner McFarland, November 5, 1883.*

I have examined the case of Solomon S. Underwood *v.* Clara Eves, involving the SW.  $\frac{1}{4}$  of Sec. 5, T. 122 N., R. 46 W., Benson, Minn., on appeal from your decision of September 18, 1882, awarding the land to Underwood.

The tract was formerly covered by homestead entry No. 8,457, which was contested by Underwood January 16, 1880, relinquishment made and filed, and by reason thereof entry canceled May 31, 1880, and noted on records of local office June 9, same year.

Underwood filed declaratory statement No. 7,538, for the tract, June 17, alleging settlement June 15, 1880; and Clara Eves filed declaratory statement No. 7,539, June 19, alleging settlement June 9, 1880.

September 14, 1881, both parties, pursuant to notice, appeared and gave testimony, from which I find the following facts:

Underwood made claim as contestant under the act of May 14, 1880. He settled upon the land June 16, 1880. He built a good frame house, 24 feet square, worth about \$300, and moved into it, with his wife and children, July 9, 1880. July 31 he went to Long Lake to harvest some crops he had there. He took his family, but left his household goods in the house. He returned August 21, with his wife, but they left again, August 23, to stack the grain at Long Lake. They returned to the claim September 14 or 15, and Underwood put up some twenty tons of hay for the winter. October 6 he went to Long Lake to do thrashing. His wife accompanied him at this time, because she feared to remain at the house in the absence of her husband on account of violent language and threats affecting her, made by Frank Eves, husband (?) of said Clara Eves. The family again returned to the claim about the 15th of October, at which time they found that the house had been broken open and the greater part of the furniture and household goods removed. Underwood and family again went to Long Lake to complete the thrashing. While so absent said Frank Eves, on October 24, moved his family into Underwood's house on the claim, and on the 26th day of November,

1880, moved the house on the section line between Secs. 5 and 8, leaving one-half of it standing upon the land in question, and continued to occupy it, with said Clara Eves. Underwood did not cultivate the land or do any breaking except for the purpose of a fire guard.

Clara Eves is about thirty years of age. She was married to Frank Eves some five years before this contest. By such marriage there was one child. About three years after the marriage, and the fall before she filed for the land in question, she obtained a divorce in the State of Minnesota. A copy of the decree is attached to the testimony as an exhibit, but does not state the ground of the divorce. No defense was interposed. Immediately upon its being granted, Clara, according to her own testimony, hired out to Frank, and the domestic relation changed from that of husband and wife to that of master and servant; and they, with their child, which had been decreed to the mother, continued to occupy the same domicile. On the 10th day of June, 1881, Frank and Clara, being within a convenient distance of Dakota Territory, went there and executed a brief written agreement, which they made oath to before a notary public, reciting "that they are of sufficient age and capable of contracting marriage, and that they will have each other for husband and wife, for better and worse, and nothing but death shall part them." They then resumed the relation of husband and wife until the wife, as she claims, was advised by a lawyer that the contract of marriage made in Dakota was not valid, because it was made before a notary public; and thereupon they again assumed the relation of master and servant. At the time of making the marriage contract in Dakota Clara had been indicted in Minnesota "for cohabiting with Frank Eves as his wife without a marriage." During the whole period of these different phases of the domestic conditions there seems to have existed the most friendly relation between the parties, and both the testimony and the record made by the register and receiver, during the somewhat protracted trial in this case, show that she was most subservient to the wishes of her husband and employer.

She claims that she is unmarried and the head of a family, and therefore a qualified pre-emptor, because of the invalidity of the Dakota contract.

The civil code of Dakota provides that marriage may be solemnized before a justice of the supreme court, judge of probate court, justice of peace, a mayor, minister or priest of any denomination; but solemnization is not necessary to the validity of a marriage contract. Section 34 of Part III declares that "marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." And section 35 provides that "consent to, and subsequent consummation of, marriage may be manifested

in any form, and may be proved under the same general rules of evidence as facts in other cases."

In this case consent is sufficiently manifest by the instrument executed before the notary public, and the consummation abundantly proved, if, indeed, under the circumstances any direct proof upon that question were necessary. Without considering the question whether the remarriage was valid at common law, as found by you, I think it was valid under the Dakota code.

The evidence discloses that Frank Eves was attempting to obtain in his own right more land than he was entitled to under the settlement laws; and although there is no direct proof upon the subject, the whole case leads to an almost irresistible conclusion that the divorce was a part of the scheme to obtain more land by means of his wife. The remarriage in Dakota is strongly suggestive that it constituted the best defense to the pending indictment in Minnesota.

The residence of Clara Eves upon the tract in question was not in good faith. She made a pretense of occupying a shanty situate on the land near her husband's claim, but she had no stove or means of cooking there, and for seven months of the colder season following her alleged settlement she lived in the house with Frank Eves, where all the time between the marriages she was acting in the capacity of a servant. After the Underwood house was moved so that it stood partly upon the land claimed by each, it became the residence of both. When Frank was obliged to relinquish his homestead claim because of having made another in Wisconsin, Clara entered it as a homestead in her own right, which act was inconsistent with the good faith of her residence upon the land in contention, which she was attempting to hold at the same time.

I am of the opinion that Clara Eves is not a qualified pre-emptor, and that her residence upon the land was not sufficient nor in good faith.

The register and receiver were of the opinion that Underwood's residence upon the land was not sufficient to justify awarding the land to him. His good faith is, however, shown by initiating the contest, upon the successful result of which he claimed the right to file, by building a valuable house, and by establishing and making repeated attempts to maintain his residence. The necessity of his temporary absence to secure his crops at Long Lake is not disputed. Frank Eves is proved to be a violent man, and his threats, and acts connected with them, although resulting in no personal violence, were sufficient to intimidate Underwood and his family, and to afford a reasonable excuse for not following up the residence which he had established in good faith and made a reasonable effort to maintain. I therefore concur with you in awarding the land to him, upon future compliance with law, and affirm your decision.

**X.—MILITARY RESERVATION.***RELINQUISHMENT—DISPOSAL OF LAND—ENTRIES—ACTS OF CONGRESS.***FORT BROOKE, FLORIDA.**

The land released from reservation is, by act of August 18, 1856, placed in control of General Land Office for disposal.

Manner of disposal modified by act of July 2, 1854 (R. S., 2364); minimum price to be affixed, &c.; and act of August 3, 1846 (R. S., 2455), empowering and requiring the Commissioner to order the land into market to be appraised and sold, &c. It is not subject to entry.

*Commissioner McFarland to register and receiver, Gainesville, Fla.; December 17, 1883.*

**GENTLEMEN:** The several applications to your office to make entries upon the land lately constituting the Fort Brooke military reservation at Tampa, Fla., bring the status of said land, under the laws applicable to the case, before me for consideration.

The reservation mentioned was originally established by Executive order of December 10, 1830, covering an area of 16 miles square, and after various modifications and reductions the remainder, as it then stood, containing 148.11 acres, was duly relinquished in writing by the Secretary of War to the Secretary of the Interior, January 4, 1883, under the act of August 18, 1856, and on the 17th of March, 1883, a subdivision plat of the relinquished tract was sent to your address, with my letter of that date, as follows:

Herewith inclosed I transmit for the files of your office an approved diagram of the subdivision into lots of the late Fort Brooke military reservation in Florida, in Secs. 18 and 19, T. 29 S., R. 19 E., and Sec. 24, T. 29 S., R. 18 E., relinquished by the Secretary of War to this Department in writing under date of January 4, 1883.

The plat referred to was received at your office, as appears by your acknowledgment, at 4.45 o'clock p. m., March 22, 1883.

On the 2d of April, 1883, I instructed you by telegram to allow no entries upon any land within Fort Brooke military reservation.

The following is the clause of the act of August 18, 1856 (11 Stat., 87), above referred to, which relates to the subject under consideration:

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be, and are hereby, placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: *Provided*, That said lands shall not be so placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing, shall be filed and recorded.

The 6th section of the act of June 12, 1858 (11 Stat., 336), which re-

pealed "all existing laws or parts of laws which authorize the sale of military sites which are or may become useless for military purposes," contained the following exception :

*Provided further,* That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to certain reservations in the State of Florida, shall continue in force.

The act of August 18, 1856, then excepted from this repealing section, not being a general law, but limited to the State of Florida, and so "local" in its character, was excepted from the general repealing clause of the Revised Statutes (Rev. Stat., 5596), and remains in force.

It is shown by sections 2257, 2258, and 2389 that lands constituting Government reservations are not subject to pre-emption nor to location as homesteads; and by the laws applicable to such lands they are regarded as a distinct class of the public lands after their relinquishment from reservation, and are so treated in proceedings for their disposal. The reason for this distinction is apparent. In most cases the reservations are in situations where towns and settlements grow up around them, greatly increasing their value over that of common agricultural land, the latter being the class of land intended to be opened to pre-emption and homestead settlement.

By the act of March 3, 1819 (3 Stat., 520), the military sites belonging to the United States, which had been found, or which might become, useless for military purposes, were to be sold by the Secretary of War. The act of August 18, 1856, aforesaid, succeeded, relating to the military reserves in Florida, and was followed by the act of June 12, 1858, repealing all laws providing for the sale of military sites, except that of 1856 aforesaid.

From the passage of the last-named act most of the Government reservations found to be unnecessary for public use have been relinquished by special acts of Congress, and in a great majority of the cases the appraisal and sale of the land have been directed; and in every case where it was intended to open the land to entry it has been plainly so expressed in the terms of the act. (See 12 Stat., 70, section 3; 15 *Ib.*, 123; 16 *Ib.*, 275, 430; 17 *Ib.*, 335; 18 *Ib.*, 85, 201; 19 *Ib.*, 94, 132, 406; 20 *Ib.*, 276; 21 *Ib.*, 69, 172, 198, 325.) The act of August 28, 1856, however, remained in force, as shown above, and authorized relinquishments in Florida, in the manner in which it has been made of the land in question.

By said act the land relinquished is "placed in the control of the General Land Office to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States." Whether it was intended to make it subject to entry, other than by cash sale, is not now the question (though that, considering the special character of the land and the uniform dealing of Congress with lands similarly situated, may admit of doubt); the "control" to be exercised by the head of this office is, undoubtedly, to require and see that the land

be disposed of according to the laws applicable to the case at the time of the relinquishment and the powers conferred for that purpose.

By the act of July 2, 1864 (13 Stat., 374), which is carried into the Revised Statutes, section 2364, it is provided that—

Whenever any reservation of public lands is brought into market the Commissioner of the General Land Office shall affix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

Statutes are to be construed and applied according to their intent, and that is to be determined, if possible, from the language employed. (Sedgwick on Construction, 194, *et seq.*) Words could not be made to convey meaning plainer than those which compose this brief section. The provision is general and without exception. The lands of "any reservation," when "brought into market," are made subject to it. Being thus comprehensive it must include the land lately composing the Fort Brooke reservation, and when brought into market govern the manner of its disposal; and to that extent it modifies the former law.

The public lands were originally brought into market by proclamation of the President, issued for that purpose; but by section 5 of the act of August 3, 1846 (9 Stat., 51, and Revised Statutes 2455), it is provided that—

It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, *and such other isolated or disconnected tracts or parcels of unoffered lands which in his judgment it would be proper to expose to sale in like manner.* But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner.

This statute is peculiarly applicable to the case of the land in question, it being an isolated or disconnected tract of only 148.11 acres, but lying contiguous to the town of Tampa, being of greatly enhanced value as compared with the mass of the public land, and therefore, in my judgment, proper and required to be exposed to sale in the manner therein prescribed.

It will thus be seen, if I am right in the conclusions formed, that at the time of the relinquishment the land relinquished was subject to the three acts quoted above: the law of August 18, 1856, which placed it in my official control for disposal; the law of July 2, 1864 (Rev. Stat., 2364), modifying that of 1856 as to the manner of disposal, and requiring me, whenever the land should be brought into market, to fix a minimum price, below which it cannot be sold; and the law of August 3, 1846, which empowers me, and thereby makes it my duty (it being in my judgment proper and necessary in view of the public interest involved to do so), to order the land in question into market, that it may be appraised and sold as the law contemplates and requires. I there-

fore hold that the land in question has not been and is not subject to entry, but to disposal as above set forth.

You will notify the parties in interest, or their attorneys residing in Florida, of this decision, and of their right of appeal, and advise this office at once of the date and manner of giving such notice.

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*ENTRIES HELD FOR CANCELLATION.*

SAME.

*Commissioner McFarland to register and receiver, Gainesville, Fla., January 22, 1884.*

GENTLEMEN: Referring to my decision of the 17th ultimo, in the matter of the status of the lands embraced in the Fort Brooke military reservation, Tampa, Fla., in which it was held that they could not be disposed of under the homestead or pre-emption laws or by scrip location, but must be sold at public auction, I have now to advise you that the following claims of record for said lands are held for cancellation, subject to appeal, viz:

Homestead entry No. 11,627, made March 22, 1883, by Edmond S. Carew, for 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.; declaratory statement No. 564, filed by Clifford Herrick, March 26, 1883, for the above described tracts, alleging settlement March 21, 1883; and declaratory statement No. 569, filed by Lewis Bell, March 30, 1883, for the above described tracts, alleging settlement March 25, 1883.

You will advise the parties in interest of this action, and at the expiration of the period allowed for appeal make the usual report.

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*REVIEW OF CASE—EFFECT OF FILING PLAT—ACTS APPLICABLE.*

SAME.

In the absence of any instructions, filing of plat did not foreclose further action by Commissioner under provisions of section 2364, Revised Statutes. Entry and filings upon tracts in question were premature.

*Secretary Teller to Commissioner McFarland, May 16, 1884.*

The questions relating to the Fort Brooke military reservation at Tampa, Fla., are presented to me by your letters of December 17 and January 22 last and by the several appeals from your decisions contained therein. (See 10 Copp, 319.)

This reservation, of an area of sixteen miles square, was first established by Executive order of December 10, 1830. At the time the present controversy arose it had been reduced to 148.11 acres, and that amount only is the subject of this controversy.

The 148.11 acres came within your control by the written relinquishment of January 4, 1883, made by the Secretary of War to the Secretary of the Interior. On the 16th day of March following you approved the survey of said land and made the following certificate:

I hereby certify that the above diagram of Secs. 18 and 19, T. 29 S., R. 19 E., and Sec. 24, T. 29 S., R. 18 E., Florida, show the lottings consequent upon the restoration to the public domain of that portion of that portion of the Fort Brooke military reservation relinquished by the Secretary of War January 4, 1883.

On the next day you sent to the local office at Gainesville said subdivision plat of said tract, accompanied by the following letter, viz:

Herewith inclosed I transmit, for the files of your office, an approved diagram of the subdivision into lots of the late Fort Brooke military reservation in Florida, in Secs. 18 and 19, T. 29 S., R. 19 E., and Sec. 24, T. 29 S., R. 18 E., relinquished by the Secretary of War to this Department in writing under date of January 4, 1883.

The plat was received at the local office March 22, 1883, at 4.45 o'clock p. m. On the same day Edmond S. Carew made homestead entry of said land, which was received and filed at 4.50 o'clock p. m.

On the 26th and 30th of the same month Clifford Herrick and Lewis Bell, respectively, filed declaratory statement for said land.

April 2 following you instructed the local officers by telegram to allow no entries upon said land. Subsequently, in the same month, several parties applied to file on said tract, but their applications were rejected because of your said instruction.

You then invited the several claimants to submit reasons why said tract should not be disposed of at public sale. After considering the reasons submitted, you rendered your said decisions of December 17, 1883, and January 22, 1884, to the effect that the land was not subject to entry, but that it was your duty to order it "into market, that it may be appraised and sold as the law contemplates and requires," and directed the entry and filings to be canceled.

The several parties have appeared by respective counsel, taken appeals from your decision, and filed briefs thereon. The land in question lies contiguous to the town of Tampa, and during the period of its reservation has enhanced in value, and is now much more valuable than public lands generally subject to filing and entry. It is claimed by counsel for some of the claimants that, while you might have offered the lands for sale in the first instance, your action in filing the plat without any reservation or direction to withhold the lands opened them to entry and pre-emption as other public lands, and now precludes your ignoring the claims entered and filed in the local office against them.

A brief reference to the history of Florida military reservations will enable us the better to comprehend the subsequent legislation relating to their disposition.

During the war with the Seminole Indians it became necessary to establish military posts throughout the hostile country. In order to

prevent evil-disposed persons from carrying on contraband traffic with soldiers stationed at these posts, and for other purposes of occupation and military operations, many reservations were made of the public lands adjoining such posts. In some instances these reservations were 24 miles square and embraced several townships of land. A permanent reservation of these lands for military purposes was not in contemplation, and the restoration of the greater part of them to the public domain was undoubtedly expected to follow the cessation of hostilities.

The act of March 3, 1819 (3 Stat., 520), made the first provision for the disposal of useless military reservations. It authorized the Secretary of War, "under the direction of the President, to cause to be sold such military sites, belonging to the United States, as may be found or become useless for military purposes."

This statute only applied to the reservations existing at the time of its enactment. It had no application to reservations subsequently made. (*U. S. v. Railroad Bridge Co.*, 6 McLean, 517.)

It was provided by a clause in the appropriation bill for the civil expenses of the Government, approved August 18, 1856 (11 Stat., 87) :

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands in the opinion of the Secretary of War are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: *Provided*, That said lands shall not be so placed under control of said General Land Office, until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing, shall be filed and recorded.

By section 6 of the act of June 12, 1858 (11 Stat., 332), making appropriations for the support of the Army, it was provided:

That all the existing laws or parts of laws which authorize the sale of military sites, which are or may become useless for military purposes, be, and the same are hereby, repealed, and said lands shall not be subject to sale or pre-emption under any of the laws of the United States: *Provided further*, That the provisions of the act of August 18, 1856, relative to certain reservations in the State of Florida, shall continue in force.

The act of July 2, 1864 (13 Stat., 374), section 2364 of the Revised Statutes, is as follows, viz:

Whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

Section 5 of the act of August 3, 1846 (9 Stat., 51), section 2455 of the Revised Statutes, provides that "It may be lawful for the Commissioner of the General Land Office to order into market after due notice, without the formality of a proclamation of the President," such "isolated or

disconnected tracts or parcels of unoffered lands, which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner."

The repealing section 5596 of the Revised Statutes contains the following proviso :

*Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect, any appropriation or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force.

From a review of these various enactments affecting the sale of useless military reservations, I think it is evident that the act of August 18, 1856, relating to the sale of military reservations in Florida, has not been repealed, but is still in force.

I am further of opinion that section 2364 of the Revised Statutes is not inconsistent with said act of August 18, 1856, and that, as it is a general statute, without restriction, it applies to the disposition and sale of reservations in Florida as elsewhere.

The act of 1856 provides that such lands shall "be disposed of and sold in the same manner and under the same regulations as other public lands," and section 2364 provides that "whenever any reservation of public lands is brought into market," the Commissioner "shall fix a minimum price, not less than \$1.25 per acre, below which such lands shall not be disposed of."

But, if this construction be conceded, it is contended on the part of these claimants that your action in filing the plat, without instructions to withhold the lands from entry, restored them absolutely to the public domain and authorized the initiation of said claims, and that you cannot now reject them and dispose of the lands in any other manner.

I do not agree with this view of the case. You sent the plat to the local office to be filed, but you neither instructed the officers to open the lands for settlement nor to withhold them. Perhaps you might have disregarded the provisions of section 2364 (considering them only as directory), and instructed the local officers to receive entries and filings for the tracts. In the absence of any instructions, I do not think the filing of the plat of itself foreclosed any further action on your part and precluded you from applying to the lands the provisions of that section intrusted to your office.

The act of 1856 and section 2364 must be read together. Together they make the general law for the disposition by you of these Florida military reservations, and claimants are charged with notice of the whole law upon the subject.

In *Shepley v. Cowan* (91 U. S., 330) it was held that—

Whenever in the disposition of the public lands any action is required to be taken by an officer of the land department, all proceedings tending to defeat such action are impliedly inhibited. The allowance of selections by States, or of pre-emptions by individuals of lands which might be included within grants to others, might interfere, and, in many instances, would interfere, with the accomplishment of the purposes of the Government.

I think the entry and filings upon these tracts were premature.

It is probably true, as asserted by these claimants, that in the course of the reduction of the Fort Brooke reservation from 16 square miles to the present dimension, entries and filings have been allowed and have gone to patent. What instructions were given or the particular manner in which this was done does not appear, nor is it important. Such action could not render obsolete the provisions of section 2364, nor prevent their exercise in the present case. 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.

The theory of the appraisal before sale of these lands is that time enhances their value by increase of population surrounding them, as the fort or post on the frontier or in the West is usually the nucleus of a settlement which grows into a town or city. (*The Public Domain*, 249.)

Speaking of lands generally which have been in a state of reservation, Attorney-General Butler says:

One of the most important points to be observed in the execution of the law is the securing to all persons a fair and equal opportunity to become purchasers of the public lands \* \* \*, and to allow them to be entered by any particular individual before public notice has been given that they are subject to private entry would in most cases give to such individual a preference over the rest of the community. (3 Ops., 274.)

I affirm your said decisions.

## XI.—NATURALIZATION.

W. S. JACKSON.

The daughter of an alien who, after filing his declaration of intention to become a citizen, died before taking out final papers, is deemed a citizen upon taking the prescribed oath. Before doing so she may initiate a pre-emption claim.

*Commissioner McFarland to W. S. Jackson, Streator, Ill., March 22, 1883.*

Relative to the right of a party, who has made a pre-emption entry, claiming the right of citizenship through the naturalization of her father while she was a minor, but who now finds that her father declared his intention to become a citizen, and died without taking out his naturalization papers, I have to state that section 2168 Rev. Stat. of the United States provides that when any alien, who has declared his intention to become a citizen, dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law.

Under this statute, the declaration of the deceased husband and father becomes in law the declaration of the widow and children, thus supplementing the statutes that make the citizenship of the husband or father the citizenship of the wife or children.

In the latter case (Sec. 2172 Rev. Stat.) it is provided that the children shall be deemed citizens if they were under twenty-one years of age at the time of the naturalization of their parents.

In section 2168 the word "children" is used in its natural sense, and is not qualified by reference to minority.

In this case the period of residence of the widow and children is immaterial, nor is any distinction made between minor children and adults. (Hon. C. P. Daly, Ch. J., N. Y. C. C. P., in Am. Cyclopædia, ed. 1881, v. 12, p. 164.)

I construe the words in section 2168, "upon taking the oaths prescribed by law," to refer to the final oaths required upon admission to citizenship.

The pre-emption laws provide that entries of the public lands may be made by persons who are citizens of the United States or have "filed a declaration of intention to become such."

In the case submitted by you, therefore, the declaration of intention by the father being in law the declaration of the daughter, she is legally qualified to exercise the right of pre-emption.

**BAUGHN v. BUSSARD.**

*Secretary Teller to Commissioner McFarland, November 24, 1883.*

Bussard is an alien born, and was under the age of twenty-one years when he arrived in this country with his father, also alien born. The latter has declared his intention to become a citizen of the United States, but has not been naturalized. The son has not, therefore, acquired the right of citizenship through his father under section 2172 of the Revised Statutes, which limits such right to the children of persons who have been naturalized. The mere filing of a declaration to become a citizen is insufficient for that purpose. Nor has the son, the defendant, filed a declaration to become a citizen under section 2167, although he is above the age of twenty-one years, and has resided within the United States a sufficiently long time to authorize such declaration. He is, therefore, still an alien, and was not qualified to make entry of the tract, and the same must be canceled.

Your decision is affirmed.

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**XII.—PRACTICE.****APPEAL TO COMMISSIONER.****BENNETT v. FURMAN.**

Under rule 93 of the Rules of Practice in land cases, a copy of notice of appeal and specifications of error and argument is not required to be served on the opposite party when the appeal is taken to the Commissioner from the decision of the register and receiver.

*Secretary Teller to Commissioner McFarland, May 24, 1883.*

You transmitted to me on August 8 last, in pursuance of my letter of the 2d of same month, under Rule of Practice 83, the papers in the case of Frank A. Bennett *v.* James C. Furman, involving certain lands in Sec. 24, T. 8, R. 42 E., La Grande, Oreg.

It appears that Furman filed declaratory statement March 11, alleging settlement March 9, 1881, and that Bennett filed declaratory statement March 18, alleging settlement March 8, 1881. After due publication of notice, Furman offered his proof and payment on September 14, 1881, which were rejected, because on the preceding day Bennett filed an affidavit of contest and protest against allowance of Furman's entry of the tract. In view of the testimony submitted at the hearing, the local officers recommended (November 4, 1881) that the contest be dismissed, and that Furman's entry be allowed.

Bennett filed an appeal therefrom, on December 3 following, and on December 26 Furman moved to dismiss the appeal, because copies of the notice of appeal, specifications of error, and argument were not

served on him. On April 13, 1882, you granted the motion, holding that such service was required by Rule of Practice 93.

This was erroneous. Rule 93 requires service of such papers only in appeals *from your* decisions to this Department, and no rule requires their service on appeal from the local officers *to you*. (*Lynch v. Merrifield, Copp, December, 1882*.)

You will, therefore, reinstate the case on Bennett's appeal, and consider the case on its merits; and in view of the long delay in its disposition, you will give it early attention.

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*IN LOCAL OFFICE.*

**WALKER v. SEWELL.**

A clerk *de facto* in the office of the register, with the register's knowledge and sanction, is competent to receive applications and give them legal effect.

*Secretary Teller to Commissioner McFarland, July 10, 1883.*

I have considered the case of Thomas B. Walker *v.* William Sewell, involving the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 26, T. 6 N., R. 2 W., Salt Lake City, Utah, on appeal by Walker from your decision of April 17, 1882, holding his cash entry for the tract for cancellation, and allowing the homestead entry of Sewell to remain intact.

It appears that Joseph Sewell made homestead entry of the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the section in March, 1869, and that Walker filed declaratory statement for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  in November, 1869, alleging settlement the same day, and that in order to secure an amendment of his filing to embrace the whole SE.  $\frac{1}{4}$ , he instituted a contest against Sewell for abandonment, which resulted in the cancellation of Sewell's entry, February 13, 1871.

William Sewell made homestead entry of said W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  March 14, 1871, and in June following a trial was had between Walker and William Sewell to determine their respective rights. In April, 1872, your office decided that Walker had not resided upon nor improved said W.  $\frac{1}{2}$ , as required by law, nor made formal application to amend his filing to embrace that tract, but that the tract was subject to the first legal applicant. Without appealing from this decision, Walker was (erroneously) allowed, June 24, 1872, to make pre-emption cash entry for the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ . In 1874, and also in 1876, he applied for a rehearing of the case to enable him to show that he was the first legal applicant for the tract after cancellation of Joseph Sewell's entry. These were refused by your office, but June 12, 1877, Secretary Schurz ordered a hearing for that purpose, and under the testimony your office decided, in May, 1879, that Walker was such applicant, and held Sewell's entry for cancellation. Sewell then applied for another hearing, upon the ground that your decision was based chiefly upon testimony

that Walker's application to amend was made before one John M. Moore, who, although he received and filed the application, was not authorized to act in the matter. This hearing was held in November, 1879, to ascertain the facts. The local officers rendered opposite opinions, and you decided, April 17, 1882, that Sewell's allegation was sustained, and allowed his entry to remain intact subject to his final proof. I think this was erroneous.

The question submitted is whether or not Moore was a clerk *de facto* in the office of the register, and as such, competent to receive Walker's application to amend his filing, and thus give it legal effect, as if made to the register in person.

At the date of the transaction one Maxwell was register of the local office, one Overton was receiver, and Moore was postmaster at Salt Lake City, having also a private office in the same building with that of the register, and acting as agent or attorney for settlers in preparing and presenting their applications and other papers. He testifies that he was also a clerk in the office of the register at various times from 1869 to 1874, in the absence of the register as well as in his presence, and attended to the various business of that office, and that in the absence of Maxwell he accepted Walker's application, which was the first legal application for the tract.

Walker testifies that he was at this office on several different occasions in 1869, 1870, and 1871, relative to his claim and to his contest against Sewell; that Maxwell and Moore were usually there present; that when he applied to contest Sewell's entry, Maxwell told him to "go to Moore, my clerk," about the matter; that Moore acted as the clerk in taking testimony in that contest; that when he applied to amend his filing in March, 1881 (prior to the date of Sewell's entry), Maxwell was absent, but Moore was present and told him he was attending to the business of the office, and prepared his application.

Other witnesses testify that Moore acted in other cases as a regular clerk in the office—no other clerk or person being present.

Maxwell testifies that he was absent from his office on leave from February 15 to April 3, 1871 (which included the date of the transaction in question), and that one Hoffman was his regularly-appointed and sworn clerk, under the usual regulations of your office, and that during such absence Moore was not his clerk, either *de facto* or *de jure*. But on cross-examination he says that Moore had general supervision of all his business when absent at the time named, and was left in charge of the office, and that he sanctioned his doings; that he left with him (Moore) various certificates signed by him (Maxwell) in blank, which Moore may have filled and delivered to the proper parties; that both prior and subsequent to the date of Walker's application Moore was a clerk in his office, but without appointment by your office, and that he assisted him (Maxwell) in preparing papers, making entries and returns to your office, and registering claims, as well when he was

absent as when he was present; that he was familiar with all the routine of the office, and the reason he was not left in charge of the office during the named absence was because he was postmaster, and they both thought official trouble might result from such an arrangement.

Overton, the receiver (whose office was some distance from that of Maxwell's), testifies that he had no knowledge that Moore was an employed clerk in Maxwell's office during the time named—the Government having made no appropriation for such purpose—but that he frequently prepared papers for persons doing business at Maxwell's office; that so far as he knew, Sewell was the first legal applicant for the tract, and that at the time in question Hoffman was in Maxwell's office, preparing papers for settlers and abstracts of title to land throughout the Territory, it being understood that he and Moore were copartners in that business.

Sewell testifies that when he made his entry, Hoffman was in charge of Maxwell's office, but that he made his affidavits before Overton, to whom he paid his money and with whom he left his papers.

The testimony satisfies me that Moore was a clerk *de facto* in the office of the register at the date of Walker's application, and that his acts as such, as respects third persons, have equal validity as though he was a clerk *de jure*.

A like question was discussed in the case of *The Dean Richmond Mine v. The Bronkow Mine*, decided by this Department August 18, 1882 (L. O., Vol. 9, p. 114), in which the general doctrine was held well settled that the acts of an officer *de facto* are valid in so far as they affect the rights of the public or of third persons, it being founded in necessity and upon principles of public policy; that if he is a mere intruder or usurper, third persons are bound to take notice of that fact, and can acquire no rights from his acts, but if he is in possession of the office, under color of right or authority, he may exercise its functions; reference being made in that case to the opinion of Attorney-General Black, who said (9 Op., 432), "I am of opinion that if Mr. Hooper was the *acting* secretary of the Territory (Utah), though he was not regularly appointed, a public obligation created by debts which would have been binding on the Government, if made by a regular secretary, cannot lawfully or justly be repudiated on the mere ground that his title to the office was defective. The acts of an officer *de facto* are always held to be good where the public or third parties are concerned. The legality of his appointment can never be inquired into except upon *quo warranto*, or some other proceeding to oust him, or else in a suit brought or defended by himself, which brings the very question whether he was an officer *de jure* directly in issue. \* \* \* The irregularity of Mr. Hooper's appointment (by the governor of the Territory instead of by the President) ought not to be set up by the accounting department as a plea for refusing payment" (of certain disbursements Hooper had made).

The present case is clearly within this doctrine. Moore was not an usurper or intruder in Maxwell's office. He had conducted its business both in Maxwell's presence and absence, with the latter's unquestioned sanction. The appointment of Hoffman was nominal and not intended to supersede Moore, who was the real and acting clerk. The public had a right to infer his authority in the conduct of the office, and especially had Walker, from all his transactions relative to his claim.

I reverse your decision and permit amendment of Walker's filing, holding Sewell's entry subject thereto.

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### XIII.—QUALIFICATION.

#### *FRAUD—ATTORNEY.*

#### *WARE v. BISHOP.*

While it is competent for the Interior Department to take cognizance of fraud wherever the same is evidenced by the records as affecting the title to public land, it is not its province to adjust difficulties between parties to a case involving such land, or between them and their attorneys, nor to inquire into the conduct of such attorneys towards their clients.

Where a party has paid for land, though no deed has passed, he is the owner of such land, and cannot remove therefrom to become a pre-emptor of public land.

*Secretary Teller to Commissioner McFarland, November 2, 1883.*

I have considered the case of H. E. Ware *v.* W. H. Bishop, involving the NE.  $\frac{1}{4}$  Sec. 18, T. 8 N., R. 9 W., Bloomington district, Nebraska, on appeal by Ware from your office decision of July 7, 1882, in favor of Bishop.

It appears that Bishop made timber-culture entry No. 1055 of the tract February 7, 1876; that one Frank M. Frink initiated contest against the same, which resulted in its cancellation July 7, 1880, he having filed Bishop's relinquishment in support of his allegations. On or about July 16, Ware applied at the local office to make a timber-culture entry of the tract, but the register and receiver rejected such application upon the ground that Frink had a thirty days' preference right by virtue of the provisions of the act of May 14, 1880 (21 Stat. 140). From such action Ware appealed, but your office sustained the same. August 2, 1880, Frink made timber-culture entry No. 3196 of the tract. On or about January 31, 1881, the register and receiver forwarded to your office an affidavit of Frink (executed January 21, 1881), wherein he alleged that he had been induced to make said entry by and in behalf of Bishop, who resided upon and claimed the premises; that he executed the affidavit without knowing its contents, and asked that the entry be canceled and he be allowed to make another in lieu thereof. Your office denied such request May 11, 1881. Under date of June 23 ensuing, Bishop filed in the local office declaratory statement No. 6399 for the

tract, alleging settlement March 15 preceding. He also filed Frink's relinquishment of his timber claim (which had been executed November 15, 1880), whereupon his entry was canceled. Ware made timber-culture entry No. 3288 of the tract the same day, and on August 6 ensuing he initiated contest against Bishop's claim, alleging fraud and collusion between Bishop and Frink and between Frink's and his own attorney, and that Bishop was not a qualified pre-emptor. Citation accordingly duly issued and hearing was had. The testimony was directed to the points specifically raised by contestant's allegations. The register and receiver agreed that the same were not substantiated, and that Bishop, who was residing upon the land at the date of the cancellation of Frink's entry, had the better right to the same. Your office decision in question sustains such view of the case.

With respect to the question of fraud and collusion, it should be observed that while it is competent for this Department to take cognizance of fraud wherever the same is evidenced by the records as affecting the title to public land, it is not the province of the Department to adjust difficulties between parties to a case involving such land, or between them and their attorneys, nor to inquire into the conduct of such attorneys toward their clients. Although there is a suspicion of fraud as suggested by plaintiff's counsel, such question is nevertheless immaterial at this stage of the proceedings; because it was concocted during the existence of Frink's entry prior to the date of Bishop's pre-emption filing, by virtue whereof he asserts his claim in the premises independently of any right he might otherwise have acquired to the same.

The only question, therefore, remaining to be considered is that raised by contestant's allegations touching Bishop's personal qualifications as a pre-emptor. He testified that in the year 1873 he entered into a contract with the Union Pacific Railroad Company to purchase the NE.  $\frac{1}{4}$  of Sec. 13, T. 8, R. 10, Adams County, Nebraska; that pursuant to the terms of such contract he took possession of the land, and paid the purchase-money therefor in annual installments, having paid the last one about February 6, 1881, for which he held the company's receipt; but that he had received no deed for the land from the company, although he had become entitled to one by virtue of said contract when he made his last payment; and that he removed from said land to that in question. He testified further, however, that he settled upon the same November 29, 1880, and that he had nothing to do with the allegation of settlement as of March 15, 1881, contained in his declaratory statement.

Thus it appears that Bishop virtually owned the land from whence he removed to the tract in question March 15, 1881. But in order to avoid the dilemma in which he places himself by his admission he endeavored to negative the inevitable effect thereof by interposing a plea of confession and avoidance (*absque hoc*); and in order to give color to such plea, he denies the allegation in his declaratory statement, antedating his settlement to November 29, 1880, at which date he had not made

his last payment for his claim on the railroad land. But in endeavoring to evade one horn of such dilemma, he unwittingly impales himself upon the other; in other words, in order to avoid the statutory inhibition of quitting or abandoning his residence "on his own land to reside on the public lands in the same State or Territory" (see Sec. 2260, Rev. Stat.), he antedates his settlement anterior to February 1, 1881, when he made his last payment, in order that he might say, with a semblance of truth, that he did not remove from "his own land" to that in question. But I regard this as a mere pretext, whereby he intended to cloak his conduct, which, if disclosed, would evidence his bad faith in the premises.

Your office decision is based upon the legal hypothesis that as no deed had passed from the railroad company to Bishop, the land he had contracted to purchase therefrom was not "his own land," and therefore he does not fall within the category of persons who are prohibited by the statute from acquiring title to the public lands under the pre-emption law. I cannot concur in such view, for while it is true the legal title to said land still reposed in the company at the date of Bishop's alleged settlement upon the tract in question, and so far as the record discovers it has not yet divested itself thereof, I do not think Congress intended to restrict the prohibition in question to persons who hold the legal title to such abandoned lands. Bishop, having admitted that he was the owner of the land when he removed therefrom to settle upon the tract in question, is estopped to deny such fact, and in the light of his own testimony alone it is manifest that he comes within the intendment of the prohibition.

So soon as he paid the purchase-money pursuant to the terms of said contract, he was the constructive owner of the land and clearly entitled to a deed therefor, which he could have obtained for the asking, or upon the company's refusing to deliver the same a bill for *specific performance* would have lain in a court of equity, whereby he could have enforced his undeniably right to the deed. In such case relief would have obtained under the fundamental principle that equity will invariably consider as done that which ought to be done. The contract was executed so far as Bishop was concerned, inasmuch as he had performed his part of the agreement.

It has been laid down, that, if a man has performed a valuable part of an agreement, and is in no default for not performing the residue, there (then) it is but reasonable that he should have a specific execution of the other part of his contract. (Story's *Equity Jurisprudence*, 12th ed., vol. 1, p. 766.)

I am therefore of opinion that the mere laches of Bishop in neglecting to procure his deed from the company should in no wise be permitted to militate against Ware's rights in the premises, which I regard as paramount to Bishop's, whose filing should be canceled.

Your office decision is accordingly reversed.

**XIV.—RELINQUISHMENT.***CONTEST—APPLICATION.***THOMAS A. BONES.**

Where a contest is ended by relinquishment, the land in question becomes public land subject to entry by the first rightful applicant. An application to contest, made after such relinquishment, should be dismissed.

*Secretary Teller to Commissioner McFarland March 7, 1883.*

I have considered the appeal of Thomas A. Bones from your decision of May 18, 1882, declining to recognize his application, filed March 23, 1882, to be allowed to contest the homestead entry of John W. Callender, made September 3, 1880, upon NE.  $\frac{1}{4}$  2, 121, 56, Watertown district, Dakota, No. 3721.

October 27, 1881, Edwin W. Small applied to contest said entry, alleging abandonment, and hearing was set for the 19th December, and was continued at request of both parties to April 1, 1882.

On the 31st of March, Callender filed his relinquishment, and thereupon the land became subject to disposal without further action, as provided by act of May 14, 1880 (21 Stat., 140), and on the same day one Andrew Smail filed his declaratory statement, No. 6856, alleging settlement on that date as a pre-emptor.

The application of Bones to contest, filed on the 23d of March, was indorsed, apparently in the handwriting of the register, as follows: "File subject to present contest." Underneath this indorsement the receiver noted over his own signature a formal rejection of the application, as follows:

March 23, 1882—Rejected because of pending contest to be heard on the 1st day of April, 1882, upon the same allegations contained in the within affidavit.

No hearing was ordered. The first contest was closed on virtual confession of abandonment by the filing of the relinquishment on the 31st of March, and there was no longer any question as to Callender's homestead entry, and consequently there was no basis for further hearing.

The land, instead of reverting to the United States by virtue of a declaration of forfeiture under Section 2297 of the Revised Statutes, became public land, as before recited, under the act of May 14, 1880.

It is manifest, therefore, that if a contest fully initiated and fixed for a certain day was rendered unnecessary by the act of relinquishment, any application to contest, depending on the same facts and not yet made effective by notice and summons, was so much the more removed from the necessity for inquiry, and was barred from any further notice. It results, as of course, that no question as to the propriety of allowing a second contest after the institution of one proceeding remains to be answered here, as the cancellation upon the relinquishment left the

land open, and any party who should obtain legal priority as a settler after such cancellation would be permitted to enter in the manner required by law. If Bones was such settler, he was bound to present his claim by filing an entry within the legal period, subject to all prior rights, if any, of others who might also present their claims.

The appeal is dismissed.

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*SECOND FILING—WAIVER.*

*THOMPSON v. JACOBSON.*

A party who puts up a board with notice of his claim thereon, and, taking advantage of the fact that his brother thereafter filed a declaratory statement in his (the claimant's) name, sells his claim for a consideration, may make another filing on showing that the filing by his brother was without his consent, notwithstanding his brother had erected a house for him on the land, wherein he lived for a short time.

A party who, after filing a pre-emption declaratory statement, relinquishes and makes a homestead entry, waives his right under the filing, and if another party has in the meantime filed a declaratory statement, the homestead party loses the land.

*Acting Secretary Joslyn to Commissioner McFarland, June 28, 1883.*

I have considered the case of O'le Thompson *v.* Asle Jacobson, involving the NW.  $\frac{1}{4}$  of Sec. 1, T. 157, R. 54, Grand Forks, Dak., on appeal by Jacobson from your decision of February 28, 1882, holding her entry for cancellation, and awarding the tract to Thompson.

Jacobson filed declaratory statement April 20, 1880, alleging settlement July 17, 1879. She relinquished the tract May 14 following, and made homestead entry for it on the 17th.

Thompson filed declaratory statement April 29, alleging settlement April 27, 1880, and on May 1, following, purchased from Jacobson whatever interest she had in the land.

Jacobson's relinquishment was a waiver of her claim under her filing of April 20, and thereupon Thompson's settlement and filing took effect, free from any adverse claim; and she acquired no right under her homestead entry, because at the date thereof Thompson had a valid filing upon the tract—unless, as claimed by Jacobson, he had already exhausted his pre-emption right.

It appears that a filing was made by the brother of Thompson in the latter's name, but without his solicitation or knowledge, and when he was not in Dakota, upon another tract in the same land district, in March, 1880, under an alleged settlement in December, 1879. The testimony shows that Thompson was a visitor at his brother's house on land near by in December, 1879, and then erected a board upon the tract filed upon, stating thereon his claim to it, and, without any other act indicative of settlement, returned to his home in Iowa. The filing in question was made during his absence. Upon his return to Dakota, he again went to his brother's with his family, and thence to a house built

by his brother without his request, on the land filed upon, where he remained a few days while looking for another tract upon which he might file, and until he accepted the sum of \$45, offered him by another person to vacate the tract, which he did, and went upon the tract in dispute. The testimony clearly shows that the filing by his brother in his name was without his knowledge or consent, and his acceptance of the sum named to vacate the tract cannot, I think, be construed into a ratification of that filing. The erection of the board, with a statement of his claim, was not an act of settlement, but indicative merely of a future intent to settle on and claim the tract. This does not satisfy the requirement of the pre-emption law that actual settlement must precede a filing in order to validity of the filing. As Thompson (even had he elected so to do) could not claim this filing as valid for want of prior settlement, so, on the other hand, it cannot, by reason of its illegality, operate to exhaust his pre-emption right and estop him from another filing. The filing was inoperative for all purposes.

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CONTEST—HEARING—REINSTATEMENT.

SCHMITT v. KNAUF.

Where a pre-emptor fails to assert his claim within the legal period, though his filing is still uncancelled, it is error to order a hearing when an entry of the same land is made thereafter.

Where the pre-emptor, after such hearing, files a relinquishment, he cannot have his rights reinstated on the ground that the adverse party has failed to pay money due on account of such relinquishment.

*Acting Secretary Joslyn to Commissioner McFarland, August 15, 1883.*

I have considered the case of William H. Schmitt v. Henry Knauf, involving the NE.  $\frac{1}{4}$  of Sec. 10, T. 115, R. 35, Redwood Falls district, Minnesota, on appeal by Knauf from your decision of April 18, 1882, dismissing the contest.

Knauf filed declaratory statement No. 660, May 23, 1874, alleging settlement May 22, 1874.

Schmitt made homestead entry No. 2975, March 8, 1881, on the same tract, and filed notice of contest March 21, 1881, alleging abandonment by Knauf.

Knauf failed to make final proof within the time prescribed by law, but as the Government is averse to technical forfeiture, his filing was permitted to stand in the absence of an adverse claim (Johnson v. Towsley, 13 Wall., 72).

Knauf still having omitted to make final proof, his right under his filing was at an end when Schmitt made entry, consequently the local officers erred in permitting a contest by the latter. Schmitt was in no jeopardy. His entry was admitted under the regular practice, subject to the assertion of any prior right of pre-emption, and unless Knauf

appeared, upon due notice as required by law, to make final proof, the entry of Schmitt would be entitled to pass to patent.

But the parties duly appeared; and, in the final proceedings, Knauf executed to the United States a relinquishment of his claim, which was placed on file and transmitted with the record. He now attempts to reassert his claim on the ground of an alleged understanding that the relinquishment was only intended to be filed on receipt by him of certain money considerations from Schmitt, and that he has never given final authority to effect the purposes of the instrument.

I think he cannot be further heard upon his showing in this regard.

He also alleges excuse for his laches in failing to offer final proof and payment on the ground of grasshopper ravages, and his right of absence under the laws relating thereto.

His allegations in this respect fail to show a foundation for his claim by proper notice, or that he ever left the land during the period allowed by law; he therefore has no standing upon this ground. The other reasons set up by him are without weight, and do not require consideration.

Your decision is affirmed.

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## XV.—RESIDENCE.

### *PROOF—ABANDONMENT.*

RUFUS McCONLISS.

Whilst a pre-emption claim is pending, the claimant cannot make a homestead entry without abandoning his pre-emption claim. He cannot reside on two tracts at once.

*Secretary Teller to Commissioner McFarland, April 12, 1883.*

I have considered the appeal of Rufus McConliss from your decision of May 17, 1882, rejecting his application to enter under the pre-emption law the SW.  $\frac{1}{4}$  of Sec. 22, T. 12, R. 13 W., Salina, Kans.

It appears that McConliss filed declaratory statement for this tract July 21, alleging settlement July 18, 1881, and made the affidavit required by section 2262 of the Revised Statutes, and also his final proof, April 1, 1882, before a clerk of court. He was authorized to make his final proof before such officer, but not his affidavit, the section requiring that this be made before the register or receiver of the land office for the district in which the land is located; and the local officers rejected his proof because of the irregularity and insufficiency of the affidavit. Were this the only question, McConliss would be permitted to perfect his proof by a supplemental affidavit, in accordance with the requirement, there being no adverse claimant.

It appears, however, that on February 11, 1882, McConliss made a homestead entry upon another tract in a different township from that

in which his pre-emption claim was located, and that he had resided on the homestead tract from the date of such entry, and was residing thereon when he made his pre-emption proof; in other words, he was, from February 11 to April 1, 1882, claiming lands under both the pre-emption and homestead laws, each of which requires residence on the respective tracts embraced thereby. He was not required to commence residence on his homestead tract until within six months from the date of his entry; but having done so immediately upon his entry, he must be held to all the legal consequences which result therefrom. One claiming a pre-emption right must reside on the tract to the date of his entry, and residence on a homestead tract pending the pre-emption claim is in the nature of an abandonment of the latter. He cannot reside on the two tracts at the same time.

Your decision is affirmed.

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#### *FURTHER PROOF—CONTINUOUS OCCUPANCY.*

##### *TUPPER v. SCHWARZ.*

In view of the good faith in settlement and improvement, the pre-emptor is allowed the full period of thirty-three months within which to furnish satisfactory proof of residence.

*Secretary Teller to Commissioner McFarland, February 2, 1884.*

I have considered the case of Ellen S. Tupper *v.* Jacob Schwarz, involving the SW.  $\frac{1}{4}$  of Sec. 2, T. 99, R. 54, Yankton, Dak., on appeal by Schwarz from your decision of April 14, 1883, holding that although the facts do not justify a present entry of the tract by Mrs. Tupper, you are not sufficiently satisfied of her want of good faith, and therefore allow her to make further proof of her compliance with the law within the time required therefor, and that also the entry of Schwarz be held subject thereto.

Tupper filed declaratory statement August 9, alleging settlement June 25, 1880, and Schwarz made homestead entry December 3, 1880. A trial was held May 24, 1882, upon Tupper's offer to make proof and payment. The testimony shows that in June, 1880, she purchased a few acres of breaking on the tract, and caused a few more to be broken, amounting in all to about seven. She also caused a cellar for a house to be dug, and in the month of August following, slept two or three nights on the land under a wagon. In August, 1881, she erected a house on the land, placed some furniture therein, and has frequently since been upon the land; but the evidence fails satisfactorily to show a continuous residence thereon, or that it has been her actual home.

Schwarz erected a house on the land in April, 1881, over her cellar, in which house with his family he has since continuously resided. He has also out-buildings, and has broken and cultivated about two acres;

but in view of the fact that he entered the land with knowledge of her improvements and appropriated them to his own use, and of the possibility that her former proofs in respect to residence are defective merely, and may be cured and made satisfactory on further proof, within thirty-three months from the date of her settlement, I affirm your decision.

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*ABSENCE—CONTINUOUS CLAIM.***GOODNIGHT V. ANDERSON.**

All absences which do not impeach a pre-emptor's good faith are permissible. He who sleeps on his claim in a pen or in the open air, intending to erect a habitable dwelling as soon as his means or occupation permits, maintains a satisfactory residence.

In view of the evidence the land is awarded to Anderson.

*Secretary Teller to Commissioner McFarland, March 31, 1884.*

I have considered the case of Edward Goodnight *v.* C. C. Anderson, involving the NW.  $\frac{1}{4}$  of Sec. 30, T. 3 N., R. 31 E., Le Grand, Oreg., on appeal by Anderson from your decision of October 2, 1883, rejecting his final proofs and holding his filing for cancellation.

It appears from the record that Anderson, an unmarried man, settled on the tract February 11, 1881, and filed his declaratory statement No. 2929 on the 19th of the same month; that in the following May he put up a little shanty or pen, without window or door, and but partially roofed, in which, alone or with a brother, he slept for one or more nights every few weeks until December, 1882; that he intended to build a habitable house at the latter time, at the conclusion of certain work in which he was engaged during the summer; that he plowed half an acre in the spring of 1882, had several more acres plowed for him, which were sowed in wheat and planted with vegetables and trees, and rudely fenced a small garden; and that from time to time he hauled lumber upon the land for the proposed dwelling, the nearest timber being some forty miles away.

On November 18, 1882, Goodnight went upon the land, and filed his declaratory statement for it on the 22d of the same month. He put up a small, cheap house, with a window and door, but without a floor, slept in it for two nights, dug a couple of "wells," 3 to 5 feet deep, and about December 10, as he says, started for Washington Territory to settle up his business there, leaving in his shanty a bucket and some pans and nails.

Between the 1st and 15th of December, 1882, Anderson built a fairly substantial and habitable dwelling, where he appears to have had his home since, though being absent part of the following winter at school. His residence on the land since December, 1882, to date of his offer to make final proof, April 9, 1883, was not satisfactorily shown at the hear-

ing; nor was it shown that he did not maintain a residence. He has since cultivated the land somewhat, has allowed his father's sheep to pasture on it, and their herder to live in the house for a portion of the time.

On March 9, 1883, Goodnight returned from Washington Territory, went on the land with some household goods, was ordered away by Anderson, and refused to go. Anderson then brought an action against him for forcible entry and detainer, the jury found for the plaintiff, and Goodnight was ejected by the officers in the latter part of the same month. He has since resided on what he calls his "railroad claim."

You find that Anderson failed to build a habitable house, and in other respects to comply with the law prior to Goodnight's settlement; and your action is based on the case of *Titus v. Bull* (9 Copp, 117), wherein it is said that "a pre-emptor who relinquishes his rights by failure of constant assertion thereof on the land \* \* \* cannot resume them at his pleasure in the presence of an adverse claim." In that case Titus had not cultivated the land, and had wholly abandoned it for seven months, during which Bull's settlement and improvement were made, which were continuously maintained afterwards. There was a reasonable cultivation in this case; there is no evidence of abandonment whatever, and there is shown a continuous assertion of claim to the land; for the language above quoted is not to be construed as meaning that the settler must never absent himself from the land; and the uniform rulings are to the effect that all absences which do not impeach his good faith are permissible. A man who sleeps on his claim in a pen or in the open air, intending to erect a habitable dwelling as soon as his means or occupation permits, maintains a satisfactory residence. If he keeps a little garden, plows and sows land, and hauls lumber from time to time for the contemplated dwelling, he is continuously asserting his claim. All these doings show good faith. In this case, while the evidence does not satisfactorily show a reasonably-continuous residence, it certainly does not show an abandonment; and it is to be observed that in this contest Goodnight is resting on his superior right to the land, and must therefore prove such abandonment or want of good faith to sustain his own claim. He has not done this.

But again, what good faith did Goodnight show, and how did he continue to assert a claim to the land? He made a pretence of digging a well, put up "a little shanty," as he has termed it, slept in it two nights, made no cultivation or other improvement, never established a residence on the land, and in less than a month went off to Washington Territory, remaining away some three months. Thereby he may have made a good settlement against the United States (if Anderson's abandonment be admitted), but he did nothing to hold the land against third persons. Had he duly established a residence and remained on the land, the case would be different; but he took the chance of the acquisition of a better right by some third person, when he left the land without doing these

things. Supposing, then, that Anderson had forfeited his right to the land as against Goodnight, his return to it during this period of abandonment, the erection and occupancy of a dwelling, and the subsequent cultivation, gave him the superior right (*Belk v. Meagher*, 104 U. S., 279).

I cannot but allow considerable weight to the judgment of the local jury which heard the testimony upon his allegation of six months' residence, and which sustained his possessory claim. This and his final proofs are in my opinion sufficient to entitle him to enter the land.

Your decision is therefore reversed.

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## XVI.—SELECTION.

### *IMPROPERLY MADE—EFFECT OF.*

CHARLES DURFEE ET AL.

*Secretary Teller to Commissioner McFarland, November 7, 1883.*

The appeal, denying that the townships named are entitled to indemnity for reasons stated, further claims that the commissioners of Walla Walla County were not authorized to make said selections, because the act of March 3, 1853—the only act under which they had authority to make them—limited their selections to cases in which Sections 16 and 36 were occupied by actual settlers prior to survey thereof; in which case they are authorized to locate other lands in lieu of the land so occupied.

It is not necessary to consider this question, because the lands applied for being in a state of reservation—whether rightly so or not—are not subject to sale or disposal during its continuance. The applications to enter tracts within said reservation were therefore properly rejected, and your decision is affirmed.

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### *UNCANCELED—LAND IN RESERVATION.*

AGNES N. L. EARLE.

*Secretary Teller to Commissioner McFarland, November 9, 1883.*

Your decision states that the selections in question are yet uncanceled and in force.

The appeal claims that the selections were improperly or illegally made, and are without effect. It is nor here necessary to consider that question, for the selections became an appropriation and reservation of the tract, and so long as these continue the tracts are not subject to other disposal.

The application of Earle having been made pending the reservation was properly rejected, and your decision is affirmed.

**XVII.—SETTLEMENT.****CITIZENSHIP—GOOD FAITH.****KELLY v. QUAST.**

A filing and settlement before declaration of citizenship are of no legal effect. But where no adverse claim intervenes prior to declaration of citizenship and subsequent settlement, the original filing should not be canceled.

*Secretary Teller to Commissioner McFarland, October 9, 1883.*

I have considered the case of E. A. Kelly *v.* Carl Quast, involving the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 20, T. 38, R. 5 W., Lewiston district, Idaho, on appeal by Quast from your decision of June 8, 1882, in which you deny his application to enter the tract in question, and hold his filing for cancellation on the ground that his settlement was made subsequent to filing.

Quast filed declaratory statement No. 993, March 26, 1879, alleging settlement March 10, 1879, and gave notice that he would make final proof July 18, 1881. Kelly made homestead entry No. 777, November 17, 1880, on the same tract, and appeared on the day set for making final proof, opened contest, and alleged that Quast had not improved the land nor established a residence thereon, but sought to obtain it merely for the purpose of speculation.

The evidence shows that Quast visited the land March 10, 1879; but as he failed to declare his intention of citizenship until March 26, 1879, any act of settlement which he might have performed prior to the latter date could not enure to his benefit. (*McMurdie v. C. P. R. R. Co., Copp's L. O., June, 1881.*)

It does not appear that he went on the land again until about the middle of April, 1879, at which time he proceeded with his work upon the same, built his house during the following month, and improved the land and resided thereon in good faith up to the time of contest.

The allegation that Quast held the land for the purpose of speculation is not sustained by the evidence, and is therefore not entertained.

Quast failed to protect himself by making proper settlement prior to filing; but in the absence of an intervening adverse claim, the Government will not interpose any objection to his entry (*Stanley v. Fairchild, Copp's L. O., November, 1876.*)

Your decision is reversed. Quast will be allowed to make entry, and upon receipt of his final payment the entry of Kelly will be canceled.

## REV. STAT. 2382—ACTUAL RESIDENCE.

SAMUEL M. FRANK.

*Rec'd in*

-339

-57 A party making an entry on one or two lots, under Section 2382 Rev. Stat., must actually reside upon one lot. "Actual settler" as found in said section held to mean *actual resident*.

-583 -513 Commissioner McFarland to register and receiver, Le Grand, Oreg., January 2, 1884.

-23274

I am in receipt of your letter of the 3d instant, transmitting the affidavit of Samuel M. Frank, in which he states that he is not a resident of lot 10, block 7, Baker City, Oreg., which lot is covered by his T. S. cash entry 35, made February 20, 1873. July 29, 1874, said entry was suspended for the reason that the proof failed to show that claimant at date of entry resided upon said lot. November 1 last you transmitted Frank's affidavit, which indicated that he had for years resided upon lot 4, block 2. It also appeared therein that claimant has erected two warehouses and a stone cellar upon lot 10, block 7. The affidavit first referred to shows that claimant has never resided upon the lot covered by his entry.

Section 2382 Rev. Stat., under which said entry was made, provides "that any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale." This office has always instructed local officers to require parties making entries of town lots under said section to show residence upon one lot so entered and substantial improvements upon an additional lot, and the rule requiring such proof has been strictly adhered to wherever the question has been presented; but there has been no case considered wherein the question arose since the decision in the case of *Allman v. Thulon* (Copp's Land Laws, 690, 1875), on appeal to the honorable Secretary of the Interior. In that case Assistant Attorney-General Smith was of opinion that the word *settler*, as used in the land laws of the United States, had a well-defined technical meaning, and "a person is a settler who, intending to initiate a claim under any law of the United States, for the disposition of the public domain, does some act connecting himself with the particular tract claimed, said act being equivalent to announcement of such his intention, and from which the public generally may have notice of his claim. Such act constitutes a settlement;"

\* \* \* and recommended that the decision of this office be reversed, his recommendation being based in part upon the construction placed upon the term "settler," as used in said section. The honorable Secretary in his decision stated that "while not entirely clear in my own mind as to the question of law involved in the case, I cannot perceive sufficient grounds for reversing the decision of your office." In said

case there were two questions of law presented, one being the question involved herein. After a careful consideration of the last clause of section 2382, I am unable to arrive at a conclusion in harmony with the recommendation in *Allman v. Thulon*. Said clause is as follows:

Any actual settler upon any lot, as above provided, and upon any additional lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as a pre-emption.

The language may fairly be interpreted to mean that a party seeking to enter one lot must possess a qualification to enable him to make such entry, superior to that required to make an entry of an additional lot; for the placing of substantial improvements upon the latter is sufficient, the term settler, whatever may be its meaning, having no reference thereto. The special qualification in my opinion is actual residence, though the term settler is used. It is stated in the opinion referred to, that from the moment a claimant "enters in person on land open to such a claim, *animo manendi*, or rather with the intention of availing himself of the provision of the act referred to, and does any act in execution of that intention, he is a settler." Under the pre-emption law a mere act of settlement, unless actual residence follows, cannot entitle a party to make an entry. The settlement must develop into a residence, and the same is required under the homestead law.

Although it is not prescribed in plain and indisputable language that under section 2382 residence must be shown upon one lot, such certainly was the intention of Congress. There can be no doubt that the making of substantial improvement upon an additional lot as therein provided must be as much a settlement as any act that could be performed; and what more could an applicant do to constitute himself a settler to entitle him to enter a single lot, unless it be to establish a residence thereon; and the law certainly requires more of an applicant in such case than when seeking to enter a second lot. The terms "settlement" and "inhabits" are both used in section 2259 in the order given, and the language clearly shows the distinction between the terms actual settler and resident, as contemplated in the pre-emption law—the one meaning the performance of some simple act to operate as notice to the world that a tract is claimed, the other meaning that an actual residence or habitation must be established and follow the settlement.

It is a well-settled rule that wherever settlement is required by a claimant to the public land under any law regulating the disposal of the public domain, a residence must follow at some period before entry; and though the requirement as provided in express terms in the pre-emption and homestead laws, and the word "residence" or "inhabit" do not occur in the section referred to, I am of opinion that by analogy, and on the ground of public policy, actual residence should be required under said section, and so decide. Were it held otherwise, a party, not a resident of a town, could, by building a fence upon one lot and an

outhouse upon another, make an entry for speculative purposes, and thereby evade the evident object of the town-site law of July 1, 1864, which was not only that the towns should be improved and built up, but that the population should increase, the one being as essential to the development of a town as the other.

Frank's entry is therefore held for cancellation, subject to appeal to the honorable Secretary of the Interior under the rules.

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*INCLOSURE NECESSARY TO PROTECT POSSESSION—TRESPASS—DECISION IN ATHERTON AND FOWLER—INTIMIDATION.*

WARD *v.* GANN.

Two or more pre-emptors may settle on the same forty-acre tract, notwithstanding notice of the first settler's claim thereto. Unless the forty-acre tract is inclosed, such subsequent settlement is not a trespass under the Atherton-Fowler decision. In this case it was not intimidation for a subsequent settler, a single man, to build his house within a few feet of the house erected by a prior settler, a young unmarried woman.

*Acting Secretary Joslyn to Commissioner McFarland, April 28, 1884.*

I have considered the case of Marinda A. Ward *v.* Abraham Gann, involving lots 3 and 4 in Sec. 4, and lots 1 and 2 in Sec. 5, T. 7 S., R. 18 E., Stockton, Cal., on appeal by Ward from your decision of October 18, 1883, awarding the land to Gann.

It appears that Miss Ward, who is a young colored woman, went with her father upon the land on January 5, 1882, and made settlement by having logs for a house placed on it, filing her declaratory statement, No. 11281, two days after. The cabin was subsequently built, nailed up, and left empty and unfurnished. Miss Ward did not establish her residence on the land, but went into service at Merced, some 20 miles distant, in order to earn money to pay for it, as she testifies. On May 10, 1882, Gann went on the land, built him a house within 25 feet of Miss Ward's house (both houses being built near a spring), took up his residence, filed his declaratory statement, No. 11519, in the following July, and in March, 1883, gave notice of his intention to make final proof. Miss Ward contested his right to the land, showing that she returned to the land on March 16, 1882, for the purpose of taking up her residence, found Gann living in his house, was intimidated thereby, and therefore did not take up her residence. It is shown that Gann was notified of Miss Ward's claim before he settled, and also that there was no intimidation other than building his house within such close proximity to her house.

Counsel for Miss Ward urge, under the ruling in *Atherton v. Fowler* (96 U. S., 513), and in other cases in the Supreme Court following it, "that Gann's entry and erection of a house upon the same forty-acre tract upon which Miss Ward had her house was a trespass, and gave

him no basis for any claim as a pre-emptor." Section 2273, Rev. Stat., contemplates settlement by two or more persons "upon the same tract of land," and it seems clear that as a person may pre-empt a single subdivision of a quarter-section, such a subdivision is "a tract of land" within the meaning of the law. Hence the law authorizes a settlement of two or more persons on such subdivision, and the said case merely requires that it shall be peaceable, and "on lands not in the actual possession of another." In the case at bar there was no inclosure by Miss Ward, and her possession was therefore not disturbed by Gann's entry.

The plea of intimidation is not sustained by the evidence, and there is therefore no excuse for Miss Ward's failure to reside on the land. Nor is there any excuse for her failure to offer proof and payment within twelve months from date of her settlement. Hence Gann has the superior right to the land, and your decision is affirmed.

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## XVIII.—TIMBER LANDS.

*DEFINITION OF ACT JUNE 3, 1878.*

*SPITHILL v. GOWEN.*

This act contemplates such timber lands as are found in broken, rugged, or mountainous regions, where the soil, when the timber is cleared off, is unfit for cultivation, and not lands, though heavily timbered, where the soil is susceptible of cultivation.

*Secretary Teller to Commissioner McFarland, May 8, 1883.*

SIR: I have considered the case of Alexander Spithill *v.* John D. Gowen, involving the SW.  $\frac{1}{4}$  of Sec. 29, T. 31, R. 4 E., Olympia, Wash., on appeal by Gowen from your decision of March 25, 1882, holding his filing for cancellation and allowing the entry of Spithill.

Gowen filed declaratory statement January 13, 1880, alleging settlement December 24, 1879, and Spithill applied February 19, 1881, to enter the tract under the act of June 3, 1878 (20 Stat., 89).

This act provides (section 1) for the sale of lands "valuable chiefly for timber, but unfit for cultivation," at the minimum price of \$2.50 per acre. \* \* \* "Provided, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale" of \* \* \* "the improvements of any bona fide settler." Section 2 requires an affidavit from the applicant that the land applied for is "uninhabited," and by section 3, publication of the application to enter the land must be made for sixty days, after which the applicant is required to furnish the local officers satisfactory evidence "that the land is of the character contemplated in this act, unoccupied, and without improvements" (except such as were made by or

belong to the applicant), providing, also, that any person having a valid claim to any portion of the land may object to issuance of patent to the applicant, and that the merits of his objections be determined as in other land cases.

Spithill was thus required to show that the land was uninhabited, unoccupied, and unimproved (except by himself), and that it was chiefly valuable for timber, and unfit for cultivation. Should it, however, appear that it is not subject to entry under the provisions of this act, consideration of Gowen's pre-emption claim becomes immaterial in this case. All timbered lands are unfit for cultivation in their natural condition; but if they may be redeemed and made susceptible of cultivation by ordinary farming process, they are not, in my opinion, within the purpose of this act, which was intended to embrace within its provisions timbered tracts only in broken, rugged, or mountainous districts, with soil unfit for ordinary agricultural purposes when cleared of timber. A different construction of the act would subject to its operation immense bodies of heavily timbered land, which need only enterprise and labor for their conversion into fertile fields and flourishing towns.

The testimony shows that the tract in question, with all the land in that vicinity, is heavily timbered, but does not show that it is unfit for cultivation when cleared of timber. On the contrary, it is shown that neighboring lands of this same general character are cultivated with fair success. A portion of that in question, variously estimated at from 10 to 50 acres, consists of a swamp of rich soil, 8 or 10 acres of which is now fit for pasture and hay (the balance of which may be made so by drainage), and a lake of 4 acres, while the remaining portion is upon a level upland, heavily timbered, with a gravelly and somewhat sandy soil slightly mixed with clay, which, under a large preponderance of testimony, may be converted into farming lands and made fit for cultivation. Such land is not, in my opinion, subject to entry under this act, but must be appropriated under the pre-emption and other laws for the disposition of the public lands.

I reverse your decision and dismiss the application of Spithill, leaving the claim of Gowen for his final proof.

*LAND SUSCEPTIBLE OF CULTIVATION.**ROWLAND v. CLEMENS.*

Notwithstanding there may be much and valuable timber on a tract, the same is not subject to entry under the act of June 3, 1878, if the soil is a black loam and susceptible of ordinary cultivation, except in minor portions, where it is rocky or steep.

Where a declaratory statement is on file, the land covered thereby is not subject to entry under the timber-land act.

*Secretary Teller to Commissioner McFarland, March 7, 1884.*

I have considered the case of Robert Rowland *v.* John W. Clemens, involving lot 2 and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  in Sec. 30, T. 9 N., R. 5 W., W. M., Vancouver, Wash., on appeal by Clemens from your decision of July 25, 1883, awarding the land to Rowland.

It appears that on September 8, 1882, Clemens made application to enter lots 1 and 2 and the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of said section, under the timber-land act of June 3, 1878. On September 23, 1883, Rowland filed declaratory statement No. 1154, alleging settlement on the same day for the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and lot 2 of said section. Rowland afterwards filed an affidavit alleging that the tracts first above mentioned were valuable chiefly for agriculture; and on that issue a hearing was had on February 20, 1883. On the evidence your said decision holds that said land is chiefly agricultural.

On a careful consideration of the testimony, I concur in your opinion. There is much timber on the land, and it is doubtless quite valuable; but nearly all the witnesses agree that the soil is a black loam and susceptible of ordinary cultivation, except in minor portions where it is rocky or steep.

I observe that your decision concludes with the language, "I award the land in contest to him" (Rowland). The issue in this case is not the superior right of one of these parties, and there is therefore no "contest," in any proper sense, between them. Rowland's affidavit presented one issue only, namely, the character of the land; on that the evidence was taken, and on that the decision should be made. The latter's pre-emption papers are not in the record, and the Land Department is in no position to judge of his right to the land. Furthermore, the evidence shows that there was a pre-emption settlement on the land prior to Rowland's filing, and although that settler testifies that he sold his house to Rowland, it does not appear that he has abandoned the land, or that he is in laches in respect to his claim. Rowland's claim should therefore stand on its own merits, as customary, when he offers to make final proof. (See *Hughes v. Tipton*, decided the 23d ultimo.)

I also direct your attention to the fact that the first pre-emptor, one Ryan, distinctly testifies that he had duly filed his declaration, and was in lawful possession of the first-named tracts at date of the timber

application. If so, the local officers were in error in receiving the timber application, in so far as it covered said tracts. The act of June 3, 1878, is express in declaring that nothing in it "shall defeat or impair any bona fide claim under any law of the United States," and to accept a timber application for part of a tract already covered by a *prima facie* valid pre-emption filing is to seriously impair it, by subjecting the pre-emptor to the possible annoyance and expense of a contest concerning priority of right. Had Rowland not made his appearance in this case, such a result would actually have happened. I do not think that this act gives equal privileges with a bona fide settler to a mere speculator in timber. The former, by the terms of the pre-emption and homestead laws, is authorized to settle or enter the lands, subject to the prior settlement rights, but the latter is expressly precluded from jeopardizing the settler's interests, if he has notice of them, which he does have when a declaratory statement is on file. The act of June 3, 1878, is opposed to the policy of the general settlement laws, though not repealing any part of them, for it allows the mere speculator to appropriate land if he is first in time; consequently it should have a strict construction, and the timber applicant should never be allowed to cover land which the records of the local office show is already legally occupied.

Your decision is modified accordingly.

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### XIX.—TOWN SITE.

#### TIMBER CULTURE—INCORPORATED LIMITS.

JAMES M. DAYTON.

A timber-culture entry cannot be made on lands within the incorporated limits of a city or town.

*Acting Commissioner Harrison to register and recorder, Aberdeen, Dak., December 28, 1883.*

I am in receipt of your letter of the 12th instant, transmitting the rejected application of James M. Dayton to enter the SE.  $\frac{1}{4}$  14, 123, 64, under the act of June 14, 1878, and the argument of his attorney in support of the appeal.

Dayton presented his application November 12 last, upon which the register indorsed the following: "This application is rejected on the ground that the land is included within the incorporated limits of the city of Aberdeen, Brown County, Dakota Territory." The act of June 14, 1878, prescribes in specific terms the qualifications of applicants thereunder. It also describes the natural character of the land that shall be subject to entry, but, unlike the pre-emption and homestead laws, does not in express terms prohibit an entry of land included within the limits of a city or town. While the law does not prohibit

the entry of land so included, it must be construed in the light of the general laws regulating the disposal of the public lands. Section 2258, Rev. Stat., provides that the following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit, \* \* \* "Lands included within the limits of any incorporated town, or selected as the site of a city or town." \* \* \* And it is provided that such lands cannot be entered under the homestead law.

The inhibition of the section referred to effectually reserves the lands referred to for a special reason and purpose, and, as is therein stated, to render it subject to entry it must be specially provided for by law. The timber-culture law contains no such provision, and the absence of any positive inhibition, such as occurs in the pre-emption and homestead laws, cannot be construed to allow an entry of such land thereunder.

Your action in rejecting said application is sustained.

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## XX.—TRANSMUTATION.

### *PRE-EMPTION TO HOMESTEAD—CONTEST—BURDEN OF PROOF.*

#### *SLATE v. DORR.*

The right to transmute a pre-emption filing to a homestead entry depends upon the validity of the pre-emption claim. A settlement is an appropriation of land, and a subsequent homestead entry is subject to the settler's compliance with law. The entry appropriates it against the world except the prior settler. The assertion of the settler's claim initiates a contest. The burden and expense of proof is upon the entryman. The settler's application to transmute must be received, and the entryman given an opportunity to show cause why it should not be permitted.

A pre-emption or homestead claim may be valid as to one part and invalid as to another part of the land covered by it.

*Secretary Teller to Commissioner McFarland, November 22, 1883.*

I have considered the case of William Slate *v.* Madison Dorr, involving the SE.  $\frac{1}{4}$  of Sec. 30, T. 16 S., R. 18 W., Wa Keeney, Kans., on appeal by Slate from your decision of October 3, 1882, denying his application to alter his pre-emption to a homestead claim, and declining to change the status of the land, or the respective rights of the parties, as determined by your decision of December 20, 1881.

It appears from the record that one Moon had a timber-culture entry upon said tract, which was relinquished, and thereupon canceled April 14, 1879, under a written agreement between Moon and Slate that the latter would pre-empt it, and, after obtaining title, convey to the former the east half of it. On July 7, 1879, Slate filed his declaratory statement, No. 3825, alleging settlement April 14, 1879; and on July 8, 1880, Dorr

covered it by homestead entry No. 5021. Contest thus arose, and your first decision aforesaid held that Slate had a valid pre-emption right, which, under California *v.* Alara (8 Land Owner, 140), he could perfect at final proof by showing a reconveyance or release of his claim by Moon, or by eliminating from his application to enter that part of the tract embraced in his contract with Moon. No appeal from this decision was taken.

On June 24, 1882, Slate made application to change his filing to a homestead entry, which your second decision aforesaid denies on the ground that, "as he has not in a proper manner shown either release or elimination, my (your) decision must stand." I do not think that the reason assigned is ground for denying the application. Your decision of December 20, 1881, held that Slate's pre-emption right was barred unless he could go to the local land office with clean hands at date of his application for cash entry, and there it stopped; it had no bearing upon the application to transmute, and therefore, if his right to convert his pre-emption into a homestead claim is questioned, it must be questioned for other cause.

Now, section 2289, Rev. Stat., gives a qualified person a right to enter as a homestead any land "upon which such person may have filed a pre-emption claim," and there is nowhere expressed any qualification of this right. It is true that Slate's right depends on the validity of the pre-emption claim; but you have already held that his claim is valid, and it follows that he has unqualified right of homestead entry. In 1871 it was held by this Department, in Ross *v.* Sinclair (Copp's Public Lands, 318), that "a person in possession of a valid pre-emption claim may at any time commute it to a homestead, and in so doing his right will relate back to the date of his settlement, to the exclusion of intervening adverse claims to the land." In 1876 this case was approved in Watson *v.* Mo. R., Ft. S. and G. R. R. (3 Land Owner, 7), where it is said, "This right to change from a pre-emption filing to a homestead entry is incident to and a part of the right given the pre-emptor at the time he initiates his claim." The doctrine above enunciated I approve, so far as it relates to the right of entry in law.

The question then arises as to the effect of this doctrine upon such cases as that at bar, where an entry is already of record. Whilst the doctrine is sound that an entry is an appropriation of the land covered by it, it cannot be held to be an appropriation of land already appropriated. Where there is a prior valid pre-emption claim to the tract, the settlement is an appropriation of it, and the entry subsequently allowed is subject to such claim; therefore the entry appropriates it against the whole world except the prior settler, and as against him it is null and void if he duly asserts his claim. The assertion of such claim necessarily initiates a contest, and the rule is that the burden of proof is on him who contests the claim first of record. In the case at bar, whose was the first of record? Evidently Slate's, whose declara-

tory statement placed on record the fact that he had settled on a certain tract, and that in due time he intended to claim it under the pre-emption law.

Consequently, if Slate applied for cash entry, the burden and the expense of disproving his right to it rested on Dorr; and it follows that the burden and expense of disproving his right to transmute to a homestead entry is also on Dorr.

Wherefore, under such circumstances, the application to transmute must be received, and the entryman given due notice by the local officers to show cause why the transmutation should not be permitted. And, as your office held in *Wolfe v. Struble* (9 Land Owner, 148), "if the validity of the pre-emptor's claim is not impeached (at the hearing), the adverse homestead entry will be canceled and the transmutation allowed."

In this case, however, there are in evidence certain facts which warrant an adjudication without resort to a further contest. They came out at the original hearing between the parties, though your decisions have failed to take notice of them. It is shown that, whilst Moon relinquished his timber-culture claim under the aforesaid contract with Slate, he relinquished possession and occupancy of but the west half of the land; that Slate settled on and improved the west half only, and that it was not until July 7, 1880, that Moon sold and transferred his improvements and possessory rights to Dorr, who thereupon made his homestead entry aforesaid.

Now, the contract between the two, being illegal, was of no force or effect whatever in so far as the status of the land was concerned. Moon was in possession of the east half by color of law, and therefore Slate's settlement on the west half could give him no claim to the east half (*Banks v. Smith*, 10 Land Owner, 226). Settlement is the sole basis of the pre-emption right, and the right is not greater nor less than the settlement; hence Slate never initiated a valid claim to the east half of the tract in contest. It is true that he filed a declaratory statement covering it, but the law itself defines his declaratory statement to be a declaration of "his intention to claim" the tract, and not as the claim itself. Therefore, generally, a declaratory statement not based on a settlement is void, and in this case it is void as respects the east half of the tract. It has frequently been held by this Department that the expression of an "intention" to claim certain land, unaccompanied by any act marking it off or otherwise reducing it to possession, does not reserve it against other settlers. (See *Kessel v. Spielman*, 10 Land Owner, 6; and *Buchanan v. Minton*, 10 Land Owner, 281.) In *Kelley v. Wallace* (14 Minn., 236), the court held that "the original settlement must be followed by occupancy of the land as the home of the settler;" whereas in this case it is shown that Slate not only never actually occupied it, but that he ran a line separating the east and west halves for

the purpose of distinguishing the part occupied by himself from that occupied and improved by Moon.

On the other hand, and upon the same principle, a homestead entry of that part of a tract in the legal possession of a pre-emptor is voidable, and must be canceled when the latter duly asserts his right to it. Here there was a contract by Slate to convey the east half of the tract in controversy to Moon, when title had been acquired under the pre-emption law; but the subsequent acts of the parties, by dividing the occupancy and settlement of the land, and so defeating Slate's title to the east half, destroyed and obliterated the contract, leaving Moon in possession of the east half, which he afterwards sold to Dorr. There was therefore no illegality in the initiation of Slate's claim to the west half, and nothing that could bar his right of cash entry or transmutation. His filing should accordingly be canceled as to the east half of the tract in controversy, and he should be allowed the option of purchase or transmutation of the west half; whilst Dorr's entry should also be canceled as to the west half of said tract.

Your decision is accordingly reversed.

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## XXI.—UNLAWFUL INCLOSURES.

### SETTLEMENT—TRESPASS—OCCUPATION.

#### MCKITTRICK & ANDREWS.

The inclosure of large tracts of public land for grazing purposes is unlawful, and a trespass. Persons desiring to become bona fide settlers may tear down the fences surrounding such tracts.

*Secretary Teller to Commissioner McFarland, March 26, 1883.*

You transmit under date of the 10th instant, for my consideration and action, "a petition and resolution of citizens of Barbour County, Kansas, relative to the unlawful inclosing of large tracts of vacant Osage Indian lands in said county, amounting in all to about 200,000 acres," and also sundry affidavits corroborating the alleged facts, and showing that, among others, one John McKittrick and one — Andrews, his partner, have inclosed, for grazing purposes, a tract of about 6,000 acres subject to pre-emption, situate wholly or in part in T. 31, R. 13 W., in said county, and by such inclosures and by threats and violence, have prevented bona fide settlement on the inclosed tract. You also state that like inclosures are believed to exist in adjoining counties, and recommend that speedy action be taken for the relief of settlers intending to locate on such inclosed lands, and that the fences be removed.

I need not advise you that inclosures of the character described are

unauthorized and illegal, or that settlement on such lands is limited to 160 acres, or that such mere occupation without settlement is trespass only, and gives no right to the occupant, or that such occupation does not legally exclude bona fide settlement by another. Such trespass on the public land is equally offensive to law and to morals as if upon private property, and lands not legally appropriated are vacant and subject to disposal to whomsoever legally applies for them. Until settlement is made under the settlement laws there is no objection to the grazing of cattle or cutting hay on Government land, provided such unappropriated lands are left open to all alike. To allow a few wealthy stockmen to fence these lands, and thus not only practically withdraw them from the operation of the settlement laws, but deprive men of small means of the advantage of acquiring a settlement will not be allowed under any pretense whatever. Attempts, therefore, by persons in illegal occupation of such tracts, to prevent their settlement by fence or threats or violence will be discountenanced by this Department, and should be by all good citizens.

It is immaterial that such inclosures are for stock-range purposes. The law recognizes no such purpose. The grazier may as well equitably claim any other as the landed property of the Government, but neither is permissible. He may have only what is allowed all others.

The inclosure of McKittrick & Andrews is illegal, and against the right of others, who desire to settle or graze their cattle on the inclosed tracts. It gives them no exclusive right to such tracts, and they cannot thereby, or by threats or violence, prevent entry thereon by others who desire to graze the same land or to enter thereon for any purpose within the law. This Department will therefore interpose no objection to the destruction of their fences by persons desiring to make bona fide settlements on such inclosed tracts, should McKittrick & Andrews endeavor to prevent the same by their fences or threats or violence, but will rather lend its influence to their appropriate punishment under the law for their trespass. You will therefore cause them (and all others inclosing tracts of the public land beyond that allowed by law) to be notified by a circular letter that the Government will prosecute or otherwise express its disapprobation of their trespass whenever, after such notice, it shall appear that, by such inclosure, they prevent settlement on the inclosed tracts by persons entitled thereto under the law.

**CIRCULAR.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 5, 1883.*

*To registers and receivers, United States land offices, and special agents.*

You are instructed to circulate the following notice in your district:

**NOTICE RELATIVE TO UNLAWFUL INCLOSURES OF PUBLIC LANDS.**

In view of the numerous complaints of the unlawful inclosures of public lands for stock-range purposes, and consequent impediment to settlements, all persons are hereby notified as follows:

The public lands are open to settlement and occupation only under the public-land laws of the United States, and any unauthorized appropriation of the same is trespass.

Such trespass is equally offensive to law and morals as if upon private property.

The fencing of large bodies of public land beyond that allowed by law is illegal, and against the right of others who desire to settle or graze their cattle on the inclosed tracts.

Until settlement is made there is no objection to grazing cattle or cutting hay on Government land, provided the lands are left open to all alike.

Graziers will not be allowed, on any pretext whatever, to fence the public lands, and thus practically withdraw them from the operation of the settlement laws.

This Department will interpose no objections to the destruction of these fences by persons who desire to make bona fide settlement on the inclosed tracts, but are prevented by the fences, or by threats, or violence from doing so.

The Government will take proper proceedings against persons unlawfully inclosing tracts of public land whenever, after this notice, it shall appear that by such inclosures they prevent settlements on such lands by others who are entitled to make settlement under the public-land laws of the United States.

N. C. McFARLAND,  
*Commissioner.*

DEPARTMENT OF THE INTERIOR,  
*April 5, 1883.*

**Approved:**

H. M. TELLER,  
*Secretary.*

## DIVISION K.—SWAMP LANDS.

- I.—DISPOSAL.
- II.—ERRONEOUS CERTIFICATION.
- III.—ESTOPPEL.
- IV.—INDEMNITY.
- V.—LEGAL SUBDIVISIONS.
- VI.—MCDONOUGH CLAIM.
- VII.—OVERFLOWED LANDS.
- VIII.—RESURVEY.

### I.—DISPOSAL.

#### *ADJUDICATION—DETERMINATION—ALIENATION.*

*ARANT v. STATE OF OREGON.*

The term disposal means alienation of title.—A pre-emption filing may be received for land claimed as swamp and overflowed.

*Secretary Teller to Commissioner McFarland, July 11, 1883.*

I have examined the testimony, and concur with you in the opinion that the tracts were not swamp and overflowed land, and did not inure to the State under said act. It is claimed, however, that by reason of the selection of February 7, 1872, which was prior to Arant's settlement, Arant's filing must be rejected under Secretary Schurz's ruling in the case of *Crowly v. Oregon* (Copp., May, 1880), wherein he held—construing the proviso to act of March 12, 1860—that pending consideration of the State's claim for land asserted to be swamp and overflowed, and before final determination that the land was not of the character contemplated by the act, it would be erroneous to permit pre-emption *entries* of such land; in other words, that after the State has claimed land under its grant, it cannot be disposed of under other general laws for the disposition of the public land, until after such claim has been adjudicated adversely to the State.

I concur in this ruling, but it is not, in my opinion, applicable to the present case. A disposal of a tract of public land involves an adjudication—a determination of its status and condition and alienation. But an application to file for a tract or even a filing is not a disposal, but a step only to that end. It is only when a pre-emption *entry* is allowed, with the consequent right to a patent, that the Government disposes of a tract of its land under that law. *Disposal* in this sense is equivalent to sale and alienation, and such I think was the meaning of Secretary Schurz in *Crowly v. Oregon*, and therefore he well held that Government could not alienate its title so as to deprive the State of its asserted claim in case such claim be finally held valid. I know no reason why Arant

might not file for the tract, subject to the prior asserted claim of the State, or why upon decision adverse to such claim his filing, if otherwise regular, should not take effect.

I affirm your decision that the State has no claim to the tracts in question, under its grant, because not of the character thereby contemplated, and that the claim of Arant be allowed.

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## II.—ERRONEOUS CERTIFICATION.

### NEW TITLE—LAND DEPARTMENT.

#### STATE OF MINNESOTA.

Where lands have been erroneously certified to a State under one grant when they should have been certified under another, the Land Department has authority, upon reconveyance of the outstanding title, to make new titles under the proper law.

*Secretary Teller to Commissioner McFarland, March 11, 1884.*

It appears from your letter of November 9, 1883, and accompanying papers, that certain lands, amounting to 32,102 acres, were certified to the State of Minnesota as part of the grant to said State under the act of Congress approved May 5, 1864 (13 Stat., 64), to aid in the construction of the Lake Superior and Mississippi Railroad, and were so conveyed to said company by the State; whereas, in fact, they should have been certified to the State as part of the State's swamp grant under the act of March 12, 1860 (12 Stat., 3); that the Saint Paul and Duluth Railroad Company is successor to the Lake Superior and Mississippi Railroad Company, and as such is entitled to said swamp lands under an act of the legislature of the State of Minnesota, approved March 8, 1861; that the State, by deed dated June 9, 1882, relinquished the said lands to the United States, in order that the lands so erroneously certified may now be properly certified to the State, so that they may be regularly granted to the Saint Paul and Duluth Railroad Company as part of the State's swamp grant under said act of March 8, 1861.

You state that the certification of the lands in question for railroad purposes was clearly erroneous and should have been under the swamp grant to the State, and you recommend that upon receipt of evidence that the title conveyed by the State to the Lake Superior and Mississippi Railroad Company, under the grant for railroad purposes, has been reconveyed to the State (which appears to have been done by the Saint Paul and Duluth Railroad Company's deed of January 13, 1882, a copy of which, certified by the auditor of the State, has been filed in this Department since the date of your letter), that you be authorized to accept the same so far as the tracts therein described may, upon re-examination of the field notes of survey in your office (which the State accepted as the basis of adjustment of its swamp grant), be found to

be swamp land within the meaning of the act of September 28, 1850, and to issue patents for such lands under its swamp grant.

Concurring in your views under the facts stated, I approve of your recommendation, and you will take action accordingly.

### III.—ESTOPPEL.

#### STATE OF CALIFORNIA.

The State having claimed land under Section 1, act of 1866, and title having passed to an individual, the State is estopped from claiming same land under Section 4 of said act.

*Secretary Teller to Commissioner McFarland, December 21, 1883.*

SIR: I have considered the appeal of the State of California from your decision of January 15 last, denying her application for patent to the S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 11, T. 4 N., R. 5 E., M. D. M., Stockton district, California.

The tract in question was involved in the case of State of California, *ex rel. Kile et al., v. Tubbs* (6 Copp, 108), wherein this Department rendered decision July 15, 1879, in favor of defendant, to whom patent issued for the tract October 1, 1879.

It appears that Kile preferred claim in the premises as the State's grantee by virtue of purchase under the provisions of the first section of the act of July 23, 1866 (14 Stat., 218), and it was held by my predecessor, Mr. Secretary Schurz, in the decision that—

A careful examination of the first section of the act convinces me that it has no reference to swamp claims, its manifest office being to confirm sale under selections made in part satisfaction of grants to the State, requiring for such satisfaction the selections of lands from the public domain by the authorities of such State duly appointed under her laws for that duty.

The State now prefers claim under clauses 1 and 2 of the fourth section of said act of 1866, predicated upon certain alleged Government and State segregations; maintaining that she is not estopped from so claiming by reason of her previous assertion of claim under the first section, and that it is not competent for the Government to deny her right to patent, inasmuch as it is required so to do by the express terms of the act, which is mandatory, and this notwithstanding the fact that patent has already issued to Tubbs.

Upon the state of facts thus disclosed, you held that the tract having been so patented, in accordance with said departmental decision, your office had no authority in the premises.

Deeming it unnecessary to discuss the several points raised upon appeal by the State's counsel touching the doctrine of estoppel, it will suffice to say that I concur with you in such opinion, inasmuch as all

jurisdiction of the Land Department over the title ceased when it issued said patent. *Moore v. Robbins* (96 U. S., 530).

The appeal is therefore dismissed, and your decision is accordingly affirmed.

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#### IV.—INDEMNITY.

##### *PROOFS TO BE FORWARDED.*

*Commissioner McFarland to Special Agent Bergan, Jefferson City, Mo., October 15, 1883.*

SIR: You are hereby instructed to notify the proper State authorities that hereafter when the State has completed any portion of its indemnity proofs they must be turned over to you, when you will certify to the same as heretofore directed and forward them to this office.

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#### V.—LEGAL SUBDIVISIONS.

##### *MIXED CHARACTER—SURVEY.*

##### *STATE OF CALIFORNIA.*

Where a legal subdivision contains swamp and overflowed land equal in area to more than half of such subdivision, the entire tract passes to the State under the act of September 28, 1850, and a survey segregating the swamp from the arable land therein should not be approved.

*Secretary Teller to Commissioner McFarland, November 2, 1883.*

I have considered the case presented by the appeal of the State surveyor-general of California from your decision of July 12, 1882, disapproving the amended diagram forwarded to you by the United States surveyor-general of California, showing amendments made to lots 1 and 6 in Sec. 7, T. 13 S., R. 2 E., M. D. M., California, according to State segregation survey No. 10, made August 9, 1860.

On the segregation map of T. 13, approved August 28, 1872, the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7 is divided into dry land lot 1, containing 15.69 acres, and swamp land lot 7, containing 24.31 acres, and lot 6, being a part of the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of said section, and 10.62 acres in area, appears as swamp land.

If the amendment to the segregation map is made strictly in accordance with the State survey, referred to above, lot 1 will appear as swamp land, and a new lot, designated as No. 11, will be carved out of lot 6; but the real object of the desired amendment is to secure the designation of lot 1 as swamp land; for, by the records of your office, that part of lot 6, which would be included in lot 11, appears to have been patented to the State as swamp land February 8, 1873.

The Southern Pacific Railroad Company of California, by its attorney, resists the application of the amendment of the segregation map, and claims said lot 1 as part of an odd section inuring to said company by the act of July 27, 1866 (14 Stat., 292).

You disapproved the amended diagram for the reason that "an examination of said State survey shows that it was not made in accordance with the system of surveys adopted by the United States."

By the act of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits" (9 Stat., 519), "the whole of those swamp and overflowed lands made unfit thereby for cultivation," which were unsold at the date of the passage of the act, were granted to the State of California. Section 3 of said act provides :

That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

The act from which the foregoing quotation is made is a present grant, vesting in the State, from the day of its date, the title to all the swamp and overflowed lands within the State that were then not sold, and requiring nothing but the determination of boundaries to make it complete. *Nall et al. v. The State of California* (Copp's L. L., 1882, p. 1048); *Railroad Company v. Smith* (9 Wall., p. 95). In order that there should be no difficulty in determining the boundaries of the granted land, Congress, in section 3 of the act, defined with precision the lands which should be taken by the State under the grant, as "swamp and overflowed lands," to wit, "all legal subdivisions the greater part of which is wet and unfit for cultivation." When the character of the greater part of a legal subdivision has been ascertained, by properly constituted authority, the character of the whole of that subdivision is determined, and the question as to whether title to such tract will or will not pass under the grant is settled by virtue of the statute itself.

In this case it appears that the segregation surveys, made both by the Government and the State, agree so far as the character of "the greater part" of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7 is concerned, but the approved segregation map of that township shows lot 1, which only contains 15.69 acres, as dry land, and the remainder of the 40 as swamp land; and in this particular I think the said map should be amended.

The remainder of the amendment, asked to be made under the designation of lot 11, includes 3.95 acres already patented to the State as hereinbefore stated; and the title thereto having passed to the State as swamp land, no further act on the part of the Government, as affecting the legal status of said tract, is required under the grant.

The whole of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7. passed to the State under the grant when the character of the greater part of such subdivi-

vision was determined to be swampy; hence the segregation map of that township should designate lot 1 as swamp land, on account of the character of the greater part of the legal subdivision of which it is a portion. Your decision is accordingly modified as indicated in the foregoing.

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## VI.—McDONOUGH CLAIM.

### STATE OF LOUISIANA V. CITY OF BALTIMORE ET AL.

Status of certain tracts in T. 10 S., R. 5 E., Louisiana.

*Secretary Teller to Commissioner McFarland, November 21, 1883.*

I have examined the case of The State of Louisiana *v.* The City of Baltimore *et al.*, involving certain selections of swamp lands in T. 10 S., R. 5 E., southeastern district, Louisiana, east of the Mississippi River, reported to your office December 15, 1881, by the surveyor-general of said State, on appeal from your decision of December 4, 1882, holding the list of such selections for rejection.

The cities of Baltimore and New Orleans appear by counsel, claiming to hold the lands as devisees, under the last will of John McDonough, jr., in trust for the purpose of founding charity schools in those cities for destitute orphan boys; and some other adverse parties appear by the same counsel.

By your letter E, of August 23, 1881, you directed the surveyor-general to cause to be canceled so much of the subdivisional survey of said township as lies south of the line of the old claimed limits of the William Conway portion of the Houmas grant, and east of the claimed line of John McDonough & Co., as surveyed by Deputy John Kap. In your letter of December 4 last, from which appeal is taken, you state that the list aforesaid is rejected "for so much of the same as falls within the canceled portion of the subdivisional survey of said township." Your letter gives no grounds for the decision therein contained, but in your reply (January 15, 1883) to a letter addressed to you by Mr. Mason, sub-agent for Louisiana, asking for such grounds, you state that "it is held by this office that the claim of John McDonough & Co., which covers the tracts embraced in my decision of the 4th ultimo, was confirmed by act of Congress approved May 11, 1820, and therefore the selections of swamp lands made under act of March 2, 1849, were invalid."

The city of Baltimore and heirs of Lobdell and of Slidell derive title as follows, viz: About the year 1805, John McDonough, jr., and Shepard Brown, partners, doing business as merchants at New Orleans, claimed to own 18 arpens 3 toises and 3 feet front, being part of the old Delille Dupard grant of April 3, 1769, lying on the Mississippi River, about 16 leagues above New Orleans.

The claim was duly presented to the board of commissioners, acting under the act of Congress of March 2, 1805 (2 Stat., 324), and the acts amendatory thereof. And again, under the act of February 27, 1813 (2 Stat., 807), the claim was filed before the register and receiver of the eastern district of the State of Louisiana, with further evidence, and claiming a front of 32 arpens, "with a depth extending as far as Lake Maurepas."

In the report of the register and receiver of November 20, 1816, communicated to the Senate, January 20, 1817, the claim is reported as follows:

First class—species the first.

John McDonough, Jr., & Co., claim a tract of land situated in the county of Acadia, on the east shore of the Mississippi, 16 leagues above New Orleans, containing 32 arpens front, with a depth extending as far as Lake Maurepas. This tract of land has formerly been claimed before the Board of Commissioners, and the depth extending beyond 40 acres rejected by them for want of evidence of title; but the claimant has since produced a complete French title for the whole quantity claimed, in favor of Delille Dupard (under whom he claims), dated the 3d day of April, 1769. (American State Papers, Duff Green Ed., vol. 3, 223.)

The register and receiver in said report divide the claims into three classes and three species, and precede the same with the following statement, viz:

The following claims to lands are divided into three general classes: First class comprehends such claims as stand confirmed by law.

Second class comprehends such claims as in the opinion of the register and receiver ought to be confirmed.

Third class comprehends such claims as in their opinion cannot be confirmed under existing laws.

First class comprehends the following species of claims:

1st. Claims founded on complete titles, granted by the French or Spanish Governments.

The report upon the first species of class first closes as follows, viz:

All the preceding claims, being founded on complete titles, are in our opinion confirmed by law.

Near the close of the whole report, under the head of "Remarks on the preceding reports," page 233, they state as follows, viz:

In classing the claims, we thought it proper to subdivide those classes into species; for, although we believe that all the claims reported in the first and second classes are or ought to be confirmed under existing laws, yet those laws do not confirm them all to the same extent, nor demand the same requisites equally in all to entitle claimants to their lands. Hence, for the sake of perspicuity, and to pursue as nearly as possible the different kinds of claims pointed out by the various acts of Congress, we have adopted the preceding arrangement of claims as being in our judgment the best mode. \* \* \*

Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and therefore require no confirmation by the Government of the United States to give them validity.

Section first of confirmatory act of May 11, 1820, entitled "An act

supplementary to the several acts for the adjustment of land claims in the State of Louisiana," is as follows, viz:

That the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the Commissioner of the General Land Office, bearing date the 20th day of November, 1816, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States.

Under this section, it is stated in your letter of January 15 last, the claim of John McDonough & Co. was confirmed, and the tracts in question are covered by said claim as confirmed.

The State of Louisiana claims that the lands embraced in the selections were not within the limits of the claim confirmed to McDonough & Co.

Although this Department has never passed directly upon the effect of such a report of the register and receiver, and of the act of May 11, 1820, following the report as to the McDonough claim, yet it held substantially in the case of the claim of Rodolphus Ducros, decided March 2, 1874, by Secretary Delano, that said Ducros claim was confirmed by the act cited. The Ducros claim, so far as it was affected by said report and confirmatory act, stood exactly as did the McDonough claim, it being No. 484 in the same class and species as the McDonough claim.

In *McDonough v. Millaudon et al.* (3 How., 693), involving the claim under consideration, upon the question of title the court say:

The perfect title of McDonough being clothed with the highest sanction, and in full property, on the change of governments an assumption to confirm it would have been pregnant with suspicion that it required confirmation by this Government, in addition to the general law of nations and the treaty of 1803, which secured in full property such titles. That the grant stands recognized as complete and valid against the United States, and any one claiming under them, by the proceedings had before the register and receiver, and by Congress, we have no doubt; further than this, the Government has not acted on it.

It will be seen by a careful examination of the report of the register and receiver, of the confirmatory act of 1820, and of the citations already made, that the confirmation of the McDonough claim, and of all those that stood in the same class and species, was not after all so much a confirmation of that claim as it was an affirmation of the statement contained in the report, that they needed no confirmation, and this for the reason that they were perfect and complete grants by the former Government.

The register and receiver, in the State Papers, as already cited, say:

Those claims \* \* \* being founded on complete grants of former Governments, we think are good in themselves on general principles, and therefore require no confirmation by the Government of the United States to give them validity.

The confirmatory act declares that the claims "recommended in the said report for confirmation be, and the same are hereby, confirmed against any claim on the part of the United States."

In *McDonough v. Millaudon* (*supra*), the court, referring to the report of the register and receiver, say :

Many incomplete titles were recommended for confirmation, and confirmed by Congress, but in these cases the former governments had parted with the ultimate interest in the land, and the fee was transferred to the United States by the treaty with the equity attached in the claimant, which equity was clothed with the fee by the confirming act.

This opinion did not relate to the class and species in which the McDonough and Duecos claims are found. As to all the claims in that class the register and receiver said : "All the preceding claims being founded on complete titles are, in our opinion, confirmed by law." But the opinion cited undoubtedly referred to the large number of cases in species first of the second class, which had been occupied and cultivated respectively for a period of from ten to ninety years. As to that class of cases the register and receiver say : "All claims reported in the foregoing species we are of opinion ought to be confirmed."

The equity as to that class of cases was in the occupants, and the fee in the United States.

Congress by said section 1 of the act, following the recommendation of the report, annexed the fee to the equity, and thus completed the grant as to that species claimed.

As to the McDonough and other claims enumerated in that class and species, the register and receiver were of the opinion that they were grants completed under the former government, and it seems to me that all that can be claimed for the confirmatory act as to those grants is that it adopted the opinion of the register and receiver. The language of the act, "confirmed against any claim on the part of the United States," strictly construed, could perhaps be applied only to the class of cases requiring affirmative action by the present government to complete the title, and the language be regarded as addressed only to that class of claims; but I am inclined to think that the construction which the act, taken in connection with the report, ought to receive is, that Congress acknowledged and recognized the grants which the register and receiver reported and declared to be "founded on complete titles," so far as there could be made against them "any claim on the part of the United States." But I must not be understood as expressing the opinion that such recognition or confirmation fixed the depth or extent of the grants as set forth in the claims presented to the register and receiver.

With such recognition came the duty of survey, and segregation or approval in some proper manner of surveys and plats made under the former governments when properly presented for consideration.

I do not think it provident or proper in this case, as it is now presented, to enter into the history or effect of the surveys which have been made so far as they relate to this claim.

The record shows that this is not an affirmative proceeding for the survey of the McDonough & Co. grant, or to define its limits as claimed under the grant, or in the report of the register and receiver, or as it

may have been established under the F. V. Potier or other plats and surveys. The only question presented is, whether the subdivisional surveys extended over certain lands in said township 10 should be canceled and the list of swamp-land selections based thereon be rejected.

Whether the lands embraced in the subdivisional survey are within the McDonough grant depends upon the depth of that grant. The lands are not within the depth of 80 arpens, that being the depth claimed when the claim was filed before the board of commissioners in 1806. They are within the depth of the claim, if such depth is extended to Lake Maurepas, that being the depth stated in the claim as filed before the register and receiver under the act of 1813. As before stated, the question of the limits of the claim is not directly before me. It is only before me incidentally, in that the selections are made upon lands claimed by heirs and devisees under the McDonough grant.

Your letter is very brief, directing a cancellation of the survey and rejection of the selections, without a recitation of facts involved in the question of the extent of the grant. This question is, however, very elaborately considered in the brief of counsel.

I am advised that there has never been a survey of the McDonough claim as an entirety by the United States surveyor-general, and until that is done, or the question of the boundaries of the grant presented in some other proper manner, it seems to me it cannot properly be considered by this Department. Even if there was a valid survey and plat under either of the former governments, which seems to be questioned, such survey should at least be verified by the surveyor of the present Government, and, the boundaries of the grant clearly defined, submitted to your office.

The attempt to settle the question of the extent or depth failed in the State courts, because, as is alleged, certain documentary evidence was excluded in those courts.

The case (already cited) in the United States Supreme Court was dismissed for want of jurisdiction.

Although a large amount of documentary evidence is now presented to me, which it is assumed would enable me to determine the boundaries, and which has been procured at much labor and expense on the part of the claimant, I do not think it would be proper, as the case stands, for me to assume to decide the important question of the boundaries of the grant. This evidence, including exhibits from 1 to 45 inclusive, was not presented to your office nor considered by you, but is presented in the first instance to me upon the appeal. Neither was the question that I am now asked to decide considered by you.

The question of the boundaries of the grant, as I have before stated, ought properly to come to your office, and be the subject of your adjudication, before I can be expected to take cognizance of it.

I am asked to try the question in the first instance, on this new and

important evidence, without examination or consideration by your office or that of the surveyor-general of Louisiana.

Since, however, under the order to survey certain lands lying in the Conway division of the Houmas grant, pursuant to the decision of this Department of May 4, 1878, the survey was extended over the lands now in question, I think in the present state of the case that survey should be canceled, as ordered by you, and the list of swamp selections rejected.

It is quite probable that, if the selections were to remain, irreparable injury would be done to the value of these lands by their being despoiled of the timber, alleged to be their chief value. As the case stands, they should not be subject to that peril. I have no doubt but that the McDonough grant is an existing and valid one, made by the former government and recognized by the present; but the extent of it, for the reasons stated, I ought not now to determine.

I am not, however, prepared to say that I acquiesce in the opinion which you seem to express in your letter of January 15, 1883, to the effect that the *tracts in question* were confirmed to McDonough & Co. as part of their claim under the act of May 11, 1820. That depends upon the extent of the grant. I do not undertake now to decide whether the grant, as described in the claim presented to the register and receiver (greatly extending the depth beyond that as presented to the old Board), considered in connection with the report and the act of May 11, was confirmed or acknowledged, so that no "claim on the part of the United States" can be made against it to the whole extent of a "depth extending as far as Lake Maurepas."

I affirm your decision for the reasons stated, and return the papers submitted with your letter of April 24, 1883.

Mr. Bradford, counsel for the claimants of the grant, requests permission to withdraw all or part of the documentary evidence put into the case after your decision was made. Many of the documents are originals, and properly belong elsewhere; and since they were not before you, and perhaps cannot be regarded as strictly in the case, I think the request should be granted, but that before surrendering such papers, copies thereof should be taken by your office.

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## VII.—OVERFLOWED LANDS.

### STATE OF OREGON.

Lands overflowed by the melting of snow, on which, when the water subsides, crops of hay grow, are not overflowed lands in the meaning of the swamp-land act.

*Secretary Teller to Commissioner McFarland, July 13, 1883.*

SIR: I have considered the case of the State of Oregon *v.* Newton S. Goodlow, involving the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$

of Sec. 12, T. 41, R. 13 E., and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 7, T. 41, R. 14 E., Lakeview, Oreg., on appeal by the State from your decision of April 19, 1882, rejecting its claim to the tracts.

Goodlow filed declaratory statement for the tracts July 28, alleging settlement July 25, 1873, and made final proof and payment (cash entry No. 54) August 2, 1875.

Upon affidavits filed in behalf of the State in December, 1876, alleging that the tracts were swamp and overflowed lands, and as such inured to the State under the act of March 12, 1860, a hearing was ordered to ascertain their character and the good faith of Goodlow.

I have examined the testimony. It is voluminous, conflicting, and much of it irrelevant, but I concur with you in the opinion that its preponderance shows that the tracts are not swamp and overflowed land within the meaning of the act of September 28, 1850, and did not, consequently, inure to the State under its grant.

The tracts are situate in a valley, subject to annual overflow in the late winter and early spring months, caused by rains and the melting snow in neighboring mountains. This overflow subsides sometimes in April, generally in May, and with scarcely an exception before June, so that not only is the land in fit condition for plowing, and the cultivation of the ordinary crops of that country, but the overflow is of special benefit to the hay crop, the production of which is a leading industry, many of the people being engaged in stock-raising. Upon the subsidence of the overflow the land continues arable until the following season, when the overflow recurs, except that in the interior the land is frequently too dry for successful cultivation.

I affirm your decision rejecting the claim of the State to the tracts, and as the testimony does not present sufficient facts to show Goodlow's want of good faith or compliance with the law, his cash entry will be held intact.

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### VIII.—RESURVEY.

#### LAND CERTIFIED—SUBSEQUENT SURVEY.

#### STATE OF LOUISIANA.

Lands in this State found by survey to be swamp and overflowed, and certified to the State as such in 1852, cannot be claimed by the United States on a survey made in 1880, describing them as not swamp and overflowed.

*Secretary Teller to Commissioner McFarland, November 22, 1883.*

I have considered the appeal of the State of Louisiana from your decision of March 29, 1882, rejecting its claim to certain lands in that State as swamp and overflowed lands.

The State of Louisiana is entitled to such lands under the act of March 2, 1849 (9 Stat., 352), which has reference to that State only, and

also under the general swamp act of September 28, 1850 (ib. 519). The act of 1849 grants to the State "the whole" of the swamp and overflowed land therein (with certain named exceptions not material hereto), and after their examination by the surveyor-general of the State and his deputies, and their certification to the Secretary of the Treasury and approval by him, vests the fee-simple to such lands in the State, so far as they are not claimed or held by individuals. After compliance with the requirements of the act, the State selected a list of such lands, aggregating 520,014.13 acres, which, with exception of about 600 acres, were certified to the State in 1852. Subsequently, upon the knowledge or suspicion of your office that the survey upon which the approval and certification were based was erroneously made, a new survey was ordered, and in 1879 and 1880 the surveyor-general transmitted to your office a list of selections aggregating 286,506.53 acres, or nearly 34,000 acres less than were reported by the original survey. It also embraced a few hundred acres not named in that survey; and nearly all the lands embraced in the resurvey are included in the selections originally made, title to which has been in the State for thirty years.

Your decision rejects the claim of the State to those tracts embraced in the new survey which were not embraced in the old survey, under a ruling of your office in June, 1864, to the effect that the State of Michigan, claiming swamp lands under the act of 1850, was bound by its selections made under an original survey, and not entitled to lands found to be swamp and overflowed under a resurvey.

There is no imputation of fraud in either of the surveys in question, nor anything in the case to show that one is more accurate than another. The fact that they differed in respect to the character of certain tracts is insufficient to discredit either, and the only question is, whether the original survey is conclusive, as held in the Michigan case. Unquestionably, I think, title to the lands embraced in the former survey vested in the State under the act of 1849, and the same is confirmed by the act of March 3, 1857, which the Supreme Court says in *Martin v. Marks* (7 Otto, 345) confirmed to the several States their selections of swamp lands which had then been reported to your office, so far as the lands were then vacant and unappropriated, and not interfered with by actual settlement under existing laws, and that such selections could not be set aside, nor title to any of the lands which they embraced—unless they came within the exceptions mentioned in the act—be thereafter conveyed by the United States to parties claiming adversely to the swamp-land grant. Although, therefore, lands may have been approved to the State of Louisiana under a survey originally erroneous (which fact does not appear except from the subsequent survey), yet it having been properly approved after compliance by the State with the act of 1849, and certified to the State—which was equivalent to patent—the United States became divested of its title, and has no further ownership in, or control over, such lands. The title of the State to such

lands must, therefore, remain undisturbed until set aside by due course of law, even to the 34,000 acres which the resurvey finds to be not swamp land. There has been no proceeding for this purpose, and the right of the State must be admitted. The lands selected under the old survey, being no longer public lands, were not subject to further survey, and the resurvey could not affect their status. As the act of 1849 granted to the State "the whole" of the swamp lands in the State, I do not think the right of the State could be limited by one survey if another survey found additional swamp lands. If lands were in fact, in 1849, of the character contemplated by the act, they cannot be withheld from the State whenever (there being no other valid claim) such fact appears; and to approve the ruling in the Michigan case would be to uphold an office regulation rather than an express statute. "The whole" of the swamp lands in the State being granted to it, and title thereto vesting in it, its rights cannot be abridged so long as there remain unselected tracts not otherwise appropriated.

I am of opinion that the tracts found to be swamp by the resurvey, additional to those so found by the original survey, should be listed and patented to the State, and, therefore, reverse your decision.

## DIVISION M.—ACCOUNTS.

### I.—ABSTRACTS OF RECORDS.

### II.—CHANGE OF ENTRY.

### III.—CHECKS OR DRAFTS.

### IV.—DEPOSITS FOR PURCHASE OF PUBLIC LANDS.

### V.—FEES.

1. Examining, &c. Testimony on Final Proof.
2. Information.
3. Homestead and Timber-Culture Entries Canceled.
4. Initiation of Contests.
5. Plats and Diagrams.
6. Railroad Selections.
7. Reducing Testimony to Writing.
8. Swamp Selections and Indemnity Swamp Selections.
9. Transcripts of Records.

### VI.—HOMESTEAD AND PRE-EMPTION PROOFS.

### VII.—LOCAL LAND OFFICERS.

1. Surrender of Office.
2. Deposits with Receiver.

### VIII.—MILITARY BOUNTY LAND WARRANTS.

### IX.—RECONVEYANCE BY UNITED STATES.

### X.—REPAYMENT.

1. Double Minimum Excess.
2. Erroneous Selections.
3. Fraudulent Entries.
4. Bonus for Timber-Culture Entries.
5. Statutory Requirements.
6. Voluntary Abandonment.

### XI.—STATE OF KANSAS, 5 PER CENT. ACCOUNT.

## I.—ABSTRACTS OF RECORDS.

Registers and receivers of other than consolidated officers are not allowed to furnish abstracts from the records of their offices for the use of individuals and charge therefor unless the information is in the form of plats or diagrams.

Parties in interest or their attorneys are to be permitted to examine the records under proper rules, but will not be allowed to use the records to obtain information for the purpose of selling the same.

*Commissioner McFarland to register and receiver, Las Cruces, N. Mex.,  
April 18, 1884.*

GENTLEMEN: I am in receipt of the register's letter of the 28th ultimo, and in reply thereto have to state as follows:

The register inquires, "Should this office furnish abstracts from the official records for the use of individuals?"

You are authorized by law to furnish plats or diagrams showing the

status of any township or part thereof, and to charge therefor at the rates fixed by Circular M of this office, dated July 20, 1883.

Your office not being a consolidated office, you are not authorized to furnish transcripts and charge therefor from the records thereof other than lists of taxable lands, unless the information is given in the form of plats or diagrams. Rule 49 of the Rules of Practice provides that "all documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon, and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver, but access to the same under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest or their attorneys under the supervision of those officers."

Rule 51 provides for retaining in the local office during the time allowed for appeal, papers in contested cases, for the purpose of giving all parties an opportunity to examine the record and prepare their arguments.

The records of the local office are in charge of the register and receiver, and while it is right and proper for the officers to give all the information possible pertaining to the public lands, and parties in interest or their attorneys under the above rules may take copies of papers and documents filed with cases, under proper rules and supervision, yet there is no law or regulation that makes it your duty to furnish such copies, or to charge for making or certifying the same.

You are further instructed not to allow parties to use the plats, tract books, and other records of the office, for the purpose of selling information obtained therefrom.

The instructions contained herein should be communicated to all parties interested, especially to those named by you.

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## II.—CHANGE OF ENTRY.

### JACOB ALTEHOLZ.

There having been a misdescription in the entry, and the tract Alteholz intended to enter, and to which he makes application to change, having been patented to another, the only relief that can be afforded will be a return of the purchase money on application therefor.

*Commissioner McFarland to Herman Wiesel, Union, Mo., November 15,  
1883.*

SIR: In reply to your letter of 25th ultimo, in relation to Saint Louis cash entry No. 17,969, made by Jacob Alteholz, you are informed that the records of this office show that said Alteholz entered the N.  $\frac{1}{2}$  of lot 1 of NE.  $\frac{1}{4}$  Sec. 19, T. 43, R. 1 W., containing 40.04 acres, and that said entry was canceled by letter to register and receiver, Saint Louis, dated

May 25, 1861, for the reason that no such subdivision as described was shown on the plats, and he was allowed to apply for a change of entry to the tract he intended to enter, if vacant.

On December 28, 1882, A. C. Widdicombe entered the N.  $\frac{1}{2}$  of lot 1 of NW.  $\frac{1}{4}$ , Sec. 19, 48 N., 1 W., which was the tract Alteholz intended to enter, and patent issued thereon. As a patent has issued in this case to Widdicombe, this office has no jurisdiction in the matter.

The only relief this office can afford Mr. Alteholz is the return of the purchase money paid by him on said entry, upon his making proper application therefor.

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#### WILLIAM H. PETERSON.

An entry having been canceled and change of entry authorized, but not perfected, a party showing a *bona fide* title to the land is entitled to have the canceled entry reinstated.

*Commissioner McFarland to register and receiver, Boonville, Mo., January 24, 1884.*

GENTLEMEN: In reply to your letter of the 14th instant, relative to Plattsburgh cash entry No. 16,890, for the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  Sec. 29, T. 65, R. 31, made by William H. Peterson, July 16, 1855, I have to state that in November, 1855, Peterson applied to change his entry to the S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  Sec. 20, and SE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  Sec. 30, 65, 31, and on November 24, 1855, authority was given to the local officers at Plattsburg to allow the party to change his entry to the tracts which he had intended to enter. The change was never perfected, and in the mean time the tracts to which he applied to change were entered by other parties.

The tracts embraced in said entry 16,890 appearing vacant on your records, they were entered by T. B. Haskins, August 25, 1876, per additional homestead entry 10,166, T. C. 2,373, under section 2306 Rev. Stat.

The party, J. Hindman, who now claims title under entry 16,890 through W. H. Peterson, asserts his right to the land, and asks that the entry may be reinstated and patented, as he had no knowledge or information as to the status of the entry made by Peterson until within the past year. A. C. Widdicombe, the present holder of the land under homestead entry T. C. 2,373, now surrenders the patent issued on said entry, together with a quit-claim deed to the United States, and requests that the same be canceled, as the land in question was in actual occupancy, possession, and improvement of one John Sanders. As the grantee of Peterson appears to have been a *bona fide* purchaser, and as the change of entry was never perfected as authorized, I see no reason why entry 16,890 should not be reinstated, as nothing appears

on the records against the tracts, except the homestead of T. B. Haskins.

I have, therefore, in compliance with the request of Widdicombe, canceled said homestead entry No. 10,166, T. C. 2,373, upon the records of this office, together with the patent based upon said entry and the record thereof, and you will note the cancellation of the same upon your records. Plattsburg cash entry 16,890 is this day reinstated, and you will so note upon your records, for which patent will issue in the due course of business. Mr. Widdicombe's application for repayment of fee and commissions will form the subject of a future letter.

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### III.—CHECKS OR DRAFTS.

Checks, postal orders, or drafts are not receivable in payment for public lands sold.

*Commissioner McFarland to J. H. Patzki, captain and assistant surgeon,  
U. S. A., Saint Augustine, Fla., August 7, 1883.*

SIR : I have to acknowledge the receipt, by reference from the Department, of your letter of the 18th ultimo, addressed to the honorable Secretary of the Interior, and in reply have to state as follows :

Section 2356 Rev. Stat. provides that cash shall be paid for lands sold, and the only exceptions to this are the provisions of law authorizing the receipt of various kinds of scrip in lieu of cash. Section 2356 also provides that purchasers of public lands at private entry shall, before the entry is allowed, produce the receipt of the Treasurer of the United States or receiver of public moneys that the land has been paid for; and at public sales the lands must be paid for on the day of sale, or the purchaser can acquire no title therefor under that sale.

Section 2366 authorized the receipt of gold coins of foreign countries at the valuation fixed by the director of the mints for all payments on account of public lands. Section 5182 Rev. Stat. authorized the receipt of National Bank notes in payment of public lands. Receivers of public moneys are authorized to cash the drafts issued to them as disbursing agents by the Treasury Department on account of the expenses of their offices, but no others.

Postal orders are not recognized as cash, and therefore receivers are not authorized to accept them for lands sold, or for any other services, connected with the disposition of public lands.

The same rule applies to checks; therefore, receivers of public moneys are not authorized to accept checks of disbursing officers, that is, pay-masters' checks, in payment of lands sold.

**IV.—DEPOSITS FOR PURCHASE OF PUBLIC LANDS.**

Deposits should be made with the Treasurer and Assistant Treasurer of the United States or the receiver of public moneys for the district where the land is situated, to the credit of the United States, "on account of sales of public lands."

*Commissioner McFarland to Calvin Perkins, esq., attorney at law, Memphis, Tenn., September 3, 1883.*

SIR: I am in receipt, by reference from the Hon. J. R. Chalmers, of your letter of the 26th ultimo, inquiring as to how you shall proceed in the deposit of moneys at the sub-treasury in New York, the certificate thereof to be used in the payment for lands purchased at private sale at the land office in Jackson, Miss.

In reply I have to state that section 2356 of the Revised Statutes provides that before an entry of any tract can be made at private entry, the purchaser at private sale must produce to the register a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money.

If you desire to make a deposit under section 2356, it would be preferable that the deposit be made with the Assistant Treasurer of the United States at New Orleans, La., instead of New York, as the former is the depository with whom the receiver of public moneys at Jackson, Miss., is directed, by instructions from the Treasury, to deposit the public moneys coming into his possession. The deposit should be made in your own name, to the credit of the Treasurer of the United States, "on account of sales of public lands," without describing the tracts you desire to enter. There is no law authorizing the repayment of any moneys you may deposit in excess of the cost of the tracts purchased. You are not required to submit to the Assistant Treasurer a list of lands desired to be purchased, nor the certificate of the register that the tracts are subject to private entry.

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**V.—FEES.****1. EXAMINING TESTIMONY ON FINAL PROOF.**

No fees are authorized by law for examining and approving testimony taken before a clerk of court in final proof in *pre-emption* cases.

*Commissioner McFarland to H. R. Pease, receiver, Watertown, Dak., September 8, 1883.*

SIR: In reply to your letter of 13th ultimo, I have to inform you that there exists no provision of law authorizing you to charge and collect any fees for examining and approving testimony in final proof in pre-emption entries made before a clerk of the court. The only fees allowed for examining testimony reduced to writing not done by registers

and receivers are those allowed under the act of Congress approved March 3, 1877, which provides:

That the same fees shall be allowed for examining and approving testimony given before the judge or clerk of a court in final homestead cases, as are allowed by law for taking the same.

In future you will be governed by instructions contained in circular of this office dated July 20, 1883.

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## 2. INFORMATION.

No charge is to be made for information concerning a tract of land unless in the form of a plat or diagram.

Registers are not to retain the fee of one dollar, for notice of cancellation of an entry, authorized to be collected by them, unless a notice of the cancellation is actually given.

*Commissioner McFarland to register and receiver, Huron, Dak., February 15, 1884.*

GENTLEMEN: I have to acknowledge the receipt of the register's letter of 26th ultimo, and in reply thereto have to state as follows:

Where an inquiry is made as to whether a tract of land is vacant or not, no charge should be made for the information given; but when the applicant desires a plat or diagram showing the status of the land, it is proper that you should charge therefor at the rates authorized by the circular of this office dated July 20, 1883.

The register further states that in cases of contests, where a hearing has been ordered, and the case withdrawn prior to the day set therefor, he has held that the case was settled by default, and the work having been done by the register, although no cancellation takes place, the register is entitled to the fee; this is an error.

The act of May 14, 1880, provides that the register shall receive a fee of one dollar for giving notice of the cancellation of an entry, and the fee is for that action alone, and for no other service connected with the case. The other services rendered in connection with a contest are paid from the fees deposited therefor, and should there be no entry canceled there can be no fee for notice of cancellation, and the one dollar deposited for this service should be returned to this party entitled to receive it.

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## 3. HOMESTEAD AND TIMBER-CULTURE ENTRIES CANCELED.

### INSTRUCTIONS.

*Commissioner McFarland to registers and receivers, December 1, 1883.*

GENTLEMEN: The practice of allowing parties making a homestead or timber-culture entry credit for the fee and commissions paid by them on a canceled prior entry is discontinued.

The fee and commissions paid on entries of the above-mentioned character canceled for conflict, or because they have been erroneously allowed and cannot be confirmed, will be repaid to the proper parties upon their making application therefor, as provided in the second section of the act of Congress, approved June 16, 1880, embodied in circular instructions of August 6, 1880.

Applications for the repayment of the above fees and commissions must conform to the requirements of paragraphs 12, 13, and 14 of circular of August 6, 1880, but the affidavit required in the last paragraph of number 14 will be dispensed with.

Approved.

H. M. TELLER.

*Secretary.*

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#### 4. INITIATION OF CONTEST.

No preliminary fee chargeable by register and receiver in such case.

*Commissioner McFarland to Sanford Parker, esq., receiver, Niobrara, Nebr., June 20, 1883.*

SIR: In reply to your letter of the 4th instant, relating to fees in contest cases, you are informed that there are no preliminary fees of one dollar each to the register and receiver on the initiation of a contest, but local officers are to be governed by the fees provided for in Rules 54 to 65 of the Rules of Practice approved December 20, 1880, copy here-with.

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#### 5. PLATS AND DIAGRAMS.

The fees of registers and receivers for plats and diagrams as fixed by circular of July 20, 1883, are not mandatory except as to the maximum rate. There is no objection to their doing the work for as much less as they please.

*Commissioner McFarland to register and receiver, Huron, Dak., September 19, 1883.*

GENTLEMEN: I have to acknowledge the receipt of your letter of the 24th ultimo, and in reply thereto have to state as follows:

The fees allowed registers and receivers for preparing plats or diagrams under the act of March 3, 1883, as fixed by Circular M of July 20 last, are not mandatory, but the four classes were established in order that there could be a fixed rate for the different classes, above which limit you are not allowed to charge, but there is no objection to your doing the work for as much less as you choose. If you think \$1 is too much to charge for a diagram like the sample inclosed by you, you may furnish them for any amount you may see fit.

## 6. RAILROAD SELECTIONS.

Rule for computing the fees allowed in such cases.

*Commissioner McFarland to W. W. Spalding, R. P. M. and D. A., Duluth,  
Minn., July 12, 1883.*

SIR : Referring to my letter of May 8, 1883, in relation to the fees on railroad selections, you are advised as follows: Hereafter, in computing the amount of fees on a list of railroad selections, you will divide the total acreage by 160, the quotient will be the number of 160-acre selections, which, multiplied by \$2, will give the amount of fees. Should the quotient consist of a whole number, and a fraction you will for the latter collect \$1, if the fraction is 80 acres or more, and nothing if less than 80 acres.

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## . REDUCING TESTIMONY TO WRITING.

Registers and Receivers have no right to charge fees for reducing or examining testimony, for the writing contained in the original entry papers, or for certificates and receipts in final proofs.

*Commissioner McFarland to register and receiver, Kirwin, Kans., June  
20, 1883.*

GENTLEMEN: I am in receipt of a letter from U. S. Search, esq., clerk of the district court of Mitchell County, Kansas, inclosing a letter from the register referring to the circular of this office relating to fees for reducing testimony to writing, and giving his construction of the same. In reply I have to inform you that the decision of the register is erroneous.

Registers and receivers have no right to charge fees for reducing or examining testimony, for the writing contained in the original entry papers, or to make any charge for the certificates and receipts in final proofs.

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## INSTRUCTIONS.

*Commissioner McFarland to registers and receivers, July 20, 1883.*

GENTLEMEN: Your attention is called to the following provisions of law:

Registers and receivers are allowed, jointly, at the rate of 15 cents per hundred words for testimony reduced by them to writing for claimants in establishing pre-emption and homestead rights. (Section 2238, subdivision 10, Rev. Stat.)

A like fee as provided in the preceding subdivision when such writing is done in the land office in establishing claims for mineral lands. (Section 2238, subdivision 11, Rev. Stat.)

Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, are each entitled to collect and receive fifty per centum on fees and commissions provided for in the first, third, and tenth subdivisions of this section. (Section 2238, subdivision 12, Rev. Stat.)

The register and receiver shall be entitled to the same fees for examining and approving testimony given before the judge or clerk of a court in final homestead cases as are now allowed by law for taking the same. (Act of Congress approved March 3, 1877.)

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, Rev. Stat., above mentioned. The amount of these fees in every case is to be ascertained by counting only the words actually reduced to writing, and not the printed words.

The register for any consolidated land district, in addition to the fees now allowed by law, shall be entitled to charge and receive for making transcripts for individuals or furnishing any other record information respecting public lands or land titles in his consolidated land district such fees as are properly authorized by the tariff existing in the local courts of his district; and the receiver shall receive his equal share of such fees, and it shall be his duty to aid the register in the preparation of the transcript or giving the desired record information. (Section 2239, Rev. Stat.)

Under the timber-lands act of June 3, 1878, the registers and receivers in the States of California, Oregon, and Nevada, and in Washington Territory, are entitled, jointly, at the rate of 22½ cents per hundred words for testimony reduced by them to writing for claimants.

Under the timber-culture act of June 14, registers and receivers are entitled to the same fees for reducing testimony to writing in cases of contest therein provided for as in other contested cases. This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, Rev. Stat., above mentioned.

Receivers must report and account for all fees received under the foregoing provisions of law up to and including the 3d day of March, 1883, and from and after that date the following act of Congress, approved March 3, 1883, is in force:

AN ACT in relation to certain fees allowed registers and receivers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing pre-emption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

SEC. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plats or diagrams at such rates as may be prescribed by the Commissioner of the General Land Office, and said officer shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with

the names of the purchasers, and shall be allowed to receive compensation for the same not to exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

The provisions of the first section of the above act apply only to testimony reduced to writing in establishing claims to mineral entries, final proof in pre-emption and homestead cases, and testimony in contested cases.

Receivers will report and account for fees received for reducing testimony to writing in timber and stone land entries as heretofore. In computing the fees for reducing testimony to writing the words actually written by registers and receivers, or persons in their employ, only, must be charged for at the rates allowed by paragraphs 10, 11, and 12, of section 2238, Rev. Stat., and no charge is to be made for the printed words. The words actually written must be counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers cannot fix the fee at one dollar or more for each pre-emption, final homestead, or mineral entry.

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats or diagrams, the fees for the same are hereby fixed as follows:

For a diagram showing entries only .....	\$1 00
For a township plat showing entries, names of claimants, and character of entry .....	2 00
For a township plat showing entries, names of claimants, character of entry, and number .....	3 00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry, together with topography, etc .....	4 00

The register and receiver shall be entitled to the same fees for examining and approving testimony given before the judge or clerk of a court in final homestead cases as are now allowed by law for taking the same. (Act of Congress approved March 3, 1877.)

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, Rev. Stat., above mentioned. The amount of these fees in every case is to be ascertained by counting only the words actually reduced to writing, and not the printed words.

The provisions of section 2239, Rev. Stat., relating to transcripts of records at consolidated land offices, are not repealed, and the fees therein prescribed are to be reported and accounted for as heretofore, except in so far as they relate to lists of lands sold, prepared for State or Territorial authorities.

In no case are fees to be charged for examining and approving testimony given before the judge or clerk of a court, except in *final homestead cases*.

The attention of registers and receivers is called to section 2242, Rev. Stat., which is as follows:

No register or receiver shall receive any compensation out of the Treasury for past services who has charged or received illegal fees; and on satisfactory proof that either of such officers has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.

The circulars of this office dated May 24, 1879, and April 7, 1881, in so far as they conflict with the provisions of the act of March 3, 1883, are hereby modified.

You will be held to a strict compliance with the laws and regulations relating to the matter of fees in all cases.

Registers of land offices have no right, officially, to receive any moneys whatever except such as are paid to them by receivers as salary, fees, and commissions, and the fee of \$1 they are especially entitled to receive for giving notice of the cancellation of pre-emption, homestead, and timber-culture entries, under the act of May 14, 1880.

All moneys received for services rendered by either registers or receivers, under the act of March 3, 1883, are to be paid to the receiver, who will pay the register his portion thereof.

Should any money be forwarded to the register, or paid to him, he will at once pay over the same to the receiver; and where parties address the register as to the cost of any service required, he will refer the matter to the receiver for answer, as the latter is the proper officer to receive all fees.

Receivers will keep an account of the fees received for all services rendered under the provisions of the act of March 3, 1883, which shall be open to examination by the register at any time.

The circular of this office dated March 23, 1883, and that dated May 9, 1883, relating to fees for reducing testimony to writing, is hereby revoked.

Approved, July 21, 1883.

M. L. JOSLYN,  
*Acting Secretary.*

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#### INSTRUCTIONS.

Charge of fees by register and receiver for testimony not reduced to writing by them personally, or by their clerks, or (in final homestead cases) by the judge or clerk of a court of record, is a palpable violation of law.

*Commissioner McFarland to register and receiver, Huron, Dak., January 28, 1884.*

GENTLEMEN: I am in receipt of your letter of the 28th ultimo, relative to the payment of fees for reducing testimony to writing in homestead and pre-emption final proofs, and the repayment of fees illegally collected.

Upon the first point you state as follows:

In the matter of final proofs, we have held that if parties prefer to have the attorneys do the writing and are willing to pay the attorneys the fees, we should not be deprived of the very advantages which the statute confers upon the local officers when we are authorized to make the final proofs at the office; hence we have, when proofs have been made before this office, collected testimony (fees) at the rate of 15 cents per one hundred words. This is the construction of the law and the practice which prevails in every land office in the south half of this Territory.

The first section of the act of March 3, 1883 (22 Stat., 484), to which general reference is made, does not authorize the collection of any fees whatever. It provides that—

The fees *allowed* registers and receivers for testimony reduced by *them* to writing for claimants in establishing pre-emption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

The fees which are not to be taken into account in determining the maximum of compensation of registers and receivers are the fees "allowed" to those officers. The fees that are "allowed" are fees allowed by authority of law. No other fees are allowed. This section does not "allow" any fees. The laws of Congress and the regulations of this office and Department show what fees are allowed.

The exactions of any other fees is a misdemeanor, demanding dismissal from office and involving penalties of fine and imprisonment (Sections 2242 and 5481, Rev. Stat.)

Section 2238 (subdivisions 10 and 11) allows registers and receivers 15 cents per hundred words for testimony *reduced by them to writing* for claimants, in establishing *pre-emption* and *homestead* rights and *mineral claims*.

The act of March 3, 1877 (19 Stat. 403), allows registers and receivers the same fee for examining and approving testimony taken before the judge or clerk of a court of record *in final homestead cases*, as if such testimony had been reduced to writing by registers and receivers themselves.

The foregoing statutes comprise all the law there is applicable to fees of registers and receivers for reducing testimony to writing in the Territory of Dakota and in similar States and Territories.

There is no warrant of law for the construction that you state is made and generally followed in Dakota, that testimony fees are authorized to be charged by registers and receivers in cases where the testimony is reduced to writing by claimants' attorneys.

The law is plain and unambiguous. Any land-office charge for testimony not reduced to writing by registers and receivers personally, or by their clerks, or (in final homestead cases) by the judge or clerk of a court of record, is a palpable violation of law.

It is also a violation of specific instructions communicated in repeated circulars and orders issued by this office.

The fee-table which you are directed to keep posted in your office informs both yourselves and the public what testimony fees you are allowed to charge and what you are prohibited from charging, and the prohibition against charging fees for reducing testimony to writing when the writing is not done by yourselves or your employés (except in examining and approving testimony taken by the judge or clerk of a court in certain cases) is plain and imperative.

All moneys now in your hands or not heretofore covered into the Treasury, received as testimony fees in cases where the testimony was not written out by yourselves, or your employés, or received from clerks of courts, must, therefore, be returned to the parties entitled thereto.

Who such parties are must be determined by yourselves, that being a matter which concerns your own personal responsibility.

You ask, in case it is decided that you must yourselves reduce testimony to writing in order to claim the fees, that authority may be given you to direct all persons desiring to make final proof to come to the land office and have the proofs written out there. You are informed that I have no authority under the law to issue such instructions.

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## 8. SWAMP SELECTIONS AND INDEMNITY SWAMP SELECTIONS.

### STATE OF WISCONSIN.

As the fee of one dollar to the register and receiver, for the location of each 160 acres, authorized by R. S. 2238, is required "to be paid by the State or corporation making such location," and as, in the case of swamp selections, the location is not made by the State but by the Secretary of the Interior, the fee is not chargeable. Otherwise in case of swamp indemnity selections.

*Secretary Teller to Commissioner McFarland, December 28, 1883.*

SIR : I have considered the appeal, by the Secretary of State of the State of Wisconsin, from your decision of February 8, 1883, which holds that registers and receivers are each entitled to a fee of one dollar for each selection of 160 acres of swamp land by a State, to be paid when the lists of selections have been examined by them for approval, and that said lists must not be approved and posted until said fees are paid.

This decision is based on section 2238 of the Revised Statutes, which reads as follows :

Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely :

Seventh. In locations of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of one dollar for each final location of 160 acres, to be paid by the State or corporation making such location.

First. It is to be observed of this section that it contemplates an act done *by the State*, namely, locating the land under the grant. If, therefore, the State is required by law to locate swamp land, and does locate it, one condition arises upon which the said fee is due and payable. But there is no law requiring swamp lands to be located by the State. The granting act of September 28, 1850, requires the Secretary of the Interior to make out and transmit to the Governor of the State accurate lists and plats of the swamp lands to which it is entitled, and to issue patents therefor on his request. Consequently any act to be done, by way of ascertaining or locating said lands, is to be done by the Land Department, and the State is entirely passive in the matter. In *French v. Fyan* (93 U. S., 169), the court say :

We are of opinion that this section devolved upon the Secretary, as head of the Department which administered the affairs of the public land, the duty, and conferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.

It follows that the State has neither duty nor power in the premises, and that locations of swamp lands are not made "by States," as they must be in order to come within the purview of section 2238 Rev. Stat.

Second. It is to be observed that, under said section, the payment to be made by the State is a *fee*, which contemplates some service rendered to or in behalf of the State by the register and receiver. This is plainly set forth in the act of July 1, 1864 (13 Stat., 335), from which the seventh subdivision of section 2238 is taken, and therein the fee is expressed to be "for their services therein," *i. e.*, in "the location of lands by States." In the appeal now before me the State of Wisconsin disclaims all request or receipt of said service. She says: "The State has not asked them to do anything, and they have done nothing for the State." The regulations of your office sustain this disclaimer, and show that any services they render in the premises are rendered to and in behalf of the Land Department. After the Secretary has approved the list of swamp lands made by your office, duplicate copies are made, of which one is sent to the governor, and "the other list is transmitted to the register and receiver of the land office in which the lands are situated, and they are requested to examine the same with the records of their office, and report any conflicts found." (Regulations, April 18, 1882.)

Their examination and approval, or disapproval, therefore, are for the purpose of advising the Land Department, and for its benefit, and are not made by way of service to the State; they are in aid of the selection by the Secretary, which, as has been shown, is the only selection or location authorized by law. Hence, there would appear to be no more propriety in requiring the State to pay for said services than there would be in requiring her to pay for their services in the multifarious questions, in relation to swamp lands, that may be the subject of cor-

respondence between the local officers and the Land Department. In this matter they are the hands by which the Land Department executes the law, and there are therefore no "fees" due them, to be paid by the State, under section 2238 Rev. Stat.

Third. It is to be observed of this section that the act done by the State is described as a *location*, whilst the bill rendered by the local office is for certain State *selections*. It is true that the swamp lands certified to a State are usually termed "State selections," and in fact the States do make a selection of them, based on the reports of their own agents or of the Surveyor-General of the United States. The State of Wisconsin elected to adopt the latter method. It is well settled, however, that these acts of the States are done by request of and in aid of the Secretary of the Interior, and, with the exception of the case of the State of Louisiana, "at the expense of the United States" (*Oregon v. The United States*, 7 Land Owner, 53). If so, it would seem that these selections are not the locations contemplated by the statute under consideration, because they are not made "by States," but by the Land Department.

The said statute was under review by the Supreme Court in *Hunnewell v. Cass County* (22 Wall., 464), in connection with a grant of lands for railroad purposes, and they say of it, "these fees are to be paid on all the lands located, which may fairly be construed to be all the lands ascertained to belong to the company under the grant." The force of this language is to be determined by a reference to the subject matter under discussion. By the act of July 2, 1864, the Burlington and Missouri River Railroad Company were required to pay "the cost of surveying, selecting and conveying" the lands granted to them, and it was said in argument that the costs of these "selections" were the fees to be paid on "locations" under the act of July 1, 1864. The court below had expressly decided that "these fees are for location, not for selecting the land"; and the Supreme Court points out the difficulty in the way of holding otherwise, say that it is "extremely uncertain" that these were the costs of selecting, and finally do not decide the point raised. But it had been shown in argument that "the process of locating railroad grants" was, in the first instance, a selection by the company which appeared on their original lists filed with the local officers, which were next corrected and certified by these officers, and which were finally approved by the Commissioner and Secretary. It was with reference to these facts, as may fairly be presumed, that the court used the language above quoted; and it therefore means that the "locations" referred to are the lands ascertained to belong to the company *on their application to the local officers*. Here, then, is an act done by the company, on application to the register and receiver, and a service performed by them, for which fees may properly be due; and there appears to be no reason to infer that the court intended to apply the statute to a case where there is no such act, application, or service.

At common law, a location is "the act of selecting and designating lands which the person making the location is authorized by law to select" (Bouvier). Manifestly the definition does not include the case of swamp lands, for the States were not authorized by law to designate or select such lands, and in fact never did designate or select them.

Fourth. If the fees are to be paid on selections of swamp lands, the only manner of enforcing their payment by the Department is to withhold approval and patent until payment is made. This is substantially your decision in the case at bar, as above cited. But here we are met by the fact that the payment of the fees becomes a condition precedent to the enjoyment of the grant, and that it is a condition precedent which is prescribed by an act passed subsequently to the date of the granting act. In *Railroad Company v. Smith* (9 Wall., 95), in referring to the act of 1850, the Court say, "All the lands of that description (swamp land) were granted, and they have remained so granted ever since," whilst they have uniformly held that said act was a grant *in presenti*, and vested full title in the States. In *Railroad Company v. Prescott* (16 Wall., 603), the Court upheld the power of Congress to attach such a condition to the Pacific Railroad grants by subsequent legislation; but it was expressly on the ground that, as there had been no definite location of the road, "no right had been vested in any tracts of land" at date of the subsequent legislation. I do not think that Congress could, nor do I think that they intended to, attach any condition precedent to the swamp land grant of 1850 by the act of July 2, 1864. A similar opinion was expressed by Mr. Secretary Schurz in the *State of Oregon v. The United States* (7 Land Owner, 53), in relation to the act of March 12, 1860.

Fifth. It is to be observed that Congress may be supposed to have had the swamp land acts in view when enacting the statute now under consideration, and if there is any provision in the former acts to which the latter act refers in terms, a proper construction of it requires that its operation shall be limited to that provision. An inspection of the granting acts makes it clear that there is such provision. In the original act of 1850 a location by the States was not required or authorized; but in the amending act of March 2, 1855, it is provided that, "where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount upon any of the public lands subject to entry." It is plain, therefore, that the swamp land act, as amended, provided for the selection of swamp lands by the Secretary of the Interior, and for the *location* of indemnity lands *by the States*. So it stood at date of the passage of the act of July 1, 1864; and I therefore am of opinion that said act required the payment of a fee only on the location of indemnity lands by the States.

Sixth. It is to be observed that for some nineteen years, or since the act of 1864, its provisions have never been held to apply to original selections. This same question was presented to this Department by the *State of Wisconsin* many years ago, and Mr. Secretary Browning

reached the conclusion herein stated. In deciding the case he said, though without stating his reasons, "The swamp lands on which these fees are claimed were original, not indemnity, selections; and I am of opinion that the act of 1864 had no reference to such cases." (See opinion of February 22, 1867.)

For these reasons your decision is reversed.

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#### 9. TRANSCRIPTS OF RECORDS.

The only record information for which land offices (other than consolidated) are lawfully entitled to charge, is for plats or diagrams and for lists of taxable lands for State or Territorial authorities.

*Commissioner McFarland to register and receiver, Aberdeen, Dak., September 30, 1883.*

GENTLEMEN: I have to acknowledge the receipt of the receiver's letter of the 22d ultimo, inclosing a form of certificate requested to be furnished by the Brown County Bank, showing the status of certain lands situated in your district, and in reply thereto have to state as follows:

Prior to the passage of the act of March 3, 1883, no authority of law existed allowing registers and receivers of other than consolidated officers to make any charge for transcripts of records or other record information, and the act of March 3, 1883, above referred to only authorizes charges to be made for plats or diagrams and for lists of taxable lands for State or Territorial authorities. As your office is not a consolidated office, the only record information you are lawfully entitled to charge for is that included in the two classes authorized by the act of March 3, 1883.

You are not permitted to furnish or to allow any one else to procure from your records the information desired by the Brown County Bank, except it is in the form of a plat or diagram, showing what lands are vacant and what lands are taken, your charge therefor not to exceed the rates prescribed by circular of this office dated July 20, 1883, copy of which is herewith inclosed.

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#### VI.—HOMESTEAD AND PRE-EMPTION PROOFS.

Duplicate copy of homestead and pre-emption proofs is not required, and charge therefore is illegal.

*Commissioner McFarland to register and receiver, Watertown, Dak., April 7, 1884.*

GENTLEMEN: I have been informed by H. R. Pease, esq., receiver at Watertown, that you are in the habit of requiring settlers to have their pre-emption and final homestead proofs made in duplicate, and that you

charge and collect the same fees for examining and approving the duplicate copy as are charged on the original proof. This practice is illegal and must be discontinued. All the law requires of parties making final proof is that it shall be full and correct, and when the entryman has paid at the rate of fifteen cents per one hundred words for writing done by you or by some one in your employ in pre-emption and final homestead cases, and fees at the same rate for examining and approving testimony in final homestead cases taken before a judge or clerk of a court, as allowed by the act of March 3, 1877, it is all that is required by law, and any other fees collected for such services are illegal and the collection thereof must cease.

You will acknowledge the receipt of this letter.

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## VII.—LOCAL LAND OFFICERS.

### 1. SURRENDER OF OFFICE.

#### INSTRUCTIONS.

*Commissioner McFarland to Henry O. Beatty, esq., R. P. M., Sacramento, Cal., August 13, 1883.*

SIR: In reply to your letter of the 24th ultimo, I have to direct that you will surrender the office to your successor upon his exhibiting to you his commission and not until then.

You will pay all the expenses of the office, including the compensation of yourself and the register, from the advance of \$1,800, of which you are advised by letter M of the 7th instant, up to and including the day upon which your successor receipts to you for the public property, depositing the balance to the credit of the Treasurer of the United States on account of the appropriations from which said advance was made, following strictly the instructions contained in marked paragraphs of the inclosed circular of June 15, 1882. Under no circumstances will you turn over to your successor any *public moneys* you may have in your possession when you cease to act as receiver, but will deposit them in the usual manner and as above indicated.

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### 2. DEPOSITS WITH RECEIVER.

#### LAND IN KANSAS.

As the money in question was merely deposited with the receiver, and has not been accounted for nor covered into the Treasury, it is a case between the claimant and the receiver.

*Commissioner McFarland to I. W. McNeal, Medicine Lodge, Kans., September 29, 1883.*

SIR: In reply to your letter of the 20th instant in the matter of \$51, alleged to have been paid the receiver at Larned, Kans., on declaratory

statement 1454, for S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  Sec. 33, T. 31, and lot 3, and SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  Sec. 4, T. 32 S., R. 12 W., "Osage Indian lands," I have to state that the money was only deposited with the receiver, that if the proof was accepted by this office then the amount would be received as the first payment on said land. The declaratory statement was canceled July 3, 1883. As the money has not been accounted for or covered into the United States Treasury, this office has no authority in the matter; it is a case between Mr. Reed and the receiver at Larned.

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#### LADY BRYAN SILVER MINING COMPANY.

If money left on deposit with a former receiver is not accounted for or covered into the Treasury, his successor in office is not chargeable, and it cannot be allowed on the entry on account of which it was deposited.

*Commissioner McFarland to register and receiver, Carson City, Nev., January 25, 1884.*

GENTLEMEN: Referring to office letter "N" of the 20th ultimo, addressed to you in the matter of the claim of the Lady Bryan Silver Mining Company, and allowing in payment thereof the \$230 left on deposit April 11, 1868, with the then receiver, David L. Gregg, it was assumed that the amount had either been accounted for or turned over to you. I am in receipt of information that you refuse the entry and decline to become responsible for the \$230 deposited with a former receiver, as he never turned the money over to you. Therefore, as the amount in question has not been accounted for by the former receiver or covered into the United States Treasury, or turned over to you, so much of the instructions of the 20th ultimo is revoked, in allowing the \$230 in payment on said entry.

The parties in interest in order to perfect their claim will have to pay for the land embraced therein.

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#### VIII.—MILITARY BOUNTY-LAND WARRANTS.

##### TRESSIE M. PIEPER.

Receipt of a military bounty land warrant in payment of a pre-emption entry is improper. Such warrants are only receivable in the form of locations. Manner of location by warrants set forth.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., March 29, 1883.*

GENTLEMEN: In your returns for the month of February, 1883, you reported pre-emption entry register and receiver No. 688, in the name of Tressie M. Pieper, the receiver transmitting military bounty-land war-

rant No. 14,555, act of 1855, for 80 acres, which he notes in his abstract thereof as having been received in payment therefor.

You are advised that said entry is improperly reported. Military bounty-land warrants are receivable only in the form of locations. Applications to locate must be made as in cash cases, but must be accompanied by a warrant, duly assigned, as the consideration for the land, and by a tender of the location fee. A duplicate certificate of location, under the act authorizing the issuance of the warrant, will then be furnished the party, to be held until the patent is delivered. At the close of the month an abstract of location showing the act under which the warrant was issued will be prepared and transmitted to this office together with the warrant and all the papers pertaining thereto. A separate series of register and receiver numbers is required to be kept and reported for locations under the several acts. \* \* \*

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## IX.—RECONVEYANCE BY UNITED STATES.

ESTELLA J. RICHARDSON.

The party, after issue of patent to her by the United States, inadvertently made and placed on record a deed, formally conveying her title to the United States; the deed was not accepted on the part of the United States, and the recording, having been at her request and not at the request of the grantee, was a nullity, amounting to a mere formal cloud upon her former estate. An indorsement by the commissioner of the refusal to accept the deed, duly recorded, would show by the record the non-delivery of the instrument. On a reissue of the patent, with proper recitals of the facts, further assurance of title might be made.

*Secretary Teller to Commissioner McFarland, January 28, 1884.*

SIR: I return herewith the papers submitted by your letter of 23d instant, in the matter of the application of Estella J. Richardson for Congressional relief respecting her title to the NE.  $\frac{1}{4}$  of 12, 24, 2 E., Kansas, she having inadvertently or mistakenly executed and procured to be recorded a deed of the same to the United States, after the issue of patent to her from the Government.

As you have not accepted this deed, of course no delivery has been had, by which only title could pass, and the recording of the same at her request and not by request of the grantee is a nullity, amounting to a mere apparent cloud upon her former estate.

I see no necessity for legislative intervention in such case. It is entirely competent for you to indorse upon the deed your refusal to accept the same on behalf of the United States, which indorsement, when duly recorded, will show by the record the non-delivery of the instrument.

If further action be deemed essential, you are also competent to re-issue the patent with recitals of the facts, and couched in terms for

further assurance of title from the United States, which will have the effect to revest her with the proofs of her title and show the same in her, notwithstanding the record of the previous ineffectual attempt to convey back to the Government.

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## X.—REPAYMENT.

### 1. DOUBLE MINIMUM EXCESS.

WILLIAM P. MACLAY.

The land in question is part of an even numbered section in the Bitter-Root Valley above So-So Fork, and within the exterior limits of the grant for the Northern Pacific Railroad Company.

Although the lands of which it is part are excluded from the grant because of their character as an Indian reservation lying within the limits of the grant, they are not within the reason of the relief intended by the act of June 16, 1880, and repayment of the double minimum excess is not recommended.

*Secretary Teller to Commissioner McFarland, June 12, 1883.*

SIR: I have considered the application of William P. Maclay, submitted by your letter of the 6th instant, for the repayment of the double minimum excess paid on the entry of the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 14, T. 11 N., R. 20 W., Helena, Mont., as per receipt No. 894, dated December 9, 1881.

The land for which the repayment of excess is sought lies within the exterior limits of the grant to the Northern Pacific Railroad Company, and also within the Bitter-Root Valley, lying above the So-So Fork.

In my decision of January 22 last, in the case of Phelps against said company, I held that such lands did not, by reason of their character as an Indian reservation, pass to said company under its said grant.

The act of June 5, 1872 (17 Stat., 226), to which you refer, provided for the survey of lands in the Bitter-Root Valley above the So-So Fork. The lands were to be opened to settlement at \$1.25 per acre, but were excluded from settlement under the homestead and pre-emption laws. An account was to be kept of the proceeds of the sales, and \$50,000 of such proceeds were to be used for the benefit of certain Indians. The act expressly "*Provided*, That no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act."

Although the act seems to provide for the survey of all the lands in the Valley, it is evident that only fifteen townships were to be sold at the price of \$1.25 per acre.

The land for which repayment of excess is asked is not a part of such fifteen townships.

The act of June 16, 1880 (21 Stat., 287), "for the relief of certain settlers on the public lands," provides (*inter alia*) that "in all cases where

parties have paid double minimum price for land which has afterward been found not to be within the limits of a railroad grant, the excess of \$1.25 per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

The lands in the Bitter-Root Valley, although excluded from the grant to the railroad company because of their character as an Indian reservation, are within the granted limits.

The land in question is part of an even section.

Section 6 of the act making the grant to the Northern Pacific Railroad Company provides that "the reserved alternate sections shall not be sold by the Government at a price less than \$2.50 per acre when offered for sale."

It is true that the odd sections in the Bitter-Root Valley do not pass to the company under its grant, and in that sense the even sections are not reserved; but the fact that the odd as well as the even sections are reserved, all being within the geographical limits of the grant, ought not to affect the price of the even sections. The financial part of the scheme of making grants to aid in the construction of railroads, as affecting the Government, was that the Government would lose nothing by the donation; that the sale of the even sections at double minimum would make the Government good for the odd sections donated, and the proximity to the railroad of the even sections would make it an object to the settlers to buy the even sections at the double minimum price. It was the fact of the nearness of the road to the even sections that enhanced their value, and not the fact that the company owned the odd sections. Assuming for the purpose of illustration that the Northern Pacific is entitled to indemnity for lands within reservations existing at the time of the grant, then in cases like the present if the even and the odd sections are sold at the single minimum the Government suffers a financial loss.

I do not think that lands lying within the exterior limits of the grant, but which do not pass with the grant because they form a part of a reservation, are within the reason or intention of the relief intended by the provision of the act of June 16, 1880, before cited.

It not unfrequently happens that the granted limits as fixed by the map of general route are changed by filing the map of definite locations, and lands included in the first limits are left outside of the grant as definitely fixed. Such lands are sometimes purchased while within the first limits, and being then subject to double minimum are paid for at that price. When finally found to be outside of the grant, the reason for such price fails, hence the necessity for the provision in the relief act aforesaid for the restoration of the excess of \$1.25 per acre.

I think the price at which all the lands in the Bitter-Root Valley not affected by the act of 1872 aforesaid are to be sold when opened to settlement should be fixed by you under section 2364 of the Revised Statutes; and I see no reason why the price should not be fixed at the

double minimum, as in the case of certain military reservations in Dakota, within the limits of the Northern Pacific grant mentioned in the letter of your office of January 24, 1881, which was approved by Secretary Schurz, in his letter of the next day addressed to your office. I must decline to recommend the repayment asked for in this case.

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#### CONSTRUCTION.

The act of March 3, 1883, which confirmed sales of lands inadvertently made after the passage of the act of June 15, 1880, at \$1.25 per acre without public offering being silent as to repayment upon sales so made at \$2.50 per acre, they are not within the repayment provision of the statutes.

*Acting Secretary Joslyn to Commissioner McFarland, June 28, 1883.*

SIR: I am in receipt of your letter of 18th instant, in response to requests of 14th and 24th ultimo, giving your views in favor of repayment of \$1.25 per acre upon private entry of public lands sold at \$2.50 per acre after the passage of the act of June 15, 1880 (21 Stat., 237), reducing to \$1.25 per acre all lands raised to the double minimum price on account of railroad grants, and put in market prior to January, 1861.

It appears that under a construction of the act holding the reduction in price to become immediately effective, and authorizing the continued disposal of the lands at private entry without public reoffering at not less than the reduced minimum, a circular was issued instructing the district officers to permit such entries at \$1.25 per acre. Many sales were reported, but on the 10th October, 1881, this construction of the act was set aside by regular instructions, on the authority of the decision of the Supreme Court in *Eldred v. Sexton* (19 Wall., 189), and the act was held to operate only as a withdrawal of the lands from private entry, and to authorize and require for its proper execution the usual fundamental proceedings of a public offering before such entries could be admitted.

Many sales appear also to have been made at the original price of \$2.50 per acre; and it is to this class of entries that the present inquiry applies.

Under the ruling finally adopted the private entries of both classes were illegal. This Department, not willing to assume the responsibility of covering its own misconstruction of the law by resort to the Board of Equitable Adjudication, left it for Congress to say whether or not confirmation should be made, or whether the entries should fail and be canceled, as in the similar case passed upon by the Supreme Court. That body confirmed the sales by act of March 3, 1883 (Laws, 526), as follows:

That in all cases where lands reduced in price to \$1.25 per acre by the act of June 15, 1880, but which have not been offered at public

sale at such reduced price, were inadvertently sold at private entry by the officers of the Land Department between the date of the passage of said act and the date of the receipt at the local offices of the instructions of the Commissioner of the General Land Office relative thereto, of October 10, 1881, the entries so inadvertently permitted to be made by innocent purchasers, and which are regular in all respects except as to time of entry, shall be confirmed as of the dates of entry, respectively.

It is evident from the first portion of this act that only the entries made at \$1.25 per acre were specifically considered, and that no intimation had been made respecting sales at \$2.50 per acre. The object of the law was to give assurance of title to purchasers under sales erroneously allowed by misconstruction of the former statute, although by so doing an advantage was given to these purchasers over subsequent applicants, who will be compelled to await a public offering and the risk of competition to acquire this class of lands. But as the error was the fault of the Government, and there was nothing to indicate bad faith on the part of purchasers, or that they would at such offering give more for the lands, the entries were possessed of an equity which forbade Congress to treat them as absolutely void and refuse confirmation.

Now, it so happens that entries at \$2.50 per acre are within the same mischief, and need the confirmation of the statute to allow them to be patented, and the act is broad enough to include them. They are, at least, within its spirit. But there was no misleading as to price. They had not yet come into market at \$1.25, and might, perhaps, at a public sale, have brought much more than \$2.50, and the parties taking them willingly paid that amount. It was a declaration on their part that to secure the lands they would bid at least so much.

In the case cited the court stated one reason for the rule requiring a reoffering to be, "to obtain for the Government the benefit of competition in case the lands should be worth more than the price fixed by Congress." It must be presumed that the purchasers were satisfied with their own voluntary offer of the double minimum, and will avail themselves of the confirmation to secure their patents upon the entries as made.

In any event the act of confirmation is silent as to repayment. The parties have also the same advantage heretofore pointed out of securing title to these lands, without awaiting a public offering and the risk of having to pay a still higher price. In the absence of a specific and clear intent expressed in law to repay these alleged excesses, I must decline to believe that they are within the repayment provisions of the statutes.

I therefore return, without my approval, the cases of Charles H. Chick, John J. Ward, David Sumsden, Henry Reynolds, and James Hyslop, jr., submitted by your several letters of March 22, March 30, and April 14, 1883.

## HORATIO WEYMOUTH.

At the date of Weymouth's entry the land was within the 20-mile limits of the Southern Pacific Railroad Company, and the even-numbered sections were \$2.50 per acre. He therefore paid the regular price, and no repayment can be allowed.

*Acting Commissioner Harrison to register and receiver, San Francisco, Cal., November 20, 1883.*

GENTLEMEN: I am in receipt of an application from Horatio Weymouth, Santa Cruz, Cal., for return of \$1.25 per acre of the N. $\frac{1}{2}$  of NW. $\frac{1}{4}$ , Sec. 32, T. 9 S., R. 1 W., said tract being a portion of San Francisco, Cal., pre-emption cash entry No. 5003. I have to state that from an examination of his case I find that under date of May 9, 1873, the Secretary of the Interior decided that the lands in the San Francisco district, originally included in the withdrawal of June 30, 1865, for the benefit of the Central Pacific Railroad Company, afterwards rejected from the grant, but since embraced in the withdrawal for the Southern Pacific Railroad Company, did not inure to the latter company under their grant; that the lands that are restored were all the vacant and undisposed of, and held to be withdrawn for the Southern Pacific Railroad Company, south of the Western Pacific Railroad grant, and included in the limits of the withdrawal for the Central Pacific Railroad Company; that the odd-numbered sections should be subject to pre-emption and homestead entry at \$1.25 per acre, but the price of the even-numbered sections within the 20-miles limit of the Southern Pacific Railroad Company would still remain at \$2.50 per acre. At the date upon which Weymouth alleges settlement, November 1, 1871, the land was within the 20-mile limits of the Southern Pacific Railroad Company and the even-numbered sections were \$2.50 per acre; therefore he paid the regular price, and there can be no refunding of any portion of the purchase money.

Notify the party in interest, and that sixty days will be allowed for appeal to the honorable Secretary.

## ROBERT T. GIBBS.

Where, through an error of the local land officers, \$2.50 land is sold at \$1.25 per acre, and the purchaser, when called upon, declines to pay the additional sum of \$1.25 per acre and applies for a return of the purchase money, repayment may be granted, as this class of cases comes under the head of "entries erroneously allowed."

*Secretary Teller to Commissioner McFarland, April 29, 1884.*

SIR: I have considered the appeal of Robert T. Gibbs from your decision of March 15, 1884, refusing either to issue a patent upon his cash entry made October 1, 1880, for the SW. $\frac{1}{4}$  of the NE. $\frac{1}{4}$ , the W. $\frac{1}{2}$

of the SE.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 6, T. 18 N., R. 14 W., Natchitoches, La., or to return his purchase money for the same.

The tracts are on an even section within the grant of March 3, 1871 (16 Stat., 579), to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and were offered April 23, 1880, and are rated at \$2.50 per acre. They were not reduced in price by the third section of the act of June 15, 1880, which only reduces to \$1.25 per acre those lands which were raised to \$2.50 per acre and put in market prior to January, 1861. The local officers sold the tract at \$1.25 per acre, receiving from Gibbs \$199.16 in full therefor, and issued to him a certificate that he was entitled to a patent. September 13, 1882, you required from him an additional payment of \$199.16 as the balance due the Government at the legal price of the land. He declines to make such payment, and asks that either patent issue to him on his present payment, or that his purchase money be refunded to him. You refuse both.

The act of June 16, 1880, authorizes repayments in cases where an "entry has been erroneously allowed and cannot be confirmed." Gibbs paid the price demanded for these tracts by the authorized officers of the Government, without fraud or misrepresentation on his part. Undoubtedly they erred in allowing the entry at \$1.25 per acre. It seems to me equally clear that an entry made in violation of law and therefore "erroneously allowed," cannot be legally "confirmed," and hence that repayment to Gibbs of his purchase money is authorized by this statute. Having purchased the tracts at the demanded price, which, it appears, he would not have done at the larger price, I think both law and equity demand that his petition be granted. I therefore reverse your decision, and allow repayment to him of his purchase money with the fees and commissions paid on his entry, upon surrender of his duplicate receipt or upon proof of its loss, and upon his affidavit that he has not transferred or otherwise incumbered the title to the land, and that said title has not become a matter of record, as required by general circular of March 1, 1884.

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#### ROBERT C. HITE.

The act of March 3, 1883, fixed the price of alternate sections of public land along the line of railroads at \$2.50 per acre (Rev. Stat., 2357), and the laws enacted since have not reduced the price of such land.

The tract in question lies within the lateral limits of Southern Pacific Railroad Company, and decision denying repayment is affirmed.

*Secretary Teller to Commissioner McFarland, May 20, 1884.*

SIR: I have considered the appeal of Robert C. Hite from the decision of your office, dated April 23, 1881, in which his application for repayment of purchase money in excess of the minimum price of Government land is denied.

The papers in the case show that Hite filed a pre-emption declaratory statement on January 24, 1868, for lots 1 and 2 and the E  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of Sec. 30, T. 9, R. 2, San Francisco, Cal., alleging settlement August 14, 1867 (unoffered land), for which patent issued to him.

The tract lies within the limits of the withdrawal of January 30, 1865, for the Central Pacific Railroad, under the acts of 1862 and 1864. It was subsequently held by this Department that so much of the lands granted as were situated within the San Francisco district did not enure to that company. Prior to their restoration, however, the grant to the Southern Pacific Railroad Company took effect, which embraced within its limits the lands rejected from the grant to the Central Pacific Railroad Company. This Department held that the act of 1866, through which the Southern Pacific Railroad Company obtained its grant, excepted the lands situated within its limits, which had been withdrawn for but also rejected from the grant to the Central Pacific Railroad Company, and the odd-numbered sections were ordered to be sold as public lands at the minimum price.

The act of March 3, 1853 (10 Stat., 244), fixed the price of alternate reserved sections of public land along the lines of railroads at \$2.50 per acre, and that provision is embodied in section 2357 of the Revised Statutes. The laws enacted since the passage of that act have not served to reduce the price of such land.

The tract in question lies within the lateral limits of the grant to the Southern Pacific Railroad Company.

Your decision is affirmed.

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## 2. ERRONEOUS SELECTIONS.

### NORTH AND SOUTH ALABAMA RAILROAD COMPANY.

By the second section of the act of June 16, 1880, fees and commissions are to be repaid to the person making entry when for any reason it has been erroneously made and cannot be confirmed.

By Rev. Stat. 5013, "person" includes "corporation." "Entry" signifies an appropriation of land. Selections are entries within the statute providing for repayment of fees and commissions.

The selections in this case were erroneous. Commissioner's decision is reversed and repayment of fees directed.

*Acting Secretary Joslyn to Commissioner McFarland, July 31, 1883.*

SIR: I have considered the application of the North and South Alabama Railroad Company for repayment of \$82, being the amount of fees on 6,527.06 acres selected by said company, on appeal from your decision of June 8, 1882, declining to recommend such repayment.

Said lands were selected August 14, 1879. The company claimed such selections under the act of Congress approved June 22, 1874, as indemnity for a like quantity of lands lost within the granted limits of

said road. The local officers allowed the selections, and the fees aforesaid were paid upon such allowance.

You held, in your decision of July 5, 1881, that the odd sections which formed the basis of the selections were disposed of before the right of the road attached by definite location, and that under the act aforesaid the right to select even sections in lieu of odd sections was limited to lands sold by the Government subsequently to the time the right of the road attached, and, therefore, that the list selected must be canceled.

In your decision of June 8, 1882, you refuse repayment upon the ground "that the laws authorizing repayment of fees and commissions and purchase money do not provide for the return of fees which have been paid for lands selected by railroads and other companies."

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides that—

Where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions.

Section 5013 of the Revised Statutes provides that the word "person" shall also include "corporation." The term "entry" is a general term, signifying an appropriation of public land (Chotard *et al. v. Pope et al.*, 12 Wheaton, 586).

Selections are entries within the meaning of the statute providing for the repayment of fees and commissions.

The facts show that these selections were erroneously allowed and cannot be confirmed.

I reverse your decision, and direct that repayment be made.

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### 3. FRAUDULENT ENTRIES.

ISAAC FENGER.

The act of June 16, 1880, provides for repayment of fees and commissions only in cases where entries have been canceled for conflict, or erroneously allowed and cannot be confirmed.

In the present case the entry was not canceled for conflict, nor was it erroneously allowed; but the party had already made one entry under the timber-culture laws when he made the entry in question. Repayment is therefore declined.

*Commissioner McFarland to register and receiver, Watertown, Dak., September 12, 1883.*

GENTLEMEN: In reply to your letter of the 1st instant, in the matter of the application of Isaac Fenger for return of the fee and commissions paid on timber-culture entry No. 8451, I have to inform you that the act of 16th June, 1880, only provides for return of fees and commissions in cases where homestead or timber-culture entries have been canceled for conflict, or when from any cause the entry has been erroneously

allowed and cannot be confirmed. Entry No. 8451 was not canceled for conflict, nor was the same erroneously allowed, as you are not cognizant of the fact that the party has already made one entry under the timber-culture laws when he made said entry 8451.

I have therefore to decline to recommend repayment as asked for.

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DAVID CRAVEN.

The applicant having removed from land he held by purchase to the tract upon which he filed pre-emption declaratory statement, and in his final proof answered the interrogatory, "Have you left or abandoned a residence upon land of your own?" etc., in the negative, and the entry having been canceled for the want of good faith, and because the proofs were false, he has forfeited his right, and decision denying repayment of purchase money is affirmed.

*Secretary Teller to Commissioner McFarland, October 8, 1883.*

SIR : I have considered the appeal of David Craven from your office decision of October 30, 1882, declining to recommend repayment of the purchase money paid by him upon cash entry, No. 1587, of the SW.  $\frac{1}{4}$  of Sec. 17, T. 13 N., R. 40 E., W. M., Walla Walla district, Washington Territory.

It appears that Craven filed declaratory statement, No. 3710, for the tract February 24, alleging settlement January 1, 1881. Under date of October 8, ensuing, he made final proof and payment, whereupon final certificate No. 1587 issued therefor.

It having transpired through some source not discovered by the record that Craven had violated the second prohibitive exception to section 2260, Rev. Stat., your office, under date of January 7, 1882, called upon the register and receiver for a report touching such matter. They accordingly forwarded to your office, per letter of February 7, ensuing, certain affidavits (of Craven and others), wherein it is admitted that Craven did remove from a certain tract of land situate in T. 10 N., said Territory (containing 160 acres, which he had acquired by purchase in the year 1878), to settle upon the tract described in his declaratory statement. He states, however, that he was not aware that he had thereby violated the law, and that he had "never had the benefit of the pre-emption, homestead, or timber, culture laws."

Upon the foregoing state of facts your office canceled his entry March 20, 1882, but directed the register and receiver to advise him that he would be allowed to enter said tract under the homestead law, if properly qualified; and that an application by him for the return of the purchase-money would be considered. The register having accordingly forwarded Craven's application in question, your office rejected the same because "the entry of Craven was not erroneously allowed, for at date of his entry it was not shown that he removed from land of his own to that covered by his pre-emption claim, and therefore it was no fault on the part of the Government in allowing the entry."

It should be observed that Craven made his final proof before the clerk of the district court of Columbia County. It appears from such proof that question 10 is in the usual stereotyped form, to wit:

Have you left or abandoned a residence on land of your own in this Territory to reside upon the land above described?

Craven answered this categorical interrogatory categorically, "No." And although he alleges in one of his numerous affidavits that "the clerk did not ask second section of question 4 as it reads, but in this wise: 'Did you leave or abandon any other claim to make this entry?'" there is not a scintilla of evidence tending to prove such allegation. It is true that section 2362 Rev. Stat. authorizes repayment of purchase-money upon satisfactory proof that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed," and that section 2 of the act of June 16, 1880 (21 Stat., 287), provides for repayment under substantially the same conditions. It should be observed, however, that it was not shown that the entry in question had been erroneously allowed, nor had the regularity thereof been called in question until after the issuance of the final certificate, when certain affidavits were filed touching Craven's failure to comply in good faith with legal requirements. Such allegations tend to show that the proofs upon which such certificate was based were not made in good faith.

In such cases the Department has invariably held that if there was no error on the part of the United States, or if the proof showed compliance with legal requirements at the date of entry, and the entry had been canceled because the proofs were false, the entry could not be regarded as having been erroneously allowed, nor could repayment be authorized. (John R. Boyce, 10 Copp., 25, and case of John Longnecker, *Ibid.*, 9.)

In the light of the evidence in the premises, and of the precedents cited, I am of the opinion that Craven has forfeited his right, and that, therefore, it would not be expedient to refund said purchase-money.

Your decision is accordingly affirmed.

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RAFAEL CHAVES.

The party having made pre-emption entry and final proof, and afterward made homestead entry on another tract, and, on report being called for as to whether the pre-emptor and homesteader were the same person, having relinquished his pre-emption entry and applied for return of purchase-money, said entry being thereupon canceled, and it being evident from the evidence that said entry was not made in good faith, repayment is not recommended.

*Commissioner McFarland to register and receiver, Santa Fé, N. Mex., October 10, 1883.*

GENTLEMEN: Referring to your letter of August 6 last, in the matter of the application of Rafael Chaves for return of the purchase-

money paid on pre-emption cash entry No. 177 of the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 10, and N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , Sec. 11, T. 10 N., R. 10 W., you are advised that the records of this office show that Chaves filed declaratory statement October 4, 1873, alleging settlement January 25, 1870, and made final proof December 3, 1875, per certificate No. 177, October 25, 1873. Chaves also made homestead entry No. 189 for lots 4, 5, and 6, Sec. 3, 10 N., R. 10 W. T. 10 is within the granted limits of the withdrawal for Atlantic and Pacific Railroad Company, May 18, 1872.

On June 16, 1876, the claimant was called upon to furnish a pre-emption affidavit, covering time up to date of certificate Chaves furnished an affidavit made before a notary public, in which he stated that he did reside constantly upon the said land from June 1, 1863, to September 21, 1881.

April 2, 1883, a report was called for to show whether Chaves was the same party who made homestead entry No. 189, and in response thereto Chaves relinquished his entry and applied for repayment of the purchase-money. Said entry was canceled on the 4th instant, on the relinquishment of the party. At the date of Chaves' settlement there were no adverse rights attached to the land in question. From the evidence before me it is very evident that Chaves did not make said entry in good faith. Had he complied with the law under which his entry was made, the United States could have confirmed the same; it was therefore not by fault of the Government that said entry was canceled, and I have to decline to recommend the return of the purchase-money asked for.

Notify the party in interest and sixty days are allowed for appeal.

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#### C. A. LINSTROM.

The party having removed from his own land and made pre-emption cash entry in same Territory, thereby not being a qualified pre-emptor, his entry was canceled. On application for repayment of purchase-money, it appearing that he made proof, which, if true, showed him a qualified pre-emptor, held that the entry was not erroneously allowed, but fraudulently made, and that there is no law allowing repayment.

*Secretary Teller to Commissioner McFarland, February 4, 1884.*

SIR: I have considered the appeal of C. A. Linstrom from your decision of June 14, 1883, declining repayment of the money paid by him on his pre-emption cash entry No. 2512, Sioux Falls, Dak.

It appears that appellant had homesteaded a tract of land in Dakota, in 1874, and that in 1875 he made settlement on and declaratory filing for another tract in Dakota, and in 1878 made the cash entry aforesaid. It was afterward discovered that he had removed "from his own land to reside on the public lands in the same Territory," and, as he was not a qualified pre-emptor under section 2260, Rev. Stat., his entry was can-

celed May 4, 1880. Thereupon he applied for the repayment, which was refused on the ground that the act of June 16, 1880 (21 Stat., 287), does not apply to his case, for the reason that, as he had failed to show said removal in his final proofs, "it was no fault on the part of the Government in allowing the entry," and it was therefore not "erroneously allowed."

I have examined appellant's final proofs, and I find that, though he himself did not swear to nonremoval, he did produce two witnesses who swore that he "did not remove from his own land within the Territory of Dakota." This was the evidence he offered of his right to preempt the tract, and on it the entry was allowed. Had he not deliberately falsified the facts entry would not have been allowed. It was not error to allow it on these proofs, for they were the proofs which the law and the regulations required. Hence, this case does not fall within the act of June 16, 1880. I know of no law authorizing the repayment of purchase-money where the entry has been obtained by fraud.

Your decision is therefore affirmed.

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#### JENS STOHL.

The Secretary of the Interior is authorized to grant repayment where public land has been erroneously sold, or an entry erroneously allowed or canceled for conflict. Where the sale or entry might be confirmed except for defect or fraud in the proofs, and there is no error on the part of the United States, he has no such authority.

The entry of Stohl was cancelled for his own laches (having been held fraudulent). Repayment is therefore not allowed.

*Secretary Teller to Commissioner McFarland, February 11, 1884.*

SIR: I have considered the appeal of Jens Stohl from your decision of June 8, 1880, rejecting his application for repayment of purchase, money paid on cash entry No. 1545 for the SE.  $\frac{1}{4}$  of Sec. 6, T. 15, R. 4, Salt Lake City, Utah.

Stohl made homestead entry of the tract May 14, 1872, and commuted the same to cash March 11, 1876. Upon allegations of fraud in his proofs Secretary Schurz, June 19, 1877, ordered an investigation of the facts, and in view of the testimony your office, September 15, 1879 (concurring with the local officers in the opinion that the allegations were sustained), held the entry for cancellation, and in the absence of appeal it was cancelled January 20, 1880.

The Secretary of the Interior is authorized to grant repayment in cases where public land has been erroneously sold or an entry has been erroneously allowed or cancelled for conflict, so that the sale or entry cannot be confirmed (Section 2362, Rev. Stat., and act of June 16, 1880). Where the sale or entry might be confirmed except for defect or fraud in the proofs of the entryman, and there is no error on the part of the

United States, the Secretary has no such authority. As the case of Stohl shows that his entry was canceled by reason of his own laches or fraud, without fault by the Government, repayment of his purchase-money is not allowable.

I affirm your decision.

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#### 4. BONUS FOR TIMBER-CULTURE ENTRIES.

CHARLES M. PRICE.

Price and another applied simultaneously to make timber-culture entry of the tract, and it was awarded to Price as the highest bidder for the privilege of entry; having availed himself of the same, and the entry being valid, there can be no return of the bonus paid therefor.

*Commissioner McFarland to register and receiver, Huron, Dak., May 9, 1883.*

GENTLEMEN: I am in receipt of your letter of 31st March last, inclosing a petition from Charles M. Price, by his attorney, L. W. Crofoot, relative to the return of the bonus charged him in making timber-culture entry No. 983. In reply I have to state that it appears from your letter and the petition of Price that said Price and one David L. Stick simultaneously filed applications to enter the SW.  $\frac{1}{4}$  of Sec. 13, T. 113 N., R. 76 W., under the timber-culture law.

Under the rulings of this office, where parties simultaneously file applications for the same land under the timber-culture law, the tract thus filed for shall be put up at auction by the register, and the party who bids the highest price shall have the privilege of entering the same.

In this case Price availed himself of this privilege, and he being the highest bidder his application was accepted.

As this is a valid entry there can be no return of the bonus paid thereon.

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CYRUS A. GORGAS.

Where three applied to make timber-culture entry, and the preference was put up at auction, on notice, through inadvertence, to only two, and bid in by one of those notified, at \$10.50; afterward, the omission of notice to the third applicant being discovered, the sale was set aside and the right reoffered on full notice, and bid off by the same party as before, at \$148. On application for repayment of the difference between the first and last bids the action of the local office is approved and repayment is declined.

*Commissioner McFarland to register and receiver, Huron, Dak., July 13, 1883.*

GENTLEMEN: In further reply to your letter of 31st May last, in the matter of the petition of Cyrus A. Gorgas to have returned to him a

portion of the money paid as a bonus for the privilege of entering the SE.  $\frac{1}{4}$  Sec. 20, T. 115, R. 62, as a timber-culture entry, I have to state that it appears from your report of the 28th ultimo that C. A. Gorgas, G. W. Thomas, and one Pettes, were contestants to enter the above-named tract as a timber-culture entry. When you advised Gorgas and Thomas when said tract would be put up at auction you overlooked the application of Pettes, and consequently did not advise him when the sale would take place.

At the time appointed by you, the tract was auctioned off, and the preference right to enter said tract was bid in by Gorgas, he being the highest bidder, at \$10.50. After the sale was closed, you then discovered the application of Pettes, which had been put away with other papers, and you immediately notified all the parties in interest that Pettes being one of the contestants, and his application was overlooked, that you would have to declare the sale void in order to give Pettes an opportunity to bid as a contestant. All parties acquiesced in your proposition, and you then again put the tract up to the highest bidder; again was Gorgas the successful bidder, and it was bid in by him for \$148. Gorgas now protests against your proceedings, and asks that the difference between the first bid of \$10.50 and the second bid of \$148, viz., \$137.50, be refunded on the ground that the second time the tract was put up the auction was illegal.

This office approves your action in the matter, and declines to grant the request of the petitioner Gorgas. Notify all parties in interest, and allow the usual time for appeal.

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#### OZRA M. WOODWARD.

Where two parties applied for right to contest a timber-culture entry, and to make entry of the tract; and one of the two, though protesting against the legal right of the other to compete, bid in the preference right in controversy, paid the amount bid, and then claimed to recover back the same, on the ground that his competitor's offered entry was illegal, and all his own rights were saved by his protest: *Held*, That the decision denying repayment should be affirmed.

Where one voluntarily pays money on an illegal claim, with full knowledge of the facts and without compulsion, he cannot recover it back.

*Secretary Teller to Commissioner McFarland, December 27, 1883.*

SIR: I have considered the appeal of Ozra M. Woodward from your decision of May 1, 1883, refusing to approve his application to the register and receiver at Huron, Dak., for the repayment to him of certain moneys.

It appears that Woodward and one Lovell simultaneously made applications on March 10, 1883, to contest a timber-culture entry for failure to comply with the law during the first year, and to enter the land for themselves, and that the local officers directed that they should bid

for the preference right, under authority of the case of Theodore Kimm (7 Land Owner, 181).

But Woodward protested against this, and demanded that his application should be received, and Lovell's rejected, on the ground that the latter's affidavit (bearing date of March 9, 1883, which was the last day of the first year) showed on its face that it was executed prior to the time that a right of contract could attach, and that the defect was fatal. He was overruled by the local officers, and, still protesting, bid some \$55, which he paid to them, thus securing the preference right.

Now Woodward sets up that he saved all his rights by the protest, and he claims the right to recover back the money so paid on the ground that Lovell's entry was illegal as aforesaid. In support of his claim he cites various authorities to sustain the proposition that a party in an action who objects, and is overruled, may proceed in the cause without waiving his objection. Such is the law without doubt, but it does not apply here for the reason that Woodward did not proceed in his action; to do so it would have been necessary for him to refuse to bid, and, if his contest were dismissed, to appeal to your office; whereas he adopted an entirely different method of settling the question, and paid over the sum named in order to acquire the preferred right. There was no mistake of fact in the payment, upon which he can rely; there was no compulsion in the payment, for he might have appealed; he voluntarily paid the money to the local officers with full knowledge of the facts. It is immaterial whether their demand and enforcement of it was illegal or not (and this point will not be discussed), for it is an established rule of law that when one voluntarily pays money on an illegal claim, with full knowledge of the facts, and without compulsion, he cannot recover it back.

Your decision is affirmed.

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#### CHARLES M. PRICE.

The money paid for the privilege of making timber-culture entry, though paid under protest, was not a payment under compulsion and the protest did not save any right of repayment.

*Secretary Teller to Commissioner McFarland, March 7, 1884.*

SIR: I have considered the appeal of Charles M. Price from your decision of September 28, 1883, rejecting his claim for the repayment of \$80, paid by him as a bonus for the privilege of making timber-culture entry for the SW.  $\frac{1}{4}$  of Sec. 13, T. 113 N., R. 76 W., Huron, Dak.

It appears that Price and one D. L. Stick made simultaneous applications to enter this tract, and that the register under the rules prescribed in such cases put up at auction the privilege of making entry for said tract, for which Price bid and paid \$80 and was accordingly permitted to make the desired entry.

It is alleged by the attorney for Mr. Price that the register, "before proceeding with the auction, made a statement that no bids of less than \$5 would be received, to which objection was made by the counsel for the petitioner;" that although Mr. Price paid the amount bid, such payment was under protest; that the register erred in thus fixing the amount of the bids; and that Price saved his right to demand repayment by his protest.

This case is fully within the rule laid down in Woodward's case (10 Copp's L. O., p. 330) wherein it was held that payment under protest for the preference right to contest a timber-culture entry was not payment under compulsion, and that the protest did not save any right to repayment.

Your decision is therefore affirmed.

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### 5. STATUTORY REQUIREMENTS.

THOMAS M. KILE.

Kile did not appear on the taking of the proof upon which his entry was canceled, and did not appeal from the decision thereupon. There is no provision of law found authorizing repayment of purchase-money in such a case, and decision denying the same is affirmed.

*Secretary Teller to Commissioner McFarland, May 24, 1883.*

SIR: I have considered the appeal of Thomas M. Kile, by his attorney, J. J. Weisenburger, from your decision of May 8, 1882, declining to recommend the return to him of the purchase-money paid on his pre-emption cash entry, No. 1779, for the NW.  $\frac{1}{4}$  of Sec. 4, T. 16, R. 17 E., Sacramento, Cal.

Kile filed declaratory statement for the tract described June 3, 1874, alleging settlement May 26, 1874, and made final proof and payment November 18, 1876; subsequently a hearing was ordered, based upon affidavits tending to impeach the bona fides of said Kile.

On the 21st of January, 1880, your office decided that the allegations of bad faith were fully sustained by the evidence adduced at the hearing, and held the entry for cancellation.

No appeal was taken from that decision, and in October, 1880, the entry was canceled.

It appears that Kile failed to appear at the trial above mentioned, although he had due notice. After thus allowing his case to go by default, without even an attempt to show his good faith, or to seek a remedy by appeal, as legally provided, he now makes application for repayment of his purchase-money on the ground that the evidence on which the cancellation was based failed to show bad faith or failure to comply with the requirements of the pre-emption law, and that said cancellation was, therefore, erroneous. I find no provision of law authorizing

the return of purchase-money in such a case. Section 2362 of the Revised Statutes authorizes repayment upon satisfactory proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed;" and section 2 of the act of June 16, 1880, provides for repayment "when from any cause the entry has been erroneously allowed and cannot be confirmed."

The only obstacle in the way of confirmation of title to Kile was one growing out of his own acts. The land was properly subject to his entry at the date thereof, and the confirmation was prevented by proof of his own laches and failure to comply with the requirements of the law, and not through any error on the part of the Government. Mr. Kile's case is clearly not within the provisions of the statutes authorizing repayment of purchase-money, and your decision denying his application is affirmed.

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*DESERT LAND ENTRY.**PERKINS RUSSELL.*

Where the party filed declaration and paid first installment, and three years after made application for repayment, alleging that the land could not be reclaimed for the reason that he had been unable to secure the amount of water necessary, whereupon his entry was canceled as relinquished:

Held, That as the statute required the water to be conducted upon the land within three years, and the party himself virtually alleged his failure to comply, the entry not having been canceled for conflict nor because erroneously allowed, but for failure to comply with legal requirements, it would be inexpedient to refund purchase-money, and decision denying the same affirmed.

*Secretary Teller to Commissioner McFarland, July 14, 1883.*

SIR: I have considered the appeal of Perkins Russell from your decision of November 12, 1881, rejecting his application for repayment of the first installment (160) of the purchase-money on desert-land application No. 3, for Sec. 22, T. 2 S., R. 5 E., Bozeman district, Montana.

Russell filed his declaration of intention to reclaim the premises October 5, 1877, paying 25 cents per acre, pursuant to the provisions of the first section of the act of March 3, 1877 (19 Stat., 377), known as the desert-land act.

September 13, 1880, he made the application in question. Subsequently, October 27, ensuing, he filed his own and another person's affidavit in support of his application. He alleges (*inter alia*) "that the said tract cannot be reclaimed for cultivation for the reasons: 1st, that he has not been able to secure the amount of water necessary to reclaim said land, as by the desert-land law required."

Upon your receipt of the register's and receiver's letter of October 28, 1880, transmitting said application, you treated the same as a relinquishment of Russell's claim, and canceled "said entry" November 5, 1881.

It was held by this Department under date of August 2, 1882, in the case of *Wallace v. Boyce* (The Reporter, vol. 2, 130), that the intentment of the desert-land act is—

To provide for the reclamation of such lands from their desert condition to an agricultural state. Congress specified water as the means to that end, but the mere conveying of water upon the land is not a fulfillment of the law, unless in sufficient quantity to prepare such land for cultivation. It would be imputing a vain intent to the statute to interpret the same as requiring a mere occasional seepage of water upon such land, which, in itself, would not materially change the original status of the same so far as agricultural purposes are concerned.

As shown by the decision cited, the statute itself expressly provides—

That the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres *shall depend upon bona fide prior appropriation*, and that the water shall be so conducted within the period of three years.

It will be observed that upwards of three years had elapsed from the date of Russell's declaration to that of his affidavit wherein he virtually alleges his failure to comply with statutory requirements. His entry was not canceled for conflict nor because it had been erroneously allowed, but because of his failure to comply with legal requirements (See case of James R. Boyce, The Reporter, vol. 2, p. 195.) I am therefore of opinion that it would be inexpedient to refund said purchase-money. Your decision is accordingly affirmed.

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#### 6. VOLUNTARY ABANDONMENT.

WILLIAM E. CREARY.

The law authorizing repayment of purchase-money does not provide for return of the same to parties who voluntarily abandon or relinquish their entries.

*Commissioner McFarland to register and receiver, Tucson, Ariz., January 22, 1884.*

GENTLEMEN: In the matter of the application of William E. Creary for repayment of the purchase-money paid on desert-land entry No. 240, I have to inform you that said entry was canceled by office letter C, of the 17th instant, addressed to you, for the reason that the party voluntarily relinquished the same. The law authorizing repayment of purchase-money does not provide for return of the money to parties who voluntarily abandon or relinquish their entries.

The entry in question was not canceled for conflict, nor was the same erroneously allowed, but the error was on the part of the applicant. Therefore, as this case does not come within the provisions of the stat-

ute authorizing repayments, I have to decline to recommend the return of the money paid on said entry No. 240.

See case of José Ygnais Gonzales and F. Chavis, page 533 Decisions of the Department.

Notify the party in interest sixty days will be allowed for appeal.

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WILLIAM M. BERNARD.

Where one relinquishes a desert-land claim on the assumption that the land is in fact agricultural, he is estopped by his prior proofs from denying its desert-land character, and is not entitled to repayment.

*Secretary Teller to Commissioner McFarland, January 31, 1884.*

SIR : I have considered the appeal of William M. Bernard from your office decision of May 28, 1883, declining to recommend the repayment of \$159.71 paid by him August 24, 1877, on account of the purchase-money upon filing desert-land declaratory statement No. 56 for the N.  $\frac{1}{2}$ , the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of Sec. 30, the N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 29, T. 37 N., R. 6 E., M. D. M., Susanville district, California.

It appears that he filed his declaration pursuant to the provisions of the act of March 8, 1877 (19 Stat., 377), commonly called the desert-land act, but his filing was canceled pursuant to your office letter of May 19 last, for relinquishment, he having executed the same March 27 preceding, and at the same time filed his application for repayment under the provisions of the second section of the act of June 16, 1880 (21 Stat., 287). Said section provides for the repayment of purchase-money "in all cases where homestead or timber culture or desert-land entries of public lands have heretofore [been] or shall hereafter be canceled for conflict, or where from any cause, the entry has been erroneously allowed and cannot be confirmed."

The "entry" was not canceled for conflict but for relinquishment, nor is it shown that it was "erroneously allowed."

Appellant maintains, however, that repayment should be made, basing his application therefor upon the bald assumption that the land is not desert land but agricultural land. And this notwithstanding the substantial fact discovered by the record that he submitted, in the first instance as a preliminary to the filing of his declaration, satisfactory proof showing that the land therein described is desert land within the meaning of the act. Having performed this prerequisite act he is estopped to deny the desert character of the land, and it is not, therefore, competent for him to attempt to prove contrariwise. See cases of Jerome Madden *et al.* (7 Copp, 151) and James R. Boyce (10 *Id.*, 25.) Finding no basis for repayment, I therefore deny the application therefor.

Your decision is accordingly affirmed.

## WILLIAM E. CREAMY.

Entry was made under the desert-land law and afterwards relinquished; application was made for return of purchase-money on the ground that the party was misled by incorrect surveys as to the location and character of the land, and alleging the responsibility of the government therefor; but the proof offered by him showed that the surveys referred to were those of a private company or corporation.

The law providing for repayment in desert-land entries makes it a prerequisite that the entry has been "erroneously allowed," clearly referring to an act of the government; but the evidence shows that it committed no error, its plats being correct, the land desert-land, and the entry without conflict.

As the responsibility for the mistake rests solely with the applicant and the survey made by the company referred to, and in no degree with the government, direction for repayment must be declined.

*Secretary Teller to Commissioner McFarland, June 19, 1884.*

SIR: Under date of March 5, 1884, William E. Creary addressed me by letter, referring to an application by him for repayment of purchase money (\$160.25) paid by him on desert-land entry No. 240, Tucson, Ariz. In that letter he claims that in making the entry he was led into error by incorrect charts and surveys, and, therefore, that the Government is responsible for the error, and he is entitled to repayment under the provisions of section 2, act of June 16, 1880. This letter being in the nature of an appeal from your action of January 21 last, declining to recommend repayment, was referred to you for report. On the 20th of March you reported that the letter presented nothing which would warrant a reconsideration of your decision of January 21.

In acting upon the case on the 28th of March I said that although the statement of applicant that he was misled by errors in the plats is not under oath, and is met by your opinion that said plats are not defective, he should be allowed an opportunity to furnish evidence in support of his averment. You notified him of that decision, and in response he has furnished two affidavits in addition to his own, setting forth that he was misled by an erroneous survey of the Gila Bend Canal, being led to believe that the land covered by his entry was adjacent to said canal and could be irrigated therefrom; but that a later survey of Gila Bend Canal makes it evident that the section filed on is not adjacent to said canal and cannot be irrigated and reclaimed from its water.

These affidavits do not support applicant's allegation that the Government is responsible for his error. They show, as you suggest, that an erroneous survey by the Gila Bend Canal Company, and not any mistake in Government survey, led applicant and others to purchase particular lands.

Had the mistake resulted from any erroneous action on the part of the Government, then clearly the act of June 16, 1880, would afford the relief desired.

On the facts as they appear, however, while there seems to be an equity in favor of applicant, I am unable to find in the law anything

which would authorize repayment as asked. The language of so much of the act cited as is invoked in this case is as follows: "In all cases where \* \* \* desert-land entries \* \* \* have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed, and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made the entry, or to his heirs or assigns, the fees and commissions, amount of purchase-money," &c. This law makes it a prerequisite that "the entry has been erroneously allowed," a condition which does not appear in the case under consideration. The words "erroneously allowed" clearly refer to an act of the Government. The evidence shows that it committed no error, its plats being correct, the land being desert land and the entry without conflict. The responsibility for mistake rests solely with applicant and with the survey made by the Gila Bend Canal Company, and in no degree, directly or indirectly, so far as the evidence shows, with the Government. I must therefore decline, for want of authority, to direct repayment as asked.

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## XI.—STATE OF KANSAS.

### FIVE PER CENT. ACCOUNT.

The view originally taken, and under which all State fund accounts based upon the compacts of admission into the Union have been adjusted, is that the amount due to the State is the fixed per centum of proceeds of lands sold for cash.

Congress did not engage not to dispose of lands in any other manner, and might otherwise dispose of them without violation of the compact.

Fees received in connection with the various dispositions of public lands are costs and not price, and form no part of the consideration upon which disposal is made. No ground is perceived for departure from the views and practice which have hitherto prevailed, or for readjustment of the 5 per centum account of the State.

*Commissioner McFarland to S. J. Crawford, esq., Washington, D. C., July 1883.*

SIR : I am in receipt of your letter of the 6th instant, applying on behalf of the State of Kansas for a readjustment of the 5 per cent. account of said State.

You refer to the act of admission into the Union, which provides for the payment to the State for certain purposes of 5 per centum of the net proceeds of sales of public lands within the State, and you suggest that fees derived from homestead entries, homestead and pre-emption filings, timber-culture entries, warrant and scrip locations, and State and railroad selections, and fees for reducing testimony to writing, are "proceeds of sales" equally with moneys received from technical cash sales, and the readjustment asked for comprehends a statement of the whole amount of moneys received at the local land offices from every source

connected with disposal of public lands, deducting therefrom the total expenses of such disposals.

The view originally taken by this office, and under which all State fund accounts based upon compacts of admission into the Union have uniformly been adjusted, is that the money due the State is the fixed per centum of proceeds of lands sold for cash.

In binding the United States to pay to States a per centum of the proceeds of sales of public lands, Congress did not engage not to dispose of public lands in any other manner than by selling them. It might donate to States, municipalities, corporations, or individuals the entire area of public lands within any State without violation of the compact of admission.

The law, as understood by this office, simply is that when the United States does actually sell lands at public or private sale, the States are entitled to their per centum of the net proceeds of such sales. The words "sales of public lands," as used in all laws relating to public lands, have a definite meaning. This meaning is not understood to include disposals by other methods than by cash sale.

The fees received in connection with homestead and other entries, filings, or selections are not considered moneys resulting from sales of land. These fees are no part of the *price* of the land, and are not in the nature of a part of the consideration upon which the disposal is made. They are required to be paid for the purpose of defraying the expenses incident to the particular manner of disposal in which they are imposed.

Thus in homestead cases the land is given to the settler upon the consideration of settlement, improvement, and cultivation. These and not a money price for the land are the considerations which authorize a transfer of title to the homestead party. The fees required to be paid by him are designed to defray the expenses of the local officers in doing the business. It is a payment of costs, and not a payment of price.

I do not perceive any ground upon which a departure from the views and practice which have hitherto prevailed would appear to be justified, and accordingly do not think that I am authorized to comply with your request.

## DIVISION N.—MINERAL CLAIMS.

### I.—ABANDONMENT.

1. The Manhattan and San Juan Silver Mining Company.

### II.—ADVERSE CLAIMS.

1. Ovens *et al.* v. Stevens *et al.*
2. Great Eastern Mining Company *v.* Esmeralda Mining Company.
3. Albert F. Harsh.
4. Samuel McMaster.
5. Downey *v.* Rogers.
6. Miner *v.* Mariott *et al.*

### III.—AGRICULTURAL CONTEST.

1. Hooper *v.* Ferguson.
2. Caledonia Mining Company *v.* Rowen.
3. Caledonia Mining Company *v.* Rowen (on review).
4. Dughi *v.* Harkins.

### IV.—APPLICATION.

1. The Gunnison Crystal Mining Company.

### V.—CIRCULARS.

1. Circular of July 6, 1883.
2. Instructions thereunder December 20, 1883.

### VI.—COAL LANDS.

1. Kerr *et al.* *v.* Utah-Wyoming Improvement Company.
2. Frank Foster *et al.*
3. J. W. Hallowell.

### VII.—LOCATION.

1. Keneage M. Griffin.
2. Keneage M. Griffin (on appeal).
3. Wight *et al.* *v.* Tabor *et al.*
4. Wight *et al.* *v.* Tabor *et al.* (on review).
5. Branagan *et al.* *v.* Dulaney.
6. James Mitchell *et al.*
7. Rust and Criteser.

### VIII.—MILL SITE.

1. J. B. Hoggin.

### IX.—NOTICE.

1. Hughes *et al.* *v.* Gilbert *et al.*
2. William A. Arnold.

### X.—PATENT.

1. Thomas Starr *et al.*
2. Alexander Moore *et al.*
3. Henry Wood, administrator.

### XI.—PLACER CLAIM.

1. Joseph M. Knapp.
2. William Rablin.

## XII.—PRACTICE.

1. William Lloyd Peacocke.
2. Maylan C. Fox.
3. F. P. Harrison.

## XIII.—SURVEY.

1. George B. Foote.

## XIV.—WATER RIGHT.

1. William A. Chessman.

## I.—ABANDONMENT.

*PROOF NOT REQUIRED WHEN.*

## THE MANHATTAN AND SAN JUAN SILVER MINING COMPANY.

Where entry of a mining claim is based upon a relocation of an alleged abandoned mineral claim, and no adverse claim upon the latter is filed as required by statute, proof of such abandonment is not necessary.

*Secretary Teller to Commissioner McFarland, December 19, 1883.*

SIR: I have examined the case of mineral entry No. 456, claim of the Manhattan and San Juan Silver Mining Company upon the Edith lode, Lake City, Colo., upon appeal from your decision of January 22, 1883, requiring the applicants for patent "to furnish positive and complete proofs of the abandonment of the Sampson lode."

The original location certificate, in giving the boundaries of said Edith lode, contains the following statement: "The boundaries of said Edith lode include a portion of the surface of an abandoned lode known as the Sampson lode," and because of this statement you require the proofs of abandonment aforesaid.

In answer to a request made of you by the applicants as to why you require this proof you state—

That it has long been the practice of this office, where entry of a mining claim is based upon a relocation of an alleged abandoned mineral claim, to require full, positive, and complete proof in regard to abandonment of the prior locations.

Section 2325 of the Revised Statutes prescribe the manner in which a patent may be obtained "for any land claimed and located for valuable deposits."

After setting forth minutely the acts necessary to be done the section closes with this language:

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists; and 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.

No adverse claim was filed in this case.

There is no provision of the statute which requires the proof called

for by you. A claimant of the Sampson lode could not be heard to require such proof, nor could any third parties object "to the issuance of a patent" without it.

The question of abandonment would be a very proper one to try in the court under the provisions of section 2326, if an adverse claim was made.

The practice of your office in this respect seems to go beyond the law, and requires proof in a manner not contemplated by the statute. The claimant of the Sampson lode, if there be any such claimant, had full opportunity to test the fact of abandonment, if he desired to do so, by filing an adverse claim for that part of the surface embraced in the boundaries of the Edith.

If he failed to make the claim I do not think it proper for your office to put the applicants for patent to the trouble and expense of proving an abandonment which they alleged in their notice of location, and which should be held to be admitted by failure to file an adverse claim; and especially should this be so under a statute which declares that if no adverse claim is filed "it shall be assumed \* \* \* that no adverse claim exists."

In the respect mentioned I reverse your decision, and return the papers transmitted with your letter of April 9, 1883.

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## II.—ADVERSE CLAIM.

### JURISDICTION.

#### 1. OVENS ET AL. v. STEPHENS ET AL.

Where an adverse claim is presented in proper form and the courts have properly acquired jurisdiction, the General Land Office will not consider a question which goes to the merits of the case.

*Commissioner McFarland to the register and receiver Leadville, Colo., December 20, 1882.*

GENTLEMEN: I have considered the motion filed by J. N. Stephens, R. S. Street, S. H. Rutherford, and A. F. Chandler asking the dismissal of the adverse claim of Adam Ovens, John McComb, Thomas Ovens and others, against the application for patent to the Steel Spring lode mining claim in the California mining district, Lake County, Colorado.

This motion was forwarded to this office in register's letter of the 4th of August, 1881, but as I could not undertake to decide a question of the character presented in said motion upon a mere *ex parte* statement, you were directed in my letter of the 23d of August, 1881, to forward to this office all the papers in the matter of said application and also all the papers in the matter of said adverse claim, etc.

I have received your reply of the 29th of August, 1881, inclosing the

papers in the matter of the Steel Spring lode mining claim application and also the papers in the matter of the adverse claim above mentioned.

The application for patent for the Steel Spring lode mining claim, as appears from indorsement thereon, was filed in your office on the 11th of March, 1881. The applicants named therein are J. N. Stephens, R. S. Street, S. H. Rutherford, and A. F. Chandler, and said application alleges that said claim was located on the 21st of December, 1880. As appears also from a certified copy from the record of the location certificate said Stephens, Street, Rutherford, and Chandler located and claimed 1,500 linear feet on the Steel Spring lode on the 21st of December, 1880. This certificate is dated January 3, 1881, and appears to have been recorded on the 4th of January, 1881.

The proof of publication shows that the notice of application for patent was published in the Daily Chronicle at Leadville, from the 11th of March, 1881, to the 10th of May, 1881.

The protest and adverse claim of said Adam Ovens, John McComb, Thomas Ovens and others, against said application for patent, as appears from register's indorsement on said adverse claim, was filed in your office on the 9th of May, 1881, before the expiration of the sixty days of publication. Said adverse claim is sworn to by Adam Ovens only, and sets forth that it is made on behalf of himself and his "co-owners, John McComb, Thomas Ovens, Daniel O'Donnell, and Barney McMahon, citizens of the United States."

Attached to said adverse claim and protest is a certified copy from the record of location certificate dated April 22, 1881, showing a location by parties named in said adverse claim on the 21st day of April, 1881, of 1,500 linear feet on the Parnell lode. This certificate appears to have been filed for record on the 27th of April, 1881. Said adverse claimants have also filed a plat, and attached thereto a certificate of Jesse F. McDonald, United States deputy mineral surveyor, showing the "conflict claimed to exist between the Steel Spring lode survey, No. 1461, and the Parnell lode, as actually surveyed" by said McDonald, who also certifies "that the value of the labor and improvements on the Parnell lode made by the adverse claimant or his grantors is not less than \$500."

Adverse claimants *inter alia* allege that the surface ground and veins and lodes contained therein, as set forth and described in the plat and field notes of said J. N. Stephens and his co-claimants, or a great portion thereof, are not the property of the said Stephens and his co-claimants, "neither are they entitled to hold the same under or by virtue of the local laws, rules, and customs of miners in the California mining district, the laws of the State of Colorado or the laws of the United States;" that a portion of the premises described in said plat and the notice of said Stephens *et al.*, and claimed by them as the Steel Spring lode, "is claimed adversely and is owned by" protestant and his co-owners as the Parnell lode or deposit, "and is in fact a portion of the

mining claim and premises claimed and owned by" said protestants as the Parnell lode; that protestant and his co owners are the owners by location and discovery of, and are in the possession of the Parnell lode

Said adverse claimants then allege specifically, "that on the *first day of April*, A. D. 1881, John McCombe, Thomas Ovens, Daniel O'Donnell, Barney McMahon, and this protestant, each and all of them being citizens of the United States, entered upon and explored the premises discovered and located the said lode or deposit as a mining claim," etc., and then allege that locators and their grantees have in all respects complied with every custom, rule, regulation, and requirement of the mining laws, and thereby became, and are, the owners of said lode, except as against the United States and the rightful possessors of said mining claim and premises, etc.

J. N. Stephens *et al.*, in their said motion of August 4, 1881, which is now under consideration, ask a dismissal of said adverse claim of said Ovens *et al.*, made against said application for patent, upon the following ground, viz, "because said pretended Parnell mining claim was located *after said application for said patent was*" made; and in support of said motion reference is made to certain decisions of this office which, it is claimed, "show that said location of said McComb and others is void, so far as it conflicts with or includes any part of said Steel Spring lode mining claim."

Upon examination, I do not think that the decisions referred to are applicable to the state of facts existing in the case under consideration.

Section 2326, Rev. Stat., provides that—

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived.

Said section further declares that—

It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim.

With the papers in the case you also sent up the certificate dated the 31st of May, 1881, of the clerk of the district court of the fifth judicial district of the State of Colorado, in and for the county of Lake. As appears by said certificate, Barney McMahon, John McComb, Thomas Ovens, Daniel O'Donnell, and Adam Ovens did on the 31st day of May, 1881, institute in said court their action in support of their adverse claim as owners of the Parnell lode or mining claim against R. S. Street, S. H. Rutherford, A. F. Chandler, and J. N. Stephens, "defendants, as

claimants and applicants for a patent for the Steel Spring lode" mining claim.

The adverse claim of Adam Ovens *et al.* was filed upon oath and shows the "nature" of the claim to be by location, and alleges that the locators and their grantees have in all respects complied with the law. The "extent" and "boundaries" of the claim are also shown. In these respects adverse claimants appear to have complied with the requirements of the law. Although they allege a location on the 1st of April, 1881, they also allege that the surface ground and veins and lodes therein contained, as set forth and described in the plat and field-notes of said J. N. Stephens and co-claimants, or a great portion thereof, *are not the property of said Stephens and his co-claimants*, and that they are not entitled to hold the same under or by virtue of the local laws or the laws of the United States, and that a portion of the premises described in said plat and notice of said Stephens *et al.* is claimed and owned by protestants as the Parnell lode, etc. It thus appears that adverse claimants filed their claim under oath during the period of publication, showing the origin of their title as well as the nature, boundaries, and extent of their claim, and that they also, "within thirty days after filing" their said claim, instituted an action in the district court of the fifth judicial district of the State of Colorado, in support of their said adverse claim. It is not shown that said suit has been settled or decided by the court, nor is it shown that said adverse claim has been waived.

The only question that can arise upon this state of facts is whether the adverse claimants have complied with the terms of the statute above mentioned, so as to bring their case within it. In my opinion, the adverse claimants in this case have shown such a compliance.

I am asked, however, in the motion under consideration, to dismiss said adverse claim "because said pretended Parnell mining claim was located after" the application for patent was made. This objection goes directly to the merits of the case, and not to the form in which the claim is presented. Whether said adverse claimants will be able, in court, to show a better right to land in dispute, this office can not undertake to decide; nor, referring to adverse claimants' location of April, 1881, can I undertake to say that adverse claimants have selected or will select this location as the only ground upon which to rest their claim to the land in dispute, these being matters over which I have no jurisdiction. It is my duty, however, under the law, to determine whether the adverse claim is made out in due form, or properly alleged, and this I have done. Beyond the ascertainment of this fact it is not necessary for me to go, nor is it necessary in the discharge of my duty under the statute to enter upon a discussion as to what may or may not be the final action of the court upon the adverse claim presented.

As far as relates to the land in dispute, the *ex parte* showing made by applicants, in support of their application, has been brought in ques-

tion by the allegations, likewise under oath, made by adverse claimants. Thus, and in the manner pointed out by the statute, has been raised an issue or "controversy" between the contesting parties—applicants and adverse claimants—as to the land in dispute. Jurisdiction over the controversy is now either in this office or in the court in which the action in support of said adverse claim has already been instituted. In my opinion, and under the rulings of the Interior Department, this office has no jurisdiction over the matter further than above stated.

In the matter of the protest of the Bodie Tunnel and Mining Company *vs.* Tioga Consolidated Mining Company, and the Bechtel Consolidated Mining Company, the honorable Secretary of the Interior, in his decisions of the 12th of December last, held as follows :

From the view, therefore, which I take of the mining law, the only place in which controversies between conflicting mining claimants or adverse claimants can be heard is in a court of competent jurisdiction.

This office, in considering the adverse claims filed against the application for patent to the Valentine gold quartz mine, in decision of 25th of April, 1879, held :

I am disinclined to usurp questionable jurisdiction. I have not the proof before me to enable me to render a well-advised decision as to the respective rights of the parties, were my jurisdiction unquestionable, *and it is not incumbent on said adverse claimants to present such proof.* It is their duty to *properly allege* their adverse claims. This has been done, and it is not my province to decide that Knight has not rights which can be successfully asserted in the courts.

And the adverse claim filed being in "due form" this office directed a stay of proceedings. (See Sickels' Mining Decisions, page 287.)

In the case of the "King of the West lode" in Utah, the honorable Secretary of the Interior, in his decision of December 26, 1876, held that the plain meaning of the law is that—

All contests which may arise in the disposal of the mineral lands shall be tried and determined, if tried at all, in a court of competent jurisdiction; that the adjudication and determination of that court shall be final, and a patent for the tract in controversy shall issue to the successful party or parties, upon showing further compliance therewith. It is equally clear, I think, that when the court has acquired jurisdiction of the subject-matter in controversy all other proceedings, except those mentioned, must be stayed until such determination is made, if the suit be prosecuted with reasonable diligence.

Referring to the objections urged against the adverse claim filed in that case, the Department in said decision further held :

Both of these objections go to the merits of the case, and not to the form of the claim. It is unquestionably your duty, as well as mine, when an adverse claim is presented for consideration, to examine it, and determine whether the claimant has substantially set forth, under oath, its nature, boundaries, and extent: but if a compliance with the law is shown in these particulars, and a suit has been instituted to determine the rights of the parties, I am of the opinion that we can proceed no further with the investigation. It is the duty of the court in which the

suit is pending to determine all other questions relating to the controversy. (Sickels' Mining Decisions, p. 297.)

For reasons above stated I must decline to dismiss the adverse claim of Adam Ovens *et al.*, and the said motion of J. N. Stephens *et al.*, is hereby overruled.

Give due notice of this decision to all parties in interest.

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*PRIOR APPLICATION—CROSS-ADVERSE CLAIMS AND SUITS.*

**2. GREAT EASTERN MINING COMPANY v. ESMERALDA MINING COMPANY.**

An application for patent is an appropriation of the ground embraced therein, and parties who have filed an adverse claim against an application cannot file an application for the same ground, or any part of it, while the controversy is pending.

*Acting Secretary Joslyn to Commissioner McFarland, July 27, 1883.*

SIR: I have examined the case of the Great Eastern Mining Company upon the Flora Bell Lode *v.* The Esmeralda Mining Company upon the Elkhorn and Fenian lodes, Deadwood, Dak., on appeal from your decision of July 11, 1882, holding that the application of the Esmeralda Company must be dismissed as to the area in conflict.

August 25, 1880, the Great Eastern Company filed application for patent to the Flora Bell lode. During the period of publication of notice the Esmeralda Company filed against said application two adverse claims for a portion of the ground so applied for by the Great Eastern Company, one of said adverse claims being for ground claimed under the name of the Elkhorn lode, and the other for ground claimed under the name of the Segregated Fenian lode. On each of said adverse claims suit was duly commenced within thirty days allowed for that purpose. February 25, 1881, the Esmeralda Company filed at the local office an application for the said Segregated Fenian lode, embracing, with other ground, a portion of the same ground previously applied for by the Great Eastern. And March 23 of the same year said Esmeralda Company filed an application for the Elkhorn lode, which also embraced, with other ground, a part of the ground applied for by said Great Eastern. At the time these applications of the Esmeralda were received at the local office the application of the Great Eastern and the two adverse claims made by the Esmeralda were all pending. During the period of publication of the Segregated Fenian and Elkhorn, the Great Eastern filed cross-adverse claims and duly commenced suits thereon.

This statement of facts presents the question whether it was error for the register and receiver to entertain the applications of the Esmeralda Company of February 25 and March 23 for portions of the same ground applied for by the Great Eastern.

The Esmeralda had already adverced the claim made by the Great Eastern to the identical ground embraced in such applications, and suits had been commenced and issue joined as to the rights of the respective parties to said ground. Such suits are still pending, so far as this Department is advised. The trial of those suits will determine all the rights of the parties to the property in contention.

The receiving of the applications of the Esmeralda led to the counter adverse claims made by the Great Eastern and to the suits begun in consequence thereof. These proceedings were not necessary to a settlement of the controversy. They engendered a multiplicity of suits—an evil always to be discountenanced, and which modern legislation especially has been anxious to prevent.

Section 2326 of the Revised Statutes provides that when an adverse claim is filed during the period of publication, "all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled by a court of competent jurisdiction, or the adverse claim waived."

The subject-matter of the controversy having been transferred, by the provisions of the statute, to a court of competent jurisdiction, all further proceedings in the Land Office between the same parties affecting the property in dispute were stayed, with the single exception of the publication of notice (already commenced), and making and filing proof thereof. This prohibition extended to the receiving and filing of the new applications for the land in conflict until the controversy was settled by the court.

The Esmeralda Company, under the statute, was to assert its claim to the property, not by filing applications therefor, but by filing a claim adverse to the application already made, and commencing a suit thereon within the statutory period.

The claim that the General Land Office has lost jurisdiction because adverse claims were made and suits commenced under the last applications received at the local office, is not well taken. Such proceedings do not prevent the Land Department from deciding the question of the regularity of the action of the local office in receiving the applications and dismissing from the record papers improperly placed in its files.

I affirm your decision, and return the papers submitted with your letter of October 14, 1882.

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*APPLICATION UPON JUDGMENT.***3. ALBERT F. HARSH.**

An application by an adverse claimant for the ground in conflict, after judgment in his favor, must be accompanied by an official plat and field-notes of the land applied for, with a certificate of \$500 worth of improvement thereon.

*Commissioner McFarland to the surveyor-general at Denver, Colo., July 27, 1883.*

SIR: Mineral entry No. 1327, Leadville series, made October 20, 1882, by Albert F. Harsh *et al.* for the A. Y. lode, comes under the provisions of section 2326, Rev. Stat., the claimants paying for and entering land awarded to them by judgment of the district court of the fifth judicial district of Colorado, said judgment having been rendered in a suit brought by these applicants for patent on an adverse claim filed by them against the applicants for patent for the Ocean Wave lode.

Said section 2326 provides that after judgment shall have been rendered, the party entitled to the possession of the claim may file a certified copy of the judgment roll with the register of the land office, together with the *certificate of the surveyor-general*, that the requisite amount of labor has been expended or improvements made thereon and the *description required in other cases, &c.*

This Office is of the opinion that the words "and the description required in other cases" contemplate a plat and field-notes of survey, properly made and approved by the surveyor-general, as required in lode applications for patent. I therefore herewith inclose the certified copy of said judgment roll awarding the land to these claimants, and you will construct therefrom a plat and descriptive field-notes, making said judgment the basis therefor.

As soon as completed you will forward the plat and field-notes to this Office, returning therewith the copy of the judgment.

An additional certificate of \$500, in labor and improvements, will also be required.

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*DEFECTIVE ADVERSE CLAIM—SUIT PENDING.***4. SAMUEL MCMASTER.**

Although the adverse claim was dismissed because sworn to by an attorney instead of an adverse claimant, and such action became final by failure to appeal, nevertheless, suit having been commenced thereon in the courts within thirty days from filing, the Department will suspend action until such suit is terminated.

*Secretary Teller to Commissioner McFarland, December 7, 1883.*

SIR: I have considered the appeal of Samuel McMaster from your decision of March 19, 1883, in the matter of the Lincoln Quartz Mine, No. 132, in the Deadwood, Dak., land district.

It appears that McMaster filed an application for patent for this mine October 30, 1878, and that December 30 following, during the period of McMaster's publication, George Brettell, as attorney for F. S. and A. L. Brettell, filed an adverse claim for the Greenback lode, sworn to by himself, and that suit was commenced thereon January 27, 1879. On February 25, 1880, you dismissed the adverse claim for the reason that it was not sworn to by either of the claimants, but by their attorney. No appeal was taken from this dismissal.

March 30, 1880, McMaster filed in your office a certificate of the clerk of the court that no suit was pending involving title to any part of the Lincoln claim, except the one brought by A. L. and F. S. Brettell, as owners of the Greenback lode, against him as owner of the Lincoln claim.

On these facts you held it would be improper for you to issue patent to McMaster pending suit in a court of competent jurisdiction involving the possessory title to a large portion of the Lincoln claim until he filed in your office a certificate from the clerk of the court that the suit had been dismissed, or had been decided in his favor. Although section 2326 of the Revised Statutes requires that "an adverse claim shall be upon oath of the person or persons making the same," and the present claim was filed upon the oath of their attorney only, and although your decision dismissing the adverse claim became final against such claimants for want of appeal so far as respects proceedings in the Land Department, I am of the opinion that the claim having acquired a status in the courts, the question of its regularity and validity should be left to the judgment of the court, and that pending the proceeding this Department should take no action therein.

Your decision is affirmed, and the papers transmitted with your letter of May 23, 1883, are herewith returned.

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*FAILURE TO BRING SUIT—PUBLICATION—OIL-BEARING LANDS.*

**5. DOWNEY v. ROGERS.**

Where suit is not commenced within thirty days after filing an adverse claim, as required by statute, it must be held that no adverse claim exists.\* A slight misdescription in the published notice held insufficient to defeat the regularity of the proceedings.

*Secretary Teller to Commissioner McFarland, December 8, 1883.*

SIR: I have considered the case of Stephen W. Downey v. Samuel E. Rogers, applicant for patent for the Washington, Adams, Jefferson, and Madison oil claims, in the Cheyenne, Wyo., land district.

This application was filed February 22, 1882, and during the period of its publication, to wit, April 22, Downey filed an adverse claim, al-

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\* It does not appear that a suit in court was ever commenced in this case.

leging prior ownership and possession of the land involved. He was notified of his duty to commence the action required by law within thirty days after such filing, which he did not do; but alleges in excuse, that May 18, his attorney transmitted by mail, by registered letter, to the clerk of the proper court, all the papers necessary for bringing such action (with the proper fees therefor), with directions to the clerk to commence the same without delay; that this letter was received by the clerk on the following day, but that the return registry receipt was not received until the 2<sup>nd</sup>; that the attorney telegraphed to the clerk on the 22d to ascertain if he had commenced the action, to which he received no reply, and that the reason suit was not commenced within the required time was because both the clerk and his deputy were absent from their office on May 18, 19, 20, 21, and 22.

The time within which such action must be commenced is limited by section 2326 of the Revised Statutes, and neither your office nor this Department have authority to waive the requirement. Nor is it the duty of the clerk of the court to commence an action under this section further than to file in his office such papers as he may receive for that purpose.

When this is done, all further proceedings must be performed by the adverse claimant. If he trusts the clerk to perform the duties incumbent upon himself, avoiding his personal attention, and no action is brought, or if failure results from nonreception of letters sent by mail when he might personally have directed and overseen the matter, or if he chooses to delay action until the last few days of the time required for bringing suit so that the failure thence results, the laches are his own, and he must suffer the consequences.

The statute affords no relief to Downey for the failure to commence this action within the required time, and hence it must be held, under section 2325, "that no adverse claim exists."

But Downey protests that Rogers' publication was defective and therefore so far fatal as to require a new publication, in that the last course and distance of the survey to inclose the tracts is made to run east instead of west. An inspection of the survey shows undoubtedly error in this description, but Downey was not misled thereby, nor did he lose any right, and I concur with you in the opinion that the objection is not of sufficient merit to defeat the regularity of the proceeding.

You however reject the application of Rogers because it embraces four separate locations of one hundred and sixty acres each, aggregating six hundred and forty acres, whereas your Circular Instructions of September 22 and December 7, 1882, forbid an application for patent to a *placer* claim by an association of persons for more than 160 acres, and provide that no application shall embrace more than one location, and that applications then on file, whether published or not, must conform to these regulations.

My letter of January 30, 1883, (Copp. Feb., 1883), considered the in-

structions of September 22, and December 7, 1882, in reference to lands containing deposits of borax, soda, alum, &c., and held that their application to such lands would result in the exclusion of the lands from sale. I therefore allowed their entry under the preceding regulations of October 31, 1881, in certain named States and Territories, requiring, however, an applicant for patent to show affirmatively that the lands were not valuable for any purpose other than that for which application was made. Whether or not the same ruling should apply to oil lands, is an undetermined question.

That the facts may be first ascertained before deciding the same, I direct that you order an investigation as to the character and value of the lands in controversy and the improvements thereon, and that upon report thereof you transmit the same to this Department.

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*PUBLICATION—CONSTRUCTION—PRACTICE—CROSS ADVERSE CLAIMS AND SUITS.*

**6. MINER v. MARIOTT ET AL.**

The construction of section 2325, Revised Statutes, which allows sixty-three days within which to file an adverse claim is erroneous, and will not be followed in the future.

Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.

Under the circumstances in this case, cross adverse claims having been filed and suits thereon commenced in court, further proceedings in the Department will be suspended.

*Secretary Teller to Commissioner McFarland, January 4, 1884.*

SIR: I have considered the case of Charles K. Miner, claimant of the Spencer lode *v. J. G. Marriott et al.*, claimants of the Tabor lode, on appeal by the last named party from your decision of January 13, 1883.

These lodes are situated in the Monarch mining district, Chaffee County, Colorado.

Application for the Tabor lode was made May 26, 1882, at the Leadville land office.

Publication was commenced in the Colorado Mining Ledger, a weekly paper, June 1, 1882, and continued till August 10, 1882.

Miner, the Spencer lode claimant, offered for filing his protest and adverse claim on the 3d of August, 1882. Said adverse was received and filed in the local office. Suit was duly commenced, and, it appears, is now pending.

The Tabor lode claimants averred that the adverse claim was not offered for filing within the time prescribed by law, *i. e.*, within the legal period of publication, and, therefore, that its acceptance by the local office was wrong and illegal.

Your office, upon an examination of the case, sustained the action of the local officers, and decided that the adverse claim filed with them

August 3, 1882, was properly received, and on this question the case is now before me on appeal.

Section 2325 of the Revised Statutes requires, among other things, newspaper publication for the period of sixty days as notice of application for mineral patent.

It also provides that—

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists.

Section 2326 prescribes the method of procedure "where an adverse claim is filed during the period of publication."

For the purpose of deciding the question raised by the appeal, it is only necessary to apply the provisions of law above cited to the facts relative to publication, as disclosed by the record.

These are found to be as follows: The first publication for the Tabor lode was, as already stated, on the 1st of June, 1882. The adverse claim of Miner was filed on the 3d of August, 1882. Excluding, in accordance with a long-established rule of the Department, the first day, we find the 3d of August to be the sixty-third day of publication.

An apparently plain and simple proposition is thus presented for consideration.

The law requires that an adverse, to be effective, must be filed within the sixty days of publication.

Miner's adverse claim was not filed until the sixty-third day. Was it filed within the period prescribed by the law, and has the adverse claimant a legal status as such? This would admit of no discussion were it not for the following facts:

This Department has held for a number of years (certainly since 1874) that where publication is made in a weekly newspaper, ten insertions are essential in order to show compliance with the law requiring sixty days' publication. In such cases the tenth issue falls on the sixty-third day after the first. In view of this ruling of the Department, your office in October, 1879, promulgated a decision or order containing the following: The last or tenth insertion being essential, it follows that adverse claims may be filed until the expiration of the day upon which the last issue of such weekly publication is made.

This rule has since been followed by your office, and you therefore recognize as legal and valid the adverse claim of Miner, filed on the day of tenth issue of paper containing publication, *i. e.*, on the sixty-third day. In my opinion the practice of your office referred to is not necessary as a logical result of the rule requiring ten insertions in a weekly paper, nor is it consistent with the law which prescribes the time within which an adverse claim may be filed.

Section 2325 of the Revised Statutes specifically fixes sixty days as

the period of publication, and says "if no adverse claim shall have been filed \* \* \* at the expiration of the *sixty days* of publication it shall be assumed that the applicant is entitled to a patent," &c. The regulation requiring ten publications (in a weekly paper), thus in fact making the period sixty-three days instead of sixty, does not alter the law as to sixty days for the filing of an adverse claim.

The regulation has its reason in the fact that in no other way can the law requiring sixty days' publication be complied with. Nine issues of a weekly paper would not cover the required period. It is true that the tenth insertion carries the publication three days beyond the legally required sixty days, yet for the purpose of meeting the requirement of law ten insertions are in fact necessary, since the continuity for sixty days can be preserved only by the tenth publication, which falls on the sixty-third day after the first.

It is also true that the applicant cannot proceed to complete his entry until after the tenth publication, but this is because it is essential as proof of sixty days' publication.

These reasons do not apply to an adverse claimant, and his acts are not controlled thereby. He has the plain letter of the law for his guide. His course is clear and his duty plain. He has sixty days, on any one of which he may file his adverse claim. If he fails to file within the sixty days of publication prescribed by the law, he is barred. So far as he is concerned the question is one of very simple computation.

It would be equally plain as to the applicant except for the reasons herein given, and which do not control in considering the rights, either legal or equitable, of an adverse claimant. You will by circular letter notify the local land officers of the rule herein laid down, and when it shall have been so promulgated, require its observance.

So far as the case under consideration is concerned, however, your decision that the adverse claim was properly received, and therefore dismissing the appeal, is affirmed.

The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal. This view will govern you in the consideration of any similar cases which may arise.

Since your decision in the Spencer lode *v.* Tabor lode case, and the appeal therefrom, to which this decision thus far has had sole reference, another case—that of the Tabor lode *v.* the Spencer lode—has come before me on appeal. Since it involves the same parties, and in part the same tract, I think the two cases may properly be considered to-

gether and disposed of in one decision. The appeal in the case last named is from your decision of September 1, 1883, adverse to the Spencer lode claimants, and comes up on facts substantially as follows:

On the 29th of May, 1883, Charles K. Miner, the adverse claimant in the case discussed in the foregoing pages hereof, filed in the local office his application for patent for the Spencer lode and made the required publication.

The Tabor lode claimants moved to dismiss the Spencer lode application on the ground of conflict with their prior pending application.

They also duly filed protest and adverse claim, and commenced suit, which is now pending. Upon an examination of the case, you dismissed the Spencer lode application, because it embraced land previously applied for, and in regard to which a contest is at present pending both in the courts and before this Department.

On appeal from your decision, it is urged in behalf of the Spencer lode applicants that, (1) pending the suit in the courts, you had no jurisdiction, and therefore erred in dismissing his application; and (2) if it be held that you have jurisdiction pending the suit, your action dismissing the application was certainly erroneous as to that portion of the Spencer lode not in conflict with the Tabor lode.

In view of the fact that suits are pending in both cases, to wit, Spencer lode *v.* Tabor lode and Tabor lode *v.* Spencer lode, I am of the opinion that the questions involved may very properly be held in abeyance until a final determination of said suits, or at least of one of them.

I therefore vacate your decision dismissing the Spencer lode application, without prejudice to either party and without decision on the merits, pending the finding by the courts.

I return herewith the papers transmitted with your letter of June 4 and November 27, 1883.

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### III.—AGRICULTURAL CONTEST.

#### *HOMESTEAD ENTRY—HEARING—CONSTRUCTION.*

##### *HOOPER *v.* FERGUSON.*

A mineral application for land designated as agricultural and covered by a homestead entry must not be received until after a hearing determining its mineral character.

Although the application in question was received contrary to the above rule, it will not be held for cancellation, but both claims will be suspended until after a hearing, at which the burden of proof shall be upon the mineral claimant.

The report of the surveyor-general, acting under instructions from the Commissioner, was a sufficient designation of the land as agricultural under the act of July 26, 1866 (section 2342, Rev. Stat.).

*Acting Secretary Joslyn to Commissioner McFarland, August 3, 1883.*

SIR: I have considered the case of William Hooper *v.* J. B. Ferguson, involving a portion of the SW.  $\frac{1}{4}$  of Sec. 8, T. 22 N., R. 3 E., Marysville, Cal., on appeal by Hooper from your decision of August 4, 1882.

Said quarter section was covered by Ferguson's homestead entry, No. 2950, of March 2, 1880, and on April 16, 1881, Hooper filed mineral application No. 198 covering ninety acres of it. On appeal by Ferguson you decided that since the tract had been so returned by the surveyor-general, it was *prima facie* agricultural land, and that the application should not have been received by the local officers without a hearing determining its mineral character; and therefore, and because it imperiled the homestead entry, you held the mineral application for cancellation.

From this decision Hooper appeals on several grounds, the discussion of which is reserved, except in the following instances.

He alleges, in the first place, that Ferguson's appeal was premature and against a mere filing of certain papers, without any decision by the local officers affecting his rights, and that therefore you were without jurisdiction over it. But it is plain that this view overlooks the significance of the action taken by the local officers. On the public records the tract in contest appeared as covered by a homestead entry at date of filing the mineral application, and, under well-settled rules, such entry was a reservation of it from further entry until after the hearing above referred to. The acceptance and filing of the mineral application was the basis of the entry provided for in section 2329 Rev. Stat.; and it accordingly follows that the action appealed from, which permitted the filing without the required hearing, was equivalent to a decision that the land was open to placer entry and that without competent evidence. Ferguson's homestead claim, carefully guarded by section 2330 Rev. Stat., was thereby impaired, and it was eminently proper that he should appeal; alleging, as he did, that such facts and matters as were necessary to justify the action of the local officers were not in evidence, you had full appellate jurisdiction over it. In my judgment the exception is not well taken.

Appellant further alleges that it was error to hold the tract in contest as *prima facie* agricultural upon the report of the surveyor-general, for the reason that lands in the mineral belt of California are *prima facie* mineral, and that said tract, being in said belt, has not been designated and set apart as agricultural by the Secretary of the Interior, as required by section 11 of the act of July 26, 1866 (section 2342 Rev. Stat.). The exception is not well taken. By circular of January 14, 1867 (Copp's Mining Decisions, 245), the Commissioner of the General Land Office, for the purpose of enabling the Department to give effect to said section, directed surveyors to describe on their field notes, and to designate on the township plats, such lands as were clearly agricultural; and by circular of May 16, 1868 (*Ibid.*, 249), for the express purpose of giving effect to said section, he directed that, after the filing of said plats, "the tracts designated 'agricultural lands' may be filed upon under the homestead laws." This order, if not directly authorized or approved by the head of the Department, was subsequently ratified in

numerous cases, and in fact it was, in contemplation of law, the order of the Secretary of the Interior, upon the principle underlying the rule laid down in *Wolsey v. Chapman* (91 U. S., 769), that "the acts of the heads of Departments, within the scope of their powers, are in law the acts of the President." Under said order the United States surveyor designated as agricultural T. 22 N., R. 3 E., and thereafter it was open to pre-emption and homestead entry. Subsequently, and with a view to a more accurate determination of the character of the land, said township, among others, was withdrawn from disposal as agricultural land by letter of January 22, 1872, to the local officers at Marysville, Cal. (*Copp's Mining Decisions*, 304), which withdrawal was revoked by circular of April 22, 1880 (*Sickels' Mining Laws*, 558). Said circular also directed the local officers, when such tracts were alleged to be mineral, to hold a hearing for the purpose of determining the facts, at which the burden of proof should rest on him so alleging, and such has been the rule of the Department since. Wherefore I concur in your opinion that the tract in contest was *prima facie* agricultural, and that its mineral character could not be duly ascertained without such hearing.

But with that part of your decision holding Hooper's application for cancellation I do not concur, for the reason that, at this stage of the case, said cancellation is not necessary to the determination of the respective rights of the parties. A hearing should have been had for the ascertainment of those rights as aforesaid, and I am of opinion that no violence will be done to the interests of either party by holding it now, pending which the entries will remain suspended.

You are therefore directed to order a hearing for the purpose of determining the character of the land covered by Hooper's claim, and of the alleged improvements on it, whereat the burden of proof shall rest upon the mineral claimant.

Your decision is modified accordingly.

Herewith are returned the papers accompanying your letter of October 28, 1882.

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*PRACTICE—CONSTRUCTION—BURDEN OF PROOF—RELATIVE VALUE.*

**2. CALEDONIA MINING COMPANY v. ROWEN.**

Rule of Practice No. 87 applies only where notice is sent through the mails from the local office.

Where the interests of the Government are involved, as in a contest concerning the character of the land, and where justice is facilitated and promoted, the Department will consider an appeal from the Commissioner's decision, although not filed within the time required by the Rules of Practice.

A rehearing will not be ordered when it appears that the evidence to be offered will be merely cumulative.

Section 2341, Rev. Stat., applies to persons who occupied and improved land, theretofore designated as mineral, prior to their claims for it; section 2342, Rev. Stat., applies to persons who make claims to lands already set apart as agricultural.

Section 2342, Rev. Stat., contemplates that the land shall be "clearly" agricultural; it is *prima facie* so by its return as agricultural by the surveyor-general; but said return is subject to contest, wherein the burden of proof is on the party denying its correctness, and wherein its comparative value for mining or agriculture must be shown.

*Acting Secretary Joslyn to Commissioner McFarland, August 15, 1883.*

SIR: I have considered the case of the Caledonia Mining Company *v.* John L. Rowen, involving the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 34, T. 16 N., R. 5 E., Marysville, Cal., on appeal by the mining company from your decision of June 10, 1882, adjudging the land to be agricultural.

The contest was initiated December 31, 1880, for the purpose of determining the character of said tract, which was included in Rowen's homestead entry No. 2837, of August 10, 1880, and on which was in part located, October 25, 1880, a placer claim by said company. Upon the evidence taken at the hearing the local officers adjudged the land to be mineral, and your letter of February 23, 1882, affirmed their decision; but, upon a review of the case, you decided, June 10, 1882, that it was not shown that the land is valuable for minerals, and revoked your former decision.

From this decision the company appealed, and Rowen filed a motion to dismiss, on the ground that the appeal was not taken within sixty days from date of notice to them, as required by Rule 86 of the Rules of Practice. This motion your office denied for the reason that, as the appeal was filed within seventy days from date of said notice, the case fell within rule 87 of the Rules of Practice, as construed by your letter of February 10, 1882, in the claim of John H. Moore (*The Reporter*, vol. 1, No. 11). The facts are that the service of notice of your decision was made June 19, 1882, on contestants' attorney in person, and acknowledged by him the same day, and that the appeal was filed August 28, 1882, or on the seventieth day from date of said service.

I do not concur in your construction of Rule 87, a construction which nullifies rule 86 entirely, namely, "that ten days are allowed as additional time to the sixty days for appeal, when notice of a decision of this office (the General Land Office) is sent by mail to the local officers to be served by them." Rule 86 was made with full knowledge of the fact that the ordinary method of notifying the local officers of the decisions of your office is through the mails, and its terms, too plain to be misunderstood, require the appeal to be filed within sixty days after service of such notice on the party in interest or his attorney.

Rule 87 allows ten days additional in a single case, namely, "where notice of the decision is given through the mails by the register and receiver," and it was provided for the reason that the date of reception

of a notice sent by mail cannot be determined with the exactness required by Rule 86. It therefore has no application to the case of a personal service where the date of such service is exactly determined.

I concur, however, in the denial of the motion to dismiss, for the reason that the aforesaid rules were devised for cases of contest between claimants, where the only question involved is, Which party has the better right of entry ? and not for cases where the interests of the Government are also involved, and the antecedent question is, Has either party right of entry ? It is fitting that contests of the former class should be governed by definite rules, and that a party's rights should depend upon a strict observance of them ; but it is not proper that the interests of the Government should be jeopardized by such unyielding rules, to the exclusion of the plain requirements of the statutes. In the case at bar the contest and the appeal present a question which the Secretary of the Interior is bound to decide under the law, namely, What is the character of the land ? If mineral, or agricultural, or saline, for example, it may be awarded to either or to neither of the contestants.

Before discussing the case upon its merits, it becomes necessary to advert to two of the points covered by your decision, which are fundamental to a correct adjudication, namely, the particular statute governing the case, and the construction of the rule relating to the burden of proof.

It appears that your decision of February 23, 1882, held that "it should be shown under section 2341, that the land is properly agricultural," and it also appears that counsel for the contestee founds part of his argument on the same section. It is unnecessary to discuss the force and effect of this section, and of section 2342, further than for the purposes of this case, and as they appear in the naked text of the Revised Statutes, section 2341 provides for a particular class of persons and of rights, namely, where homesteads have been made on certain lands (described as "heretofore designated as mineral lands, which have been excluded from survey and sale") ; and where they "have been made, improved, and used for agricultural purposes," "the owners of such homesteads \* \* \* may avail themselves of the provisions" of the homestead law. It is clear, therefore, that this section gave a right of homestead entry to persons who had already occupied and improved a tract of land, and who had no such right outside of its provisions. Thus it was applied in 1877 by Mr. Secretary Schurz in the case of *Caron v. Curtis*, (Sickels' Mining Laws, 445), where the contestant had resided upon and improved the land in question from the year 1859 ; and he observes that "the provisions of the above section" protected "the rights of actual settlers upon lands reserved as mineral, which have been occupied and used for agricultural purposes." And again, in 1872, in the case of *Smith v. Stewart* (*Ibid*, 443), it is said that—

The object of the tenth section (act of July 26, 1866, substantially

identical with section 2341, Rev. Stat.) was to give to persons who had in good faith made agricultural settlements on public lands theretofore designated as mineral, but subsequently determined to be agricultural, a preference, in pre-empting or entering the land as homesteads, over those admitted to similar rights by the eleventh section (section 2342, Rev. Stat.).

Consequently section 2341 does not apply to Rowen, who applied to enter upon public land to which he had a right of entry, and prior to an actual settlement by him and improvement of it. The record shows that "the land in question was returned by the surveyor-general as agricultural;" that it "was suspended as mineral by plat and Commissioner's letter (N) of January 22, 1872," and that "the mineral suspension was released by circular of April 27, 1880." Rowen made his entry August 10, 1880, and his case therefore falls within section 2342, because though the land applied for lay within what is known as the mineral belt of California, it had been duly designated and set apart as agricultural, as set forth in my decision in the case of *Hooper v. Ferguson* of August 3, 1883.

In regard to the burden of proof, it appears from the terms of section 2342 that the Secretary of the Interior was authorized to designate and set apart such lands as were "clearly agricultural," which lands were thereupon to be open to entry as other public lands; wherefrom it is plain that Congress designed giving the right of homestead entry only in the event that the lands were clearly agricultural. After said designation they were *prima facie* of that character, and by existing rules the burden of proof falls upon the person traversing their *prima facie* character. In the case at bar the contestants' affidavit alleged that "said land is essentially mineral land, and more valuable for mining than for agricultural purposes." Your decision of June 10, 1882, very properly holds that "it was not incumbent on the homesteader to show the agricultural capacity of the land," for the reason that the presumptions were already in his favor; but it also declined a consideration of much testimony offered by the mineral claimants to show the non-agricultural character of the land, and therein it overlooked the fact that it was their plain duty to prove, first, that the land is not "clearly agricultural;" second, that it is "valuable for minerals;" and, third, that it is "more valuable for mining than for agricultural purposes." The case upon which your said action is based (*North Leadville v. Searl, Sickels' Mining Laws*, 349), is one in which the comparative value of the land was not involved; for, as remarked in a similar case (*Town Site v. Placer, Copp's Mineral Lands*, 251), "if the land is mineral it was subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for town-site purposes." But when the statutes provide for mineral entries upon land valuable for minerals, and for agricultural entries upon lands clearly agricultural, there arises of necessity a comparison of their respective values when-

ever these two classes of claims come in conflict. And accordingly, July 10, 1872, in the case of the Central Pacific Railroad Company *v.* Mineral Affiants (Copp's Mining Decisions, 128), Mr. Secretary Delano observed that "the land is more valuable for agricultural than for mining purposes;" and to determine this relative value of mineral and agricultural lands has been a principal object of hearings since that date, (Searl Placer Mine, 9 Copp's Land Owner, 189, and Maxwell *v.* Brierly, 10 ditto, 50); such, indeed, is the express direction of general circular of July 15, 1873, and substantially that of general circular of April 1, 1879. (Circular September 22, 1882, applies the rule to all cases, including town sites). The burden of proof then being on the mineral claimant in this class of contests, it is competent for him to show his rights, not only absolutely, but relatively, by proof of the inferior rights of the agricultural claimant. And since it is a question in which the Government is interested as well as the contestants, due weight should be given to all the facts in evidence. Consequently when you declined to consider the testimony offered by the Caledonia Mining Company to show the non-agricultural character and the relatively superior mineral character of the land in contest, and rested your decision solely on the testimony respecting its absolute mineral character, you ignored a portion of the evidence which is material to a just adjudication of the case.

Considering now the case upon its merits, under the principles above enunciated, it appears that the mining company have shown by eight witnesses, practical men, that the land in question is composed of red gravel and cement, part deep and part surface diggings, which they have been mining since 1875 to the full extent of the water capacity, and that said capacity has recently been much enlarged, with prospects of a correspondingly increased success; that for the purpose of working this and the adjacent tracts, covered by their location and that of the Yuba Placer Mining Company, a tunnel has been built by the two companies at an outlay of \$1,300, and that the contestants have on the land in contest improvements of the value of \$500, consisting of a flume, iron pipes, pressure boxes, sluice ditches, etc.; that they have mined about  $7\frac{1}{2}$  acres of the tract to the average depth of  $2\frac{1}{2}$  feet, the profits from the gold obtained thus far paying all expenses; that the entire tract is hilly and covered with coarse gravel and boulders, so that it will not retain moisture sufficient to mature a crop of cereals oftener than once in three years, or to sustain more than one sheep to the acre during the spring season, and this only when the conditions are exceptionally favorable; that it is patent to the observer that the land is only fit for mining, and no crops have been known to reach maturity, though part of it was cultivated on two occasions prior to the contestee's experiment, and abandoned because they would not pay expenses; and that the crop of barley then growing, which was planted by the contestee, was drying up at the roots, and probably would not pay for the harvesting. On the other hand, Rowen introduced five witnesses, practical men, by

whom it was shown that the land had been prospected for years prior to 1875, and had never paid expenses, but it was admitted that said prospecting was done by the primitive methods, and was not a fair test of its mineral character; that the land was agricultural and better adapted to agriculture than to mining, but it was admitted that a crop had never been raised upon it; that it ought to produce from eight to fifteen bushels of grain to the acre, but it was admitted that this would only happen in a very favorable season, perhaps every third year; and that contestee's improvements were 15 acres broken and sowed, 172 rods of wire fence, and a quantity of board fence, but it was admitted that part of the fencing was constructed after the initiation of the contest.

I am of the opinion that, on the foregoing facts, the contestants have shown all which they offered or were required to show, and that the contestee has not made a successful rebuttal. It is manifest that the land is not clearly agricultural and that the testimony to its agricultural character is merely speculative. It is evident that it is less valuable for agricultural purposes than for mining, for it appears that it never paid the expenses of cultivation. And, in view of the fact that there was a considerable outlay at the outset for the tunnel, etc., that the water supply has until recently been insufficient to work the claim to advantage, and that notwithstanding these drawbacks the ore obtained has liquidated all expenses, it is my judgment that the land is valuable for minerals.

The definition which your decision invokes to support the conclusion that the land is not valuable for minerals, namely, that it must be "land which it will pay to mine by the usual modes of mining" (Town Site of Deadwood, 8 Copp's L. O., 155), is satisfied by the facts of this case, even without consideration of the land's relative value for mining and for agricultural purposes.

For these reasons your decision is reversed.

Herewith are returned the papers accompanying your letter of January 11, 1883.

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### 3. SAME—ON REVIEW.

*Secretary Teller to Commissioner McFarland, December 10, 1883.*

SIR: I have considered the motion of counsel for John L. Rowen for a review of my decision of August 15, 1883, in the case of the Caledonia Mining Company *v.* John L. Rowen, Marysville district, California, holding the tract in controversy to be mineral.

The first three grounds of review assigned are to the effect that, by reason of said company's failure to file their appeal from your decision in said case within the sixty days required by Rule 86 of the Rules of Practice, said decision became final, and this Department had no juris-

diction to review the case upon its merits. My said decision fully sets forth what, in my judgment, were good causes for taking this case out of the rule, namely, that there were practically three parties to the cause, the third being the Government, whose duty it was to determine the primary question involved (whether the land is valuable for minerals), which question the local officers decided in the affirmative, on appeal were sustained by your office, and were only reversed on a review which excluded material evidence. In *Russell v. McLellan* (3 W. & M., 157), where the mode of taking certain depositions departed from the rules of the court, it was said: "All our rules are open to such departures by leave of the court on good cause shown, as all rules are established to facilitate and promote justice and not to embarrass and defeat it." In *United States v. Breitling* (20 How., 252), where a bill of exceptions was signed after the time limited by the rules of the court below, it is said: "It is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it."

The fourth ground of review assigned is that it was error to permit the mineral claimant to establish his own title by attempting to show the inferior rights of the agricultural claimant. My said decision held that it is necessary for the mineral claimant to show the relative value of the land for mining and agriculture, and it gave satisfactory reasons for the ruling, and cited numerous authorities, extending from 1872 to the present time. To these may be added 2 Lester, pp. 338, 347, 395, showing the same practice prior to 1872.

The fifth ground of review assigned is that the mineral claimants failed to show the mineral qualities of each ten-acre tract of the land in contest. My said decision states distinctly that the testimony taken at the hearing shows that the "entire tract" is unfit for cultivation except under unusually favorable circumstances, and that it is only fit for mining. It is true that the witnesses were not questioned as to each subdivision of ten acres, but this was because no such subdivision had been made, and it is a fact that they were extensively questioned as to the various parts as well as the whole of the tract. Further, at the trial Rowen made no objection to the proceedings in this regard, and cannot be heard to object to them now.

The sixth and last ground for review assigned is that the contest was initiated before maturity of a crop of grain then growing, and when it was, therefore, impossible to show the agricultural value of the land. My said decision was based on very full expert testimony, showing the inferior character of said crop, and that it would not pay for the harvesting. *Ex parte* affidavits have been filed tending to show that it has since matured, and was an average good crop, and counsel request a rehearing to introduce this evidence. The rule is that such affidavits, after judgment, are to be received with great caution, for the reason that they are apt to encourage fraud; but in this case the rehearing

would be ordered did it appear that said evidence would change the judgment. That it would not change it sufficiently appears from the fact that it was clearly shown at the hearing, by the witnesses of both contestant and contestee, that the land had been twice before cultivated and abandoned, and that it was so covered with boulders and gravel that an average crop could not be raised on it more than once in three years, and then only when the conditions were exceptionally favorable. The said evidence would therefore be cumulative merely, and hence a rehearing will not be ordered.

The motion for review is accordingly dismissed.

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*BURDEN OF PROOF—CHARACTER OF PROOF—RELATIVE VALUE.*

*DUGHI vs. HARKINS.*

In a contest between mineral and agricultural claimants, where the land was returned as agricultural by the surveyor-general, the burden of proof is upon the mineral claimant.

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.

*Secretary Teller to Commissioner McFarland, November 21, 1883.*

SIR: I have considered the case of Bartolomeo Dughi, homestead claimant, *v.* Philip Harkins and Daniel Harkins, mineral claimants, on appeal from your decision of September 27, 1882, holding the tracts involved to be agricultural in character and subject to the claim of Dughi.

Dughi made homestead entry for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 9, T. 4, R 13 E, M. D. M., Sacramento, Cal., April 3, 1879, and Philip Harkins and Daniel Harkins made mineral application for 60 acres of the same land in May, 1880.

This land was returned by the Surveyor general as agricultural in character, and hence was subject to a homestead entry. In such case the agricultural character of the land continues until its mineral character is satisfactorily shown; and, upon a hearing ordered to establish its true character, the homestead entryman may rest upon the surveyor-general's return, and is required only to rebut proof of its mineral character. The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the

character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value.

I have examined the testimony, and, applying these principles, concur with you in the opinion that the land in question has more agricultural than mineral value, and that the mineral application should be rejected.

Your decision is affirmed, and the papers transmitted with your letter of April 16, 1883, are herewith returned.

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#### IV.—APPLICATION.

##### *CONFLICTTING APPLICATIONS—PREMATURE ENTRY.*

##### **THE GUNNISON CRYSTAL MINING COMPANY.**

An application for patent duly filed in the Land Office should be treated as *prima facie* evidence of an appropriation of the premises described therein, and a subsequent application pending the first is irregular.

Where the claimants under the second application, having adverced the first and having brought suit in support of the adverse, prematurely enter the ground in conflict before the suit has been decided, and it is afterward decided in their favor, the question is one solely between the Government and the claimants, and the Government may waive the irregularity.

*Secretary Teller to Commissioner McFarland, May 1, 1884.*

SIR: I have considered the appeal of the Gunnison Crystal Mining Company, of Colorado Springs, Colo., from your decision of October 20, 1883, holding for cancellation a portion of mineral entry No. 1637, for the Crystal Lode, Leadville district, Colorado.

It appears that the Lead Chief Mining Company filed an application for patent to the Lead Chief lode, December 15, 1882, and on the 21st of that month due notice of such application was given by publication and otherwise, pursuant to statutory requirements.

December 30, 1882, the Gunnison Company filed its application for patent to the Crystal and Clara lodes, situate in the Ruby mining district, Gunnison County, Colorado, and made mineral entry No. 1637 of the same, March 20, 1883.

The Crystal lode claim embracing a portion of the surface ground included within the boundaries of the Lead Chief claim, the Gunnison Company adverced the Lead Chief pending its publication of notice, February 20, 1883, and thereupon instituted suit March 12 ensuing, in a court of competent jurisdiction (the United States district court for the district of Colorado, sitting at Pueblo), and obtained judgment September 25, 1883, for all the land in conflict.

Such procedure was had pursuant to the provisions of section 2326 of the Revised Statutes.

But notwithstanding such judicial adjustment or determination of these conflicting claims, and although you had been duly advised by the register and receiver of the rendition of such judgment, you held for cancellation (by your decision of October 20 ensuing) so much of said entry as conflicted with the Lead Chief lode claim, advising the register and receiver that as the adverse claim appeared to conform to legal requirements, its reception by them was proper, "and suit thereon was commenced within the statutory period;" but that their action in receiving the application for the Crystal lode pending that for the Lead Chief lode was contrary to law and the invariable rulings of your office, "and the said entry thereunder was an aggravation of the previous irregularity." You further advised the register and receiver that the entry in question having been thus corrected, "the entry of said Crystal and Clara lode claims will be considered upon its merits when this decision as to the Crystal lode claim becomes final, or is otherwise disposed of."

I think that such procedure would tend to unnecessarily vexatious delay in the adjustment of conflicting rights. It was competent for you to consider the question of such rights upon its merits, inasmuch as you were cognizant of the judicial determination of the same when you rendered said decision.

The relative rights of these applicants and adverse claimants is the question at issue in the premises, which should have been determined by your decision.

The claims of the pre-emptors form part of the *res gestae* of the case, and should have been determined in your decision.

In order to avoid the delay incident to remanding the case to your office, I shall now decide the questions involved therein. (See my predecessor's, Mr. Secretary Chandler's, decision of February 12, 1877, in the case of *Koch v. Hunter et al.*)

The error you maintain that the register and receiver committed consisted in their receiving and accepting the application for the Crystal lode pending that for the Lead Chief lode; such action, you assert, being contrary to law and the rulings of your office.

Section 2326, aforesaid, provides that when an adverse claim is filed during the period of publication, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

An application for patent duly filed in the land office should be treated as *prima facie* evidence of an appropriation of the premises described in such application, so far at least as to preclude any other person from making application to enter the same ground pending the first application. If any one proposes to assert a right to the premises, or

deny the right of the applicant, he must pursue the statutory method by filing his adverse claim, which must be "on oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim." When so filed the land office must await the action of the adverse claimant, who is entitled to take thirty days in which to commence his suit to determine the right he has asserted in his adverse claim. If he brings his suit, the controversy is remitted to the court. If he fails to do so, the claimant will be allowed to proceed, notwithstanding the adverse filing. In this case the Gunnison Company filed its adverse claim, brought its suit, and at the same time had pending in the land office its application to enter the very land in controversy, in part at least, and pending such controversy in the court did enter the lands in controversy, and thus had the declaration of the land office in its favor before judgment of the court was rendered. The application of the Gunnison Company, including a portion of the claim of the Lead Chief claim, ought not to have been received pending the application of the Lead Chief Company for the same ground. It appearing by the adverse claim filed by the Gunnison Company that the controversy existed, the allowance of the entry of the Gunnison Company of the very land applied for by the Lead Chief Mining Company, before the determination of the controversy initiated by the Gunnison Company by its adverse claim of February 20, 1883, was irregular as to that portion of the claim in controversy. Judgment having been rendered in favor of the Gunnison Company, it would have been competent for the company to take title to that portion of the Lead Chief Company's claim covered by the adverse claim of the Gunnison Company, by filing a certified copy of the judgment-roll; but if the Gunnison Company desired to receive a patent for the premises in controversy, found to belong to it, together with other portions of its lode not in controversy, it could only do so by pursuing the usual course provided by statute. In this case it appears that the Gunnison Company proceeded in all respects as if there was no adverse claim filed and as if there was no conflict between them and the Lead Chief Company.

Now, while it is true that the Gunnison claimants anticipated the judgment of the court by paying for and entering their claim previously to its rendition, instead of subsequently thereto, in the manner expressly prescribed by the statute, it is nevertheless true that such judgment has been rendered in favor of the adverse claimants, and that the Lead Chief applicants have acquiesced in the same and propose to take no appeal, but to make entry of its claim conformably to the terms of said judgment, by eliminating therefrom the tract awarded to the adverse claimants. To this end you transmitted (per your aforesaid letter of October 20, 1883) the record of the Lead Chief's claim "for proper disposition under the mining laws and regulations thereunder."

Thus it appears that there is no longer any conflict existing between

these claimants. Hence the question at issue is one existing solely between the adverse claimants and the Government. They have paid for and made entry of their entire claim, according to their application; and while it is unquestionably competent for the Department to accept or cancel the entry in question, as it may deem expedient, I cannot see what useful purpose would be subserved or object accomplished by requiring the cancellation of said entry. Nor do I think it necessary to submit it to the Board of Equitable Adjudication, inasmuch as these adverse claimants have complied in all respects with legal requirements, save in the time of payment and entry.

As no valid legal objection can obtain to the issuance of patent, I am therefore of the opinion that it is competent for the Department to sanction the same.

But it should be observed that the record as transmitted by you upon appeal fails "to show the nature, boundaries, and extent of such adverse claim" (as required by the aforesaid section 2326). And as such failure is presumably owing to the absence of the Lead Chief's record, I direct that you withhold patent from the Gunnison claimants until such time as the register shall certify the whole proceedings and the judgment-roll to your office, pursuant to statutory requirements (the paper filed therein by the adverse claimant's attorney, and purporting to be a transcript or office copy of such judgment being unattested), to the end that all possible conflict of rights, if any, in the premises, may be certainly avoided.

For the reasons stated, I reverse your decision.

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#### V.—CIRCULARS.

##### *ENTRY OF LODE CLAIMS—ASSIGNEE OF APPLICANT—TRUSTEE—ADVERSE CLAIMS—PROOF OF TITLE TO LODE CLAIMS.*

*Acting Commissioner Harrison to registers and receivers and surveyors general, June 8, 1883.*

GENTLEMEN: The following additional regulations are promulgated as amendatory of circular of October 31, 1881, entitled "United States Mining Laws and Regulations Thereunder," which, except as herein modified, will remain in full force:

1. No application will be received or entry allowed which embraces more than one lode location.
2. A party who is not an applicant for patent under section 2325, Rev. Stat., or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.
3. Any party applying to make entry as trustee must disclose fully the

nature of the trust and the name of the *cestui qui trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

4. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment; but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Rev. Stat.

5. Where such suit has been dismissed a certificate of the clerk of the court to that effect, or a certified copy of the order of dismissal, will be sufficient.

6. In no case will a relinquishment of the ground in controversy, or other proof, filed with the register or receiver, be accepted in lieu of the evidence required in paragraphs 4 and 5.

7. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

8. Possessory title to a lode claim held and worked for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, may, in the absence of any adverse claim, be established in the same manner as now allowed in placer claims, and indicated generally in paragraphs 67, 68, and 69, of the circular hereby amended.

9. No entry will be allowed until the register has satisfied himself, by a careful examination, that proper proofs have been filed upon all the points indicated in official regulations in force, and that they show a sufficient bona-fide compliance with the laws and such regulations. A strict observance of this regulation will be required.

Approved, July 6, 1883.

H. M. TELLER,  
*Secretary.*

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*INSTRUCTIONS UNDER CIRCULAR OF JULY 6, 1883, IN REGARD TO APPLICATIONS EMBRACING MORE THAN ONE LODE LOCATION.*

*Acting Commissioner Harrison to register and receiver ——, December 20, 1883.*

**GENTLEMEN:** Inclosed find copy of telegraphic order this day approved by the honorable Secretary of the Interior.

These instructions are intended to apply to all cases where an application for patent embracing more than one lode location had been filed

prior to the receipt of circular N, of this office, approved July 6, 1883. In regard to similar cases in your office you will be governed by the rule therein stated.

[Copy of telegram.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., December 20, 1883.*

REGISTER AND RECEIVER, *Leadville, Colo.:*

Where consolidated application filed prior to receipt by you of circular of July 6, entry may be allowed on filing satisfactory proof of five hundred dollars improvements on each lode claim, the application being otherwise regular.

L. HARRISON,  
*Acting Commissioner.*

Approved:

H. M. TELLER,  
*Secretary.*

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## VI.—COAL LANDS.

### *DISQUALIFICATION—ASSIGNMENT.*

#### **1. KERR ET AL. v. UTAH-WYOMING IMPROVEMENT COMPANY.**

*Secretary Teller to Commissioner McFarland, October 25, 1883.*

SIR: I have considered the appeal of John W. Kerr *et al.* from your decision of August 20, 1883, denying their application to purchase and enter certain coal lands in Sec. 4, T. 13 N., R. 119 W., Wyoming. A case involving in part the same land was before me on appeal in December last, under the title of John W. Kerr *et al. v. George W. Carleton.* As to Carleton's claim, it was contested on the ground that he had failed to comply with the law in the matter of occupancy and improvement; he on the other hand averring that he had through the Utah-Wyoming Improvement Company, acting as his agent, complied with the law in every particular. In deciding that case, on the 11th of December last, I took occasion to say, in substance, that from the agreement and contract between Carleton and the Utah-Wyoming Company, together with the collateral evidence relating thereto, it quite clearly appeared not only that the relation of principal and agent did not exist, but that as a matter of fact the evident purpose and effect of the contract was, as between the parties, a complete transfer by Carleton to the company of his prospective as well as his then existing rights in the lands claimed under his coal declaratory statement. All the facts, including the acts of Carleton and the company respectively, warranted this conclusion.

As between Carleton and the Government, however, he, for the pur-

pose of formally completing the transfer to the company under the contract by passing to it a fee-simple title to the land, still claimed in his own name, and asked that patent be issued to him.

Having concluded that the relation between him and the company was that of assignor and assignee and not that of principal and agent, and that he had not continued to occupy and improve the land either in person or by agent in such a sense as to justify the issuance to him of patent, I decided that since the weight of evidence showed that he was in contemplation of law the first of the parties in contest to make settlement and improvement as a coal-land claimant, the company should be permitted to prove up and purchase as assignee of Carleton provided it could show its right to do so.

The company applied to purchase as such assignee, and on the 16th of January last the register and receiver allowed the entry.

Kerr and Fowler, former contestants, also applied on the 5th of January last to purchase and enter the lands covered by their respective claims.

Their applications were rejected by the local office, which action was affirmed by you on the ground that Carleton's filing was not canceled by departmental decision of December 11th, the finding in that decision being that the company occupied the position of assignee of Carleton, and the effect being to put said company in his place so that by virtue of the assignment it succeeded to all the rights which he had under his filing.

In other words, Carleton's filing being still *in esse*, and having inured with all his rights thereunder to his assignee, was an appropriation of the lands covered thereby, and consequently the applications of Kerr and Fowler could not be allowed.

You thereupon dismissed their appeal, and in this your action was undoubtedly correct.

Recurring to the entry of the Utah-Wyoming Improvement Company, allowed by the register and receiver in January last, you hold that said allowance was erroneous. That finding did not have reference to the merits of the case, but resulted simply from the fact that the entry had been permitted before the expiration of the thirty days given under the rules for appeal by opposing parties. Kerr and Fowler did appeal to you within the thirty days, but having dismissed their appeal you decided to allow the company's entry to stand on the records and proceed upon its merits.

Said entry is opposed and objected to by Kerr *et al.* on two grounds principally, to wit: First, that the Utah-Wyoming Company has not shown its right to purchase as assignee of Carleton; and, second, that it is not qualified under the law to make the purchase and receive patent.

As to the first objection, as already indicated (*supra*), I decided on the 11th of December last, after a careful consideration of all the

facts then before me, that to all intents and purposes the transaction between Carleton and the company under the agreement and contract of December 20, 1881, amounted to and was in effect a present disposal and assignment of all interests which he (Carleton) had or expected to have in the land covered by his coal declaratory statement. I find nothing to change this view, and in treating the case as now before me I must regard the company as the assignee of Carleton under his coal filing.

The condition imposed by my former decision, to the effect that the company will be permitted to prove up and purchase if it can show its right as assignee so to do, must therefore have reference to the qualifications under the law of the individual members of the company.

This brings us to the second objection raised, to wit, as to the qualification of the company to purchase, and this involves the qualifications of its individual members; for the law (section 2350, Rev. Stat.) authorizes "only one entry by the same person or association of persons," and provides among other things that "no association of persons, any member of which shall have taken the benefit of such sections (meaning sections 2347, 2348, and 2349 of the Revised Statutes, which provide how and by whom coal lands may be entered) either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof." Other qualifications are mentioned in the law, such as age and citizenship; but counsel for Kerr *et al.* objects to the patenting of entry made by the Utah-Wyoming Company, as assignee of Carleton, and asks the cancellation of said entry on the ground that the company is disqualified to enter because three of its former stockholders, viz, H. A. Van Praag, Charles M. Gilberson, and E. H. Murray, are interested in other lands claimed under the coal law. It is not charged that any of these three persons were at the date of the entry by the company—January 16, 1883—members of the company or owners of any its stock, and it is shown that they were not. Van Praag and Gilberson disposed of their stock June 15, 1882, and Murray sold his one share January 4, 1883.

It is claimed, however, that the fact that the three persons mentioned were at the date of the purchase by the company from Carleton members of said company was such a defect as could not be cured by their subsequent disposal of their interests; that it was fatal and precluded the issue of patent to the company.

I do not think this view is sustained by the law.

I am clearly of the opinion that if at the date of entry no single member of a company which applied to make the entry is disqualified by reason of interest in any other land claimed or owned under the coal law, such entry, if there be no other objection, must be regarded as valid and patent should issue. Your decision on this point is therefore affirmed.

You say in closing your decision that "the proof filed by the com-

pany is, however, deficient in several particulars," and you specify one.

I return the papers for your action pursuant to this decision, and also transmit herewith for your consideration evidence filed by the company since the case left your office, probably for the purpose of remedying the defects to which you referred in the language above quoted.

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*PRICE—COMPLETED RAILROAD—CONSTRUCTION—LACHES.*

**2. FRANK FOSTER ET AL.**

The price of coal land is determined by its distance from a completed railroad at date of entry, irrespective of the preference right of entry.

The maximum price must be paid if the land is within 15 miles of a completed railroad, although an inaccessible range of mountains lies between.

The act of July 28, 1882, did not withdraw lands in the Ten Mile Strip, in Colorado, from the general rule regulating price.

Whatever rights might have been acquired by certain parties during the suspension from sale of lands in the Ten Mile Strip were lost by their failure to file declaratory statements within sixty days from July 28, 1882.

*Commissioner McFarland to the register and receiver at Leadville, Colo., October 9, 1883.*

**GENTLEMEN:** I have considered the appeal of Wyndham E. Browne for and in behalf of Frank Foster *et al.* from your decision of February 15, 1883, refusing to allow them to enter and pay for certain coal lands in T. 14 and 15, R. S., 86 W., sixth principal meridian, in Gunnison County, Colorado, at the price of \$10 per acre.

These lands, embracing twenty-three claims of 160 acres each and two claims of 80 acres each (by J. W. Hurst), are included in the tract suspended from sale by order of Acting Commissioner Holcomb on October 7, 1880, on the ground that they lay west of the one hundred and seventh meridian west from Greenwich. This one hundred and seventh meridian formed the eastern boundary of the lands belonging to the Uncompahgre and White River Utes under the treaty of March 2, 1868, proclaimed on November 6, 1868. The public surveys had, however, been extended over these townships through a misapprehension as to the location of this meridian. They are also within the ten-mile strip restored to sale, with a saving of the rights of those who had made entries, settlements, or locations therein by act of Congress of July 28, 1882.

It is alleged that these lands were occupied and properly filed upon by declaratory statement, affidavit, &c., as required by law, prior to their suspension from sale, but that by reason of such suspension the claimants were unable to make payment and entry, and that during such enforced delay by them a railroad was extended to within 15 miles of the lands.

On January 9, 1883, you wrote to this office for instructions, which were sent you by letter N, of January 19, following. Acting thereunder you refused to allow entry at a less price than \$20 per acre, in accordance with section 2347, Rev. Stat.

The record shows that the following applications to purchase were made in your office upon the dates stated:

*James W. Hurst*, SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 18, and SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 17, T. 15 S., R. 86 W., applied on January 3, 1883, under declaratory statement No. 35, dated August 9, 1880.

*Henry Peyton*, E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., applied on January 1, 1883, under declaratory statement No. 35, dated August 9, 1880.

*Owen T. Monaghan*, S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 31, and S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 32, T. 14 S., R. 86 W., applied by Richard Forrest, agent, on January 13, 1883, under coal declaratory statement No. 195, dated October 26, 1882.

*Alonzo Hartman*, S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 5 and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 6, T. 15 S., R. 86 W., applied on January 4, 1883, under coal declaratory statement No. 196, dated October 26, 1882.

*James Walsh*, N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 5, and N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 6, T. 15 S., R. 86 W., applied by Richard Forest, agent, on January 13, 1883, under coal declaratory statement No. 197, dated October 26, 1882.

*Lewis Spencer*, N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 5, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 6, T. 15 S., R. 86 W., applied by Richard Forrest, agent, on January 13, 1883, under coal declaratory statement No. 194, dated October 26, 1882.

*Frank Foster*, S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 5, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 8, T. 15 S., R. 86 W., based upon coal declaratory statement No. 198, dated October 31, 1882. His formal application to purchase does not appear among the papers, but counsel state that all the appellants made application to purchase in January, 1883.

*John L. Roberts*, SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 32, T. 14 S., and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 5, T. 15 S., R. 86 W., applied on January 1, 1883, under coal declaratory statement No. 201, dated November 29, 1882.

*James D. May*, SE.  $\frac{1}{4}$  of Sec. 21, T. 15 S., R. 86 W., applied on January 1, 1883, alleging possession since 1880 in his affidavit.

*Simon Simineo*, N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 21, T. 15 S., R. 86 W., applied on January 3, 1883, making same affidavit.

*W. P. Buttles*, S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 6, T. 15 S., R. 86 W., applied on January 2, 1883, making same affidavit.

*James Knight*, SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 7, T. 15 S., R. 86 W., applied on January 1, 1883, making same affidavit.

*Harry Timmons*, S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 19, SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 20, and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Sec. 29, T. 15 S., R. 86 W., applied on January 4, 1883, making same affidavit.

*Mathias Schmitz*, SW.  $\frac{1}{4}$  of Sec. 21, T. 15 S., R. 86 W., applied on January 4, 1883, making same affidavit.

*E. A. McCord*, S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 31, T. 14 S., and N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 6, T. 15 S., R. 86 W., applied on January 4, 1883, making same affidavit.

*Samuel M. Dilts*, NW.  $\frac{1}{4}$  of Sec. 33, T. 14 S., R. 86 W., applied on January 13, 1883, by Henry Peyton, agent, making same affidavit, and on January 15, 1883, in person.

*J. H. Rishel*. S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 21, T. 15 S., R. 86 W., applied on January 4, 1883, making same affidavit.

*Wakeman H. McIntyre*, E.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 31, T. 14 S., R. 86 W., applied on January 13, 1883, by Henry Peyton, agent, making same affidavit, and on January 15, 1883, in person.

*James H. B. McFerran*, N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., applied on January 13, 1883, by Henry Peyton, agent, making same affidavit, and on January 15, 1883, in person.

*J. W. Hurst*, NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 17, and NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 20, T. 15 S., R. 86 W., applied on January 3, 1883, adding the above land to that claimed under his declaratory statement No. 34, and making same affidavit as to possession.

*Walker Miller*, SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 29, and W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 32, T. 14 S., R. 86 W., applied on January 13, 1883, making same affidavit.

*Charles S. Robbins*, S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 8, and N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 9, T. 15 S., R. 86 W., applied on January 16, 1883, making same affidavit.

*William Deahan*, NE.  $\frac{1}{4}$  of Sec. 33, T. 14 S., R. 86 W., applied on January 15, 1883, making same affidavit.

*Peter A. Hanson*, S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 8, T. 15 S., R. 86 W., applied on January 16, 1883, making same affidavit.

*J. L. Tatum*, S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 28 and S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 29, T. 14 S., R. 86 W., applied on January 15, 1883, making same affidavit.

I should here state that the above dates are those of the affidavits by which the parties made application to purchase, not the date when formal application was made to the register. No indorsement was made upon the applications by the register showing the date of application and rejection, as ought to have been done. It is obvious, however, that such formal application could not have been prior to the dates given.

The claimants having offered to pay for the land at the rate of \$10 per acre, and the tender being refused, appeal to this office upon that ground only. No other question than the price to be paid is drawn into controversy, and that alone will be considered.

The claimants base their appeal upon two grounds, namely:

First. That there is no railroad within 20 miles of the land sought to be entered, within the meaning, spirit, and intention of the law, be-

cause there is a distance between this land and the railroad now in operation, of 6 or 8 miles over an inaccessible range of mountains, which is wholly impassable for teams or pack-animals of any kind.

Second. That their right to purchase the land at \$10 per acre was preserved by the act of July 28, 1882.

As to the first point raised, the law is very explicit. The land must be paid for at the rate of \$20 per acre where it lies within 15 miles of a completed railroad, not an accessible completed railroad. I must therefore reject the construction urged by the appellants.

Third. It has been decided that the price of coal lands depends upon their proximity to a completed railroad at the date of payment and entry, irrespective of the preference right of entry. (See letter of Secretary Kirkwood to the Commissioner of the General Land Office of October 17, 1881, reported in Copp's U. S. Mineral Lands, second edition, 345; also decision of the honorable Secretary of the Interior in case of the appeal of James McLean and Thomas H. Norton, May 10, 1882; also paragraph 12 of coal circular, approved by the honorable Secretary of the Interior on July 31, 1882.)

The only question involved, therefore, under the second point advanced by the appellants is whether the delay in payment not being due to the laches of the parties, the right to purchase the land at \$10 per acre is among those rights contemplated by the act of July 28, 1882, which made the rights of the parties "in all respects the same as if the lands had been legally subject to their claims when the same were initiated." (Statutes of the United States passed at the first session of the Forty-seventh Congress, page 178.) The first ground of appeal being rejected, it is clear that the question of price depends wholly upon the construction of the above act, which was a remedial statute and took the case out of the ordinary rules so far as it was in conflict with them.

The construction adopted and heretofore applied by this office is that the *price* of coal lands is not affected by the above statute, and that the general rule that the price depends upon the circumstances at the date of *entry* must be followed with regard to lands within the 10-mile strip as well as in other cases. The occupation of these lands at any time after 1868 and prior to July 28, 1882, was irregular and contrary to law, and the parties acquired no rights by reason of such occupation, or of any improvements and developments made by them. In the eye of the law they were mere trespassers. The act of that date extended to them a protection which they could not claim under the general laws relating to the public lands and legalized their illegal occupation, permitting them to hold and ultimately acquire the title to the lands upon which they had entered. As I understand the statute this is the extent of the relief afforded thereby. The price of the lands not being mentioned (except to provide that it shall not be less than \$1.25 per acre) it must be determined by the general law fixing the price of the particular class of lands under consideration. (See office letter N of

March 26, 1883, to Richard Irwin, declining to return \$10 excess per acre; also my letter of January 19, 1883, above referred to, in which the matters involved in this appeal were determined, so far as regards this office.)

While the principle above stated applies equally to all the appellants the applications of all except two would have to be rejected on other grounds. The records of this office fail to show that any of the above applicants except James W. Hurst and Henry Peyton, who filed their declaratory statements Nos. 34 and 35 on August 9, 1880, had filed their declaratory statements or done any other act recognized by this office or the land office at Leadville upon the lands claimed by them prior to the suspension of such lands from sale on October 7, 1880.

It must therefore be assumed, whatever may have been the status of Hurst and Peyton, that no rights existed in the other twenty-three claimants until July 28, 1882, at which time the lands were restored to sale and became a part of the public domain. (See letter of this office dated August 4, 1882, approved by the honorable Secretary of the Interior.)

If these twenty-three claimants were actually in possession of the lands during their suspension from sale, it became incumbent upon them to file their declaratory statements within sixty days from its termination, as required by section 2349, Rev. Stat.

The only declaratory statements by the parties found of record in this office, after such termination, are those of Owen T. Monaghan, Alonzo Hartman, James Walsh, and Lewis Spencer, dated October 26, 1882, Frank Foster on October 31, 1882, and John L. Roberts on November 29, 1882.

These filings show one of two things, either that the parties failed to comply with the law requiring a declaratory statement to be filed within sixty days, or that they did not enter into possession of the lands and commence improvements thereon during their suspension from sale or before such suspension. In either case they can claim no relief under the statute, for under the latter alternative their rights cannot be regarded as "*heretofore*" acquired on July 28, 1882 (see section 3 of the act), and under the former they lost all rights acquired during the suspension by their own disregard of the law.

The remaining seventeen cases, in which no declaratory statement appears to have been filed at any time, and in which the first recognized step was not taken until January, 1883, are, if possible, still further removed from the relief sought.

It should also be stated that in none of the cases, except those of Hurst and Peyton, does there appear any proof, other than the affidavit of the claimant or his agent at the time of making application, showing occupation of the land prior to suspension.

The aforesaid applications to purchase at the rate of \$10 per acre are therefore denied. You will notify the parties in interest and allow the usual time for appeal.

**DECLARATORY STATEMENT.****3. J. W. HALLOWELL.**

The declaratory statement under sections 2348 and 2349, Rev. Stat., must be made by the applicant himself.

No conflict or adverse filing appearing of record the claimant is allowed to make his declaratory statement and affidavit *nunc pro tunc*.

*Commissioner McFarland to the register and receiver at Leadville, Colo., May 29, 1884.*

**GENTLEMEN:** In the matter of coal entry No. 31, Ute series, made February 28, 1883, in the name of J. W. Hallowell, the declaratory statement and affidavit required at the time of actual purchase were made by H. F. Smith, attorney in fact for Hallowell.

The regulations under the coal-land law, approved July 31, 1882, require these, the declaratory statement and affidavit, to be made by the applicant himself. A claimant may, however, after making his application, or declaratory statement and affidavit required at time of actual purchase, as the case may be, empower an agent to do certain acts, and certain proofs may be made by an agent or facts established in accordance with ordinary rules of evidence, but these are specifically provided for in paragraphs 34, 35, and 36 of said regulations.

In this case, though, as no conflict or adverse filing appears of record, the claimant will be allowed to make his declaratory statement and affidavit as above indicated, *nunc pro tunc*.

In the proof submitted possession by agent is claimed; proof on this point is therefore required under paragraph 17 said regulations.

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**VII.—LOCATION.****PATENTED LODE CLAIM—INTERSECTING VEIN.****1. KENEAGE M. GRIFFIN.**

A locator cannot enter within the survey lines of a patented lode claim and make a location coincident therewith, although his discovery shaft be upon ground owned by himself and excluded from such patent, unless he shows that such location is upon a vein or lode which is clearly a cross or intersecting one.

*Commissioner McFarland to the register and receiver at Central City, Colo., March 6, 1883.*

**GENTLEMEN:** It is found upon examination of the survey of the claim of Keneage M. Griffin upon the Colonel Hall lode, lot No. 1216, mineral entry No. 2059, that it embraces the entire claim of Jairus W. Hall upon the Stevens lode lot No. 665, a prior location, patented January 18, 1881, and that the surveys of both claims are identical to the extent of 800 feet.

From the identity of the surveys as aforesaid it is directly inferred that the lodes embraced within them are also identical to the same extent, and this supposition is strengthened by the fact that all developments or improvements shown upon either location are upon the lode line of the Stevens claim. (See annexed diagram.)

The discovery shaft of the Colonel Hall location is situated upon a portion of the surface ground formerly embraced by the Coral lode survey, but now owned by Mr. Griffin and included in his application for patent. The Coral location having an earlier survey number, and having been excluded from the application for patent for the Stevens lode, in all probability antedates the Stevens location.

Although the Coral is a prior location, and in possession of the Colonel Hall applicant, that fact did not entitle Mr. Griffin to enter from its surface upon the *Stevens lode*, and make a location coincident therewith, without first showing that such location or discovery in no way conflicted with the said Stevens claim.

The only legal location which could be made *without such showing* would be of a vein which is clearly an intersecting one.

You will so instruct the applicant, and inform him that unless positive and convincing proof is offered to show that the Colonel Hall location is upon a vein separate and distinct from the Stevens lode his application will be denied and the entry held for cancellation.

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*INTERVENING PATENTED GROUND—PARALLEL VEIN—INTERSECTING VEIN.*

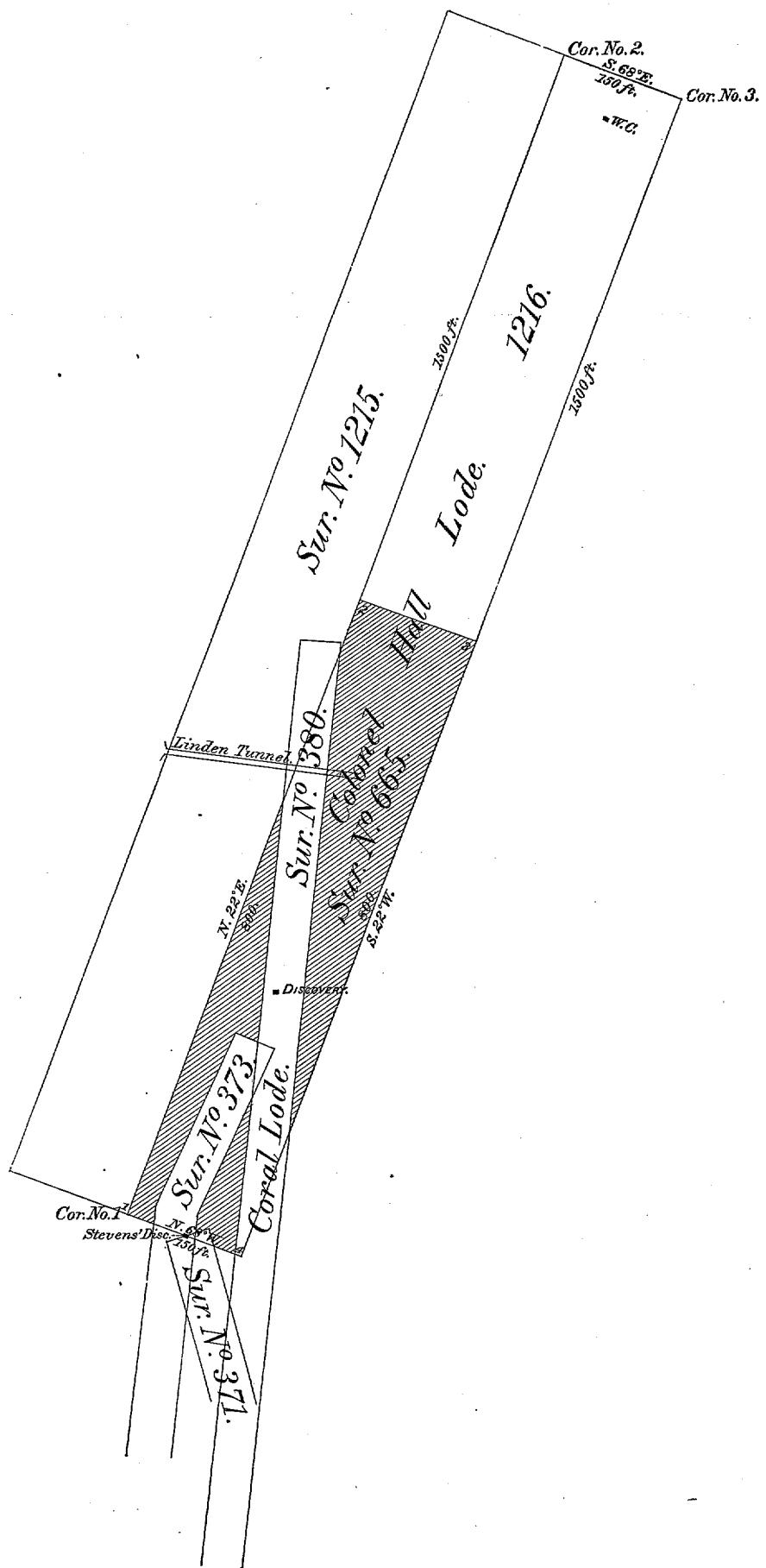
**2. KENEAGE M. GRIFFIN. (ON APPEAL.)**

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. A parallel vein within the side lines of a patented claim passes with the patent.

*Secretary Teller to Commissioner McFarland, December 7, 1883.*

SIR: I have considered the appeal of Keneage M. Griffin from your decision of March 6, 1883, declining to patent his claim upon the Colonel Hall lode, lot No. 1216, mineral entry No. 2059, Central City, Colo.

In this case the applicant for patent claims his discovery shaft to be on a piece of public land, excepted from survey No. 665, or Stevens's lode, for which a patent issued in 1881. The exception was of the Coral lode, which appears to have been surveyed as survey No. 380, to cross the Stevens or No. 665 survey very nearly from the southeast to the northwest corners, and was 50 feet wide, and about 600 feet in length. The applicant now seeks to make the discovery shaft on said excepted land the discovery shaft of his Colonel Hall lode. It does not appear whether the shaft described as a discovery shaft was the old Coral dis-



covery shaft, or whether it has been sunk as the discovery shaft of the Colonel Hall.

If the vein found in said shaft runs in the direction of the lines of survey of the Coral lode the applicant might secure on such lode about 600 feet within the side lines of the Stevens survey; but if the course of the lode or vein is in the direction now indicated by the Colonel Hall survey it must be either the Stevens vein or one parallel to it. If it be the same vein, then all between the ground excepted from the Stevens patent and the line of the Colonel Hall location lying northerly of the Stevens patent must have passed with the Stevens patent to the persons therein named as the grantees.

The distance between the two last-named points is about 500 feet. If it be a parallel vein or lode it passed with the Stevens patent, because it had its apex within the side lines of the ground included in the patent. If the discovery shaft is on a vein running in the course or direction of the Stevens lode the applicant can only find within such vacant lands about 100 feet of lode. Can the applicant having a discovery shaft on that vacant hundred feet make a valid location on that vein or lode of a portion of the land not contiguous, and separated by a portion held and owned by others by virtue of a patent? I think not. I think, in order to make a valid location, he must have all portions of his lode contiguous; that is, there must not be an intervening claim as there is in this case. I distinguish this case from that of a cross or intersecting lode, for such a condition is provided for in section 2336 of the Revised Statutes.

If the locator of a claim on a lode or vein can cross 500 feet of patented ground, he may if he chooses cross a mile, and, with his shaft on one end of his claim, he may pass over other property and hold the other end of a claim. It cannot be supposed such was the intention of the act of 1872.

If the applicant chooses to take a patent to so much of the lode or vein as shall be found within the side lines of the Coral lode he may be allowed to do so by releasing his application for the other portions of the Colorado Hall lode.

For these reasons your said decision is affirmed.

Herewith are returned the papers accompanying your letter of June 6, 1883.

*RELOCATION—ADVERSE CLAIM—DISCOVERY—LOCAL STATUS—PRESUMPTION.***3. WIGHT ET AL. v. TABOR ET AL.**

Under the mining laws of the United States, and those of Colorado, a mining claim cannot be relocated so as to embrace ground claimed and possessed by others under color of title.

Parties who fail to adverse a pending application admit that they have no right to the ground embraced therein and cannot afterward be heard to set up either an equitable or legal title to the premises.

It is not necessary that mineral be discovered in the discovery shaft if it is discovered within the limits of the claim before adverse rights attach.

*Quare.* Can the legislature of a State add further conditions to the provisions of the United States Statute, which only requires the discovery of mineral within the claim?

After entry, where there is no evidence of fraud, and in a question between the Government and applicants only, if it becomes necessary, in order to support the entry, to find that applicants had mineral in their discovery shaft, it will be so found in all cases where the evidence is conflicting.

*Secretary Teller to Commissioner McFarland, February 15, 1884.*

I have considered the application of the claimants for the Maid of Erin mining claim, situated in the California mining district, Leadville, Colo., for patent, and the protest of the owners of the Vanderbilt lode against the same. The papers show that February 5, 1880, H. A. W. Tabor and others made application at the United States land office at Leadville, Colo., to enter the Maid of Erin mine. This application was based on a location made on the 17th day of January, 1878, and a relocation made September 20, 1879. In 1878 applicants or their grantor had sunk a shaft on the premises described in the application, which they called the discovery shaft. The applicants also sank a shaft near the center of the property, which in all the testimony has been referred to as the working shaft. This shaft was from 160 to 170 feet deep, and was timbered and covered by a frame building, covering a whim for the raising of the mineral from the shaft. This shaft appears to have been commenced in 1878, and discontinued about the 1st of November, 1879. Due notice was published, as required by law, and the time for filing an adverse claim expired on the 8th day of April, 1880.

On the 18th of September, 1880, S. G. Wight *et al.* filed a protest in the local office against the issue of a patent to the applicants, alleging that the claim described as the Maid of Erin would conflict with the Vanderbilt location, which was alleged to have been made June 8, 1880. Protestants alleged that the applicants had no proper discovery shaft, and that no mineral had been found on the claim, at the time of the application for a patent.

The Commissioner of the General Land Office ordered a hearing before the register and receiver to determine the right of the matter.

On the 9th of November, 1881, the Commissioner of the General Land Office, after an examination of the evidence taken at such hearing, ordered that the entry be allowed, and on the 23d of November, 1881, the entry was made.

On application filed November 3 for a rehearing the Commissioner again examined the case and declined to order a rehearing.

On the 17th of December the protestants appealed to the Secretary of the Interior to exercise the supervisory power provided for in Rule 83.

On the 18th of January, 1882, the Secretary of the Interior directed the Commissioner to order a further hearing, "as to the discovery of mineral on the claim of the Maid of Erin, or in its discovery shaft, prior to the date of location, or on the relocation, limiting the testimony thereto."

Testimony was taken under this order, but not being satisfactory, on the 19th day of March, 1883, the Secretary ordered a further hearing on the following points, namely:

1. When the Maid of Erin claimants discovered mineral outside of their discovery shaft, and within the boundaries of their claim, and at what point.

2. When the Vanderbilt claimants discovered mineral within the boundary of their claim, and at what point.

3. When the Vanderbilt claimants discovered mineral within the boundaries of the Maid of Erin claim.

Testimony was taken on these points, and the case now comes before the Secretary on the evidence heretofore taken.

It is an admitted fact that the shaft called the Vanderbilt shaft, and which is the discovery shaft of the Vanderbilt claim, is not within the boundaries of the Maid of Erin claim; but the boundaries of the Vanderbilt claim are so run as to include some portions of the Maid of Erin claim, and should a patent issue to the Maid of Erin applicants it will diminish the size of the Vanderbilt claim. A drift was run from the Vanderbilt shaft to and within the limits of the Maid of Erin claim, but not until May, 1880. It is not claimed that the protestants did not have actual as well as constructive notice of the application for patent of the Maid of Erin claim, but the protestants in their protest aver that when the application for a patent for the Maid of Erin was pending they could not adverse, for that they had no mineral within the limits of the Vanderbilt claim, until after the expiration of the time of the advertisement. This is given by way of excuse, and to relieve them from the consequences of the failure to adverse the Maid of Erin application; but in the testimony taken during the summer of 1883, Mr. Wight, one of the protestants, swears that the mineral was first struck in the Vanderbilt claim on the 10th day of July, 1879, and the ore-body they struck is the same ore-body found in the Maid of Erin ground.

Mr. Wight also testifies that ore was shipped from the Vanderbilt shaft as early as December, 1879. How then can it be said that the protestants could not at the time of the application of the Maid of Erin people file an adverse claim and institute legal proceedings as required by law? He also testifies that the reason no adverse claim was filed was that he did not know that the vein found in the Vanderbilt shaft extended into the Maid of Erin ground. He thus contradicts his affidavit made by way of protest.

It will be seen by an examination of the certificates of location of the Vanderbilt lode made in 1878, and the one made in 1880, that the location of 1880 differs materially from that made in 1878. The one made in 1878 does not extend as far eastward, and contains much less area than the one made in 1880.

The original location of the Vanderbilt claim was 750 feet in length and 300 feet in width, containing an area of 225,000 feet. The second location contained twice as much ground as the first, and included less than one-half of the original location; so that three-fourths of the surface ground enclosed in the second location was not included in the first location.

The statutes of Colorado provide for the amendment of an erroneous location by a relocation, without abandoning the rights secured by the first location; but a location of that character must be substantially the same as the old location. Additional ground may be included if by so doing no interference is had with existing rights; but in this case the Vanderbilt parties substantially abandoned their first location and made a new location, taking in ground not before that time occupied by them, and included in the application of the Maid of Erin people for patent, which was then ready for entry. At the time of the making of the Vanderbilt location of 1880, the applicants for the Maid of Erin had many valuable improvements on the claim; as before stated, they had sunk a shaft 160 to 170 feet deep, built a shaft house, and put in a whim, and had advertised the claim for patent. All this had been done without objection from the Vanderbilt people. The second location gives to the Vanderbilt parties no rights whatever touching that portion of the location including the ground within the side lines of the maid of Erin claim. It was not a part of the public domain, being in the possession of the applicants for patent under at least a color of title. Whether they had complied with all the provisions of the law or not, there had been such a compliance that full and complete notice was given to protestants and all others, that the occupants thereof claimed to hold it under the laws provided for the acquirement of title to mineral lands. The law had fixed a time and method by which parties disputing this claim might be heard, and they did not avail themselves of that provision. By the failure of the Vanderbilt claimants to adverse the application of the Maid of Erin, they

admitted that they had no right to the property, and they cannot now be heard to set up either an equitable or legal title to the premises called the Maid of Erin claim.

It is sought to divest the Maid of Erin proprietors of their title on mere technical grounds—that there has been a failure to comply with all the conditions of the law for the acquirement of title to mineral lands. If there has been a failure to comply with the essential provisions of the statutes, it is the duty of the Department to withhold the patent. In dealing with a question of this character it is the duty of the Department to carry out the spirit of the law. It is asserted by protestants, that the applicants had no mineral within the boundaries of the claim at the time of the several locations, nor at the time of their application for patent. If this was sustained, there would be an end of the question. The applicant for a patent must have mineral within the surface boundary of his claim or he is not entitled to a patent. But in this case I have no difficulty in finding as a matter of fact that at the time of the second location of the Maid of Erin mineral had been discovered in the working shaft before said second location. The protestants allege that this is not sufficient; that the mineral can only be found in the discovery shaft, and if not so found then a subsequent discovery of mineral in any other part of the claim will not entitle the applicants to a patent, and that a failure to find mineral in the discovery shaft is a non-compliance with the law of Congress on the subject of the appropriation of mineral lands. It is not satisfactorily shown that the discovery shaft of the Maid of Erin contained a defined body of ore. The evidence is conflicting on that point, but I do not consider it material to a proper determination of the case, whether there was or was not mineral discovered in the discovery shaft. The applicants or their grantors sunk a discovery shaft, located on the surface a claim, marking and defining its boundaries with sufficient accuracy to give notice to all the world of their intention to appropriate the same under the laws of the United States as mineral land. Work was commenced on the shaft called the working shaft, and continued until a body of ore was discovered; and if such discovery was made before any other party had acquired rights to the land included within the Maid of Erin claim the rights of the applicants became fixed, and such discovery of mineral related back to the original location. But in this case the applicants made another location, that is, on the 20th of September, 1879, which was at a time long after the shaft appears to have been extensively worked. There is a conflict of evidence as to the time mineral was struck in the shaft; but it may be presumed, for the purpose of supporting an entry made, that such discovery was prior to the making of such location. In fact such appears to be the proof.

It is said that the statutes of Colorado made in pursuance of the authority given by the act of May 10, 1872, require that there shall be a discovery in the discovery shaft. The provision is as follows: "Sinking

a discovery shaft upon the lode to the depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice." If the legislature of Colorado had authority to require such discovery in the discovery shaft, it is by the provision of section 2319 of the Revised Statutes (enacted May 10, 1872). It may be well doubted whether the legislature of Colorado can attach such a condition to the appropriation of mineral lands, when the national statute only provides for the discovery of mineral within the claim; but I do not consider it worth while to consider whether such legislation is authorized or not, for after entry where there is no evidence of fraud, and in a question between the Government and applicants only, it is the duty of the Department to sustain the entry if it can be done without a violation of law; and if it is necessary to find that applicants did have mineral in the discovery shaft in order to support the entry made, it will be done in all cases where there is a conflict of evidence on that point. In this case there is such conflict of evidence. I have no doubt but that the Department, in such a case as this, would be justified after entry in refusing to inquire whether there had been a discovery in the discovery shaft, if it were clear that mineral had been discovered within the limits of the claim, and all parties claiming adversely had had an opportunity to be heard before entry. It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found.

In this case the applicants were the first to discover mineral within the boundaries of their claim. Due notice of their intention to apply for a patent was given; a failure on the part of protestants to object within the time fixed by statute, either in the land office or in the courts, concludes them as to title. As against all the world (save the Government) the applicants were adjudged the owners of the premises described in the advertisement. The Government might still demand a compliance with all the provisions of the law; the applicants alleged compliance with the law, made application to enter, but were not allowed to do so until a further examination was made; after a hearing before the local land office, the Commissioner allowed the entry, and such entry must stand unless the applicants have failed to comply with the conditions on which such entry was to be made. The Commissioner has twice held that there has been such a compliance. I find no failure on the part of the applicants to conform to the provisions of the law concerning the entry of mineral lands, and the decision of the Commissioner sustaining such entry is affirmed.

*PROTESTANT.—CERTIORARI.***4. WIGHT ET AL. v. TABOR ET AL. (ON REVIEW.)**

Protestants have no standing before the Department as litigants.

Assignments of error upon a refusal of the Secretary to reverse the Commissioner's decision brought before him by certiorari are meaningless, no issue having been made before the Department.

*Secretary Teller to Commissioner McFarland, March 6, 1884.*

SIR: A. W. Rucker, attorney for S. G. Wight *et al.*, protestants in this case, filed a notice for a further hearing, alleging error in questions of fact and law. The protestants have no standing before the Department as litigants, but have since the fall of 1881 been allowed to contest the right of the applicants for a patent, and have received the same consideration that a litigant does. The protestants failed to establish either a legal or equitable claim to the premises claimed by applicants. Protestants' counsel appears to have not only misunderstood the position of the protestants before the Department, but the question considered by the Department. No issues were made before the Department, and it was not at all necessary that any facts should have been found. Due notice had been given of the application to enter. All parties in interest had been given an opportunity to be heard in the courts, had they desired so to appear. No one appearing, the applicants on their *prima facie* case were allowed to enter; and protestants aver that such entry ought not to have been made, and ought to be canceled. The Commissioner, after two hearings, decided such entry properly made. An appeal was then made to the Secretary to revise the finding of the Commissioner, and order a reversal of the ruling allowing such entry and refusing to vacate the same. The Secretary, after careful consideration, refused to reverse the Commissioner. Whether he gave a good reason or a poor one for such refusal was immaterial. No error can be assigned on such refusal, and the said so-called assignments of error are meaningless. Of course, if the applicants have failed to comply with the provisions of the statute, they cannot be allowed to enter, or having entered, their entry must be vacated. If it is essential to a valid location that a discovery of mineral in place be made in the discovery shaft, that becomes a question to be determined before entry. The Commissioner of the General Land Office twice found that such discovery had been made. On examination of all the testimony I am satisfied that there was no mineral in place in the discovery shaft; but I am satisfied that before other parties had acquired rights in conflict with the rights of applicants they had discovered mineral within the boundaries of the original location, and thereupon made a new location in accordance with law; so it becomes quite immaterial whether the Maid of Erin applicants did or did not have mineral in the original discovery shaft.

This case has been carefully considered both by the Commissioner and the Secretary, and there is no reason why the applicants should be put to further expense and delay. The motion for a rehearing is therefore denied, and the patent will issue.

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*DISCOVERY—OCCUPATION—SEGREGATION—ADVERSE CLAIM—APPLICATION—LODE AND SURFACE GROUND.*

5. BRANAGAN ET AL. v. DULANEY.

A location based upon a discovery made within the limits of another existing and valid location is illegal. The rule is otherwise where the first locators fail to comply with the law within the statutory period prior to the last location.

Lands lawfully located and worked for mining purposes are as completely segregated from the body of public lands as if a patent had issued for them.

Where the owner of the original location fails to adverse the application for patent on the junior location, it must be assumed, under section 2325, Rev. Stat., that the claimant under the junior location is entitled to a patent as against the claims of the prior locator.

Where an application for patent is adverced, the applicant is at liberty to litigate with the adverse claimant, or relinquish the ground in conflict and take a patent for the remainder, or dismiss his application for patent and rely upon his possessory title.

A location of surface ground which does not include any part of the lode claimed to have been discovered therein is invalid. Surface ground is an incident of the lode.

*Secretary Teller to Commissioner McFarland, May 1, 1884.*

SIR: I have considered the matter of the protest of Patrick Branagan *et al.* against the issuance of patent to David E. Dulaney for the Hidden Treasure Lode claim, situated in Griffith mining district, Clear Creek County, Central City district, Colorado, on appeal by Dulaney from your decision of February 21, 1882, holding his entry for cancellation.

It appears that the claim was located in January, 1872, by seven persons, who claimed 1,400 linear feet, 700 feet running northeasterly and 700 feet southeasterly of the center of the discovery shaft. By virtue of sundry mesne conveyances the entire interest became vested in Dulaney and one James G. Thorn, who conveyed to Dulaney (by quitclaim deed, dated April 28, 1872) "all interest in 625 feet, commencing 25 feet west of discovery; thence east 675 feet." November 7, 1872, Dulaney applied at the local office for patent to the Hidden Treasure lode, designated by the official survey thereof as lot No. 204, being 675 feet in length (commencing 25 feet east of discovery) and 50 feet in width, and containing seventy-one one-hundredths of an acre. Due notice of the application was given by publication, and otherwise, pursuant to statutory requirements. Whereupon, pending publication, to

wit, January 4, 1873, Lewis D. C. Gaskill, Daniel Glass, and Samuel N. Millford filed a protest and adverse claim, alleging (*inter alia*) that a portion of said claim conflicted with the location of the Saco lode (survey 229), owned by them. They instituted suit within thirty days, to wit, January 31, 1873, and obtained judgment December 8, 1874, for all the land in conflict. Under date of April 8, 1878 (upward of three years after rendition of judgment), the register and receiver permitted Dulaney to pay for and enter the whole tract as applied for in the first instance, *i. e.*, including the area judicially adjudged to belong to the adverse claimants. March 31, 1879, Patrick Branagan and G. A. Williams filed in your office (through their resident attorney) the protest in question, based upon substantially the same grounds that were set forth in the protest of Gaskill *et al.*, which contained certain sworn allegations that you regarded as purely matters of protest, not within the judicial province, but which it is competent for the executive to determine.

It was alleged by Gaskill and his co-protestants that the location of the Hidden Treasure lode was in a different direction from that described in the application for patent, and shown by the plat of survey; that such location ran in a direction more nearly east and west, and lay to the south of the Saco claim; that no portion of such location lay within the limits of survey 204; and that Dulaney and his privies have worked in an easterly direction and south of the Hidden Treasure lode for a distance (as shown by the diagram) of about 250 feet, but that no work whatever has been done by him within the limits of the survey.

In addition to the foregoing allegations, Branagan and his co-protestants allege that there is no lode or vein whatever within the limits of the Hidden Treasure claim save one which is owned by protestants, and crosses said claim diagonally at a point to the northeast of the middle thereof; that since the rendition of the judgment in the year 1874, in favor of the Saco claimants, Dulaney has wholly abandoned his claim by failing to make the requisite annual expenditures thereon and permitting the old workings thereof to become dilapidated and stopped or obstructed with débris, by reason whereof they have been inaccessible for years; that subsequently to such abandonment, and prior to entry (April 8, 1878), several claims owned by protestants, and conflicting with the Hidden Treasure claim, had been located; that they are the present owners of the Patrick Branagan lode, which was discovered and located by them and one Henry Ashcroft in March, 1875, as a relocation of the Tom Thumb claim, theretofore abandoned; that the Tom Thumb was discovered long before the Hidden Treasure "and was an entirely different lode, having an entirely different strike or direction;" and that these affiants have worked upon and developed the Patrick Branagan lode ever since the location of the same, "and have expended in work and money upon the same for the development thereof at least \_\_\_\_\_ thousand dollars," etc.

These allegations are corroborated to a considerable extent by the affidavits of several persons who allege that they resided in the district where said claims are situated at the time of the aforesaid occurrences, and that they were cognizant of the same.

Upon the foregoing state of facts, and on the theory that your office had original jurisdiction in the premises, your predecessor ordered a hearing March 11, 1880, to determine the following questions, to wit:

(1). Whether the land claimed by Dulaney, known as survey No. 204, of the Hidden Treasure lode, is wholly within the original location; and, if not, to what extent it departs therefrom?

(2). Whether, if identical, the said location is based upon the discovery of a vein or lode within the limits of the claim located?

(3). Whether said claim, if properly located, has since been abandoned by said Dulaney by reason of failure to make annual expenditures thereon for labor or improvements as required by law; and, if so abandoned, when?

Pursuant to your office instructions, hearing was duly had May 18, 1880, whereat all parties in interest appeared in person and by attorney.

By your decision of February 21, 1882, the entry No. 999 was held for cancellation upon the ground, as stated, that—

The original location was based upon the discovery of a vein which ran in a direction far to the east of the surface ground located, conceding that the location was identical with the survey. This being the case, Dulaney's right of possession of surface ground terminated at the point where the apex of the vein departed from the side lines, and all of this ground the court gave to the adverse claimants.

It appears from the testimony that on March 19, 1875, Branagan and his co-protestants located what is known as the Patrick Branagan lode, which runs nearly due east and west, the side lines of the survey thereof intersecting those of the Hidden Treasure at acute angles. Some time about December, 1874, Dulaney claims to have sunk a shaft on the eastern portion of the Hidden Treasure survey, just a few feet east of the mouth of the Branagan tunnel, wherein he disclosed the Hidden Treasure lode, or one running parallel therewith, at least, which he describes as "a soft or dirt vein." It is alleged categorically, however, on the other hand, that "these works are 7 or 8 feet northwest of the north side line of survey No. 204," that the shaft so sunk by Dulaney ("in the breast of the Indigo tunnel") is on one and the same lode as that disclosed in the Branagan tunnel; that these shafts are connected in two places, and that Dulaney did no work on his claim until the spring of 1878.

It further appears from the testimony, and the plats filed as exhibits therein, that the survey of the Hidden Treasure lode runs N.  $35^{\circ} 30'$  E., while the protestants allege that the location was made about N.  $63^{\circ}$  E. from discovery, which, it is virtually admitted, was made some time in January, 1872, by Dulaney and his co-locators, of a lode or vein at a

certain point marked "discovery" on the plat of survey No. 204, filed with the application for patent; that this discovery was made "in a cross-cut tunnel and not from the surface;" that the lode so discovered was leased to one H. C. Cowles and others, who ran another tunnel to the east of that from which the discovery was made, where these lessees struck a lode, which they allege to be the Hidden Treasure lode, and from which they extracted considerable ore, paying Dulaney a mine-rent or royalty thereon. This lode lay about N. 63° E., and this work was performed by the lessees in the spring and summer of 1872. Meantime, in May of that year, the Saco lode was discovered in a cross-cut known as the "O. K. Tunnel." The surface lines of the location of this lode conflict with those of the Hidden Treasure at the west end, *i. e.*, the center of the west end of the survey thereof and the center of the west end of the Saco location are nearly identical, the latter running thence 10° east of the former.

It will be observed that the Hidden Treasure claim, as delineated upon the plat (exhibit aforesaid), runs to the north of the Saco claim, both of them starting from nearly the same initial point and diverging toward the northeast.

Although these protestants allege that a discrepancy exists between the location and the survey of the Hidden Treasure claim, such allegations are not sustained by the evidence. Such variance, if any, should be established by affirmative proof. The testimony establishes the fact, however, that the lode or vein upon which the Hidden Treasure discovery was made by Dulaney *et al.* in the tunnel is identical with that in the Saco claim, and nowhere runs in the direction of the survey of the former; that upward of 50 feet to the eastward of such discovery the lode branches off in two directions, one spur running along the line of the Saco and the other to the east thereof; that Dulaney's lessees worked the latter spur at a point where the top or apex of the same could in no wise lie within the Hidden Treasure's surface lines extended downward vertically; that the vein discovered and worked by Dulaney and others runs in a different direction from the Hidden Treasure survey; and that although a number of tunnels were run beneath and across the survey, yet persons who were familiar with these structures (having assisted in their construction) testified positively that no such vein is cut by any of the tunnels. It is true, they admit that a dirt or clay stratum is intersected by two of the tunnels, but they testify that it contained no suspicion of ore.

While such stratum may be the vein referred to by Dulaney as disclosed in the shaft sunk by him in the year 1874, it is manifestly not the vein upon which the original location was based.

That the area of the Hidden Treasure claim, containing Dulaney's workings near the discovery thereof, belongs to the Saco claimants by virtue of the judgment aforesaid there can be no doubt, because such

area was unquestionably part of the premises particularly described by those claimants in their declaration in ejectment "to be the Hidden Treasure lode, as shown by United States Mineral Survey No. 204," which premises, they alleged, the defendants (Dulaney *et al.*) entered into January 29, 1873 (*vi et armis*), and "unlawfully withhold the possession thereof." I cannot concur with you, however, in the unqualified proposition that "his right to the remainder of the claim, even if the lode discovered by him actually lay within the same, would be exceedingly doubtful, inasmuch as the judgment of the court in effect declares that the ground upon which the discovery was made belonged to the Saco claimants, and a location based upon a discovery made within the limits of another existing and valid location is illegal."

A location since the 10th of May, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location; for by the provisions of section 2322, the locator of such claim has the exclusive right of possession and enjoyment of all the surface included within the lines of the location, "and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines." If the locator then has the exclusive right of the possession and enjoyment, how can a prospector go on such claim and make a valid discovery? He cannot become the owner of that portion of the vein or lode discovered within a valid location, because that has been given to the first locator. He has not discovered mineral on land belonging to the United States, for while the fee to a valid location may remain in the United States, the exclusive right of occupancy and enjoyment has been given to the locator, and the lands described in such location made in accordance with law, usage, and customs, and maintained by compliance with the laws as to labor thereon, may be considered as certainly segregated from the body of public land, as if a patent had issued therefor. But in dealing with this question of prior location the Department labors under the embarrassment of not having a record made in the General Land Office of such location, and there is no data therefrom which it can be determined in the first instance whether there does or does not exist a prior location, unless application for patent therefor has been filed. And again, a valid location may be lost by the failure of the locator or his assigns to perform the labor required by section 2324 of the Revised Statutes. If such location is not a valid one, or if it was a valid one at its inception and the locator has not performed the required amount of labor thereon, a discovery made within the boundaries thereof before work has been resumed thereon under the statute may become the basis of a legal location. It does not, therefore, necessarily follow that a discovery made within the boundaries of a prior location is not a valid location; that must be determined by first ascertaining the status of the original loca-

tion at the time the second location was made. It has been the practice of the Land Office not to inquire as to the status of the original or prior location when the discovery is made within the boundaries thereof, unless an application for patent has been made for such original or prior location. If the owner of the original or prior location neglects to adverse the applicant for a patent to the junior location, it must be assumed, under the provisions of section 2325 of the Revised Statutes, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator. All questions concerning the proper location and the maintenance of such prior location by the performance of the labor required by statute ought to be, and necessarily must be, left to the courts for adjudication. This was done in this case, and the court, by its judgment in favor of the Saco claimants, declared that the original location was a valid and existing one, and that the discovery made within such location was no discovery at all. This concludes the Department on that point; and if, as contended by some, the discovery of mineral in a discovery shaft, as distinguished from discovery in any other manner, is essential to the existence of a valid location, Dulaney had no location at all. If, however, we adopt what I consider not only the more equitable rule, but one most consistent with the law and the ideas of miners—that is, that the discovery of mineral at any point within the boundaries of the claim not covered by the prior locator before other rights intervene will with the previous act of location make a valid and legal location—then Dulaney may have had a location such as is contemplated by section 2320 of the Revised Statutes, although technically he had no discovery shaft; for while he could not have a location to the extent which he had at first alleged, yet he might have a location as to so much of his original location as did not conflict with the Saco locators, and to which other rights had not attached, if he did discover mineral on that part of the claim not within the boundaries of the Saco claim.

It should be observed, moreover, that the judgment awarded the Saco claimants only so much of the Hidden Treasure claim as conflicted with theirs, thus leaving the residue intact in Dulaney as the original locator, and as to that portion of the claim the judgment was in effect and finally for Dulaney.

These protestants should have adverced the Hidden Treasure, but they merely protested. Having failed to file an adverse claim and institute suit as provided by the statute (sections 2325-26, Revised Statutes) they must be regarded as protestants, having no rights to be considered by the Department. It was held by this Department, May 16, 1882, that—

A court of competent jurisdiction is the proper forum in which contests between conflicting claimants can be heard, as the facts alleged might have been presented in such court upon an adverse claim duly filed (Bodie Tunnel, 8 Copp, 173). Where an applicant for a mineral

patent gives the prescribed notice any other claimant of the unpatented location objecting to the issuance of patent to such applicant on account of extent or form, or by reason of an asserted prior location, must interpose his objection within the prescribed period, otherwise he will thereafter be precluded from raising such objection; (*Copper Prince Mine, The Reporter*, vol 2, p. 118).

The mining law only authorizes the issuance of patents for lodes or veins, together with so much surface ground on each side thereof as the local law sanctions. Section 2325 of the Revised Statutes provides for the issuance of patents for claims that have been located in conformity to law. The surface ground is an incident to the lode; *Wolfley et al. v. Lebanon Mining Co.* (4 Colorado Reports, 116). In the case of *Mining Company v. Tarbet* (8th Otto, 468), the court say: "His right to the lode only extends to so much of the lode as his claim covers." The term "claim" here undoubtedly means the surface ground claimed in connection with the lode. In other words, the lode must be found within the exterior lines of the plot of ground marked on the earth's surface in making the location of a lode claim. But it appears that this was not the case, and where it is clearly shown, as in this case, that the discovery was not in public lands, although within the boundaries of the original location, and that such location does not follow the course of the lode, and the lode is not within the surface ground of that part of the location outside of the Saco claim, the law does not sanction the issuance of patent, and entry ought not to have been allowed. The local land office was also in error in allowing applicant to include in his entry that portion of the lode found to be the property of the parties who brought suit against applicant, even if applicant's right had been perfect as to the other portions of the lode. If the applicant had complied with the law on the subject of the entry of lode claims, he was entitled to that portion of his lode unaffected by the judgment of the court, and of course had the right of entry, if the case was not appealed by either of the parties to such suit. He might, if he had desired so to do, have disclaimed in a proper way in the land office any claim to all that portion of the lode included in the adverse claim, waiving no right he may have in court. In such a case he would be entitled to take, on making satisfactory proof of the actual existence of the lode and other compliances with the law, that portion of his lode concerning which there was no controversy. If the judgment in favor of the adverse claimant was for all that he claimed, there was nothing for the adverse claimant to appeal from, and the applicants had the right to treat it as a final judgment; and the adverse claimant having secured all he claimed, had no right to object to the entry of the applicants for so much of the vein or lode as he declared, by his proceeding in court, that he did not claim. If, however, the judgment of the court was that the adverse claimant had the right only to a portion of the lode claimed by him, no entry could be made by the applicants including any portion of the lode

claimed adversely, until such judgment should become final. Section 2326 of the Revised Statutes provides as follows:

"After such judgment shall have been rendered, the party entitled to the possession of the claim or any portion thereof may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver \$5 per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess."

The contest ended in the court, each party may secure a patent for whatever portion of the lode he by such judgment is found to rightly possess. If he rightly possesses it all, he takes all; if a portion only, he takes that portion only, and his opponent takes whatever he, in like manner, is found to rightly possess. Each party must still make the proof required by law. The judgment-roll proves the right of possession only.

The right of an explorer on mineral land under the provision of the statute is complete when he has discovered mineral and made a location in accordance with "regulations prescribed by law and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Such discovery and location gives him, as before stated, all the veins, lodes, and ledges, the apex of which can be found within the side lines of such claim. His right of possession is as complete as if he had a Government patent, provided he continues to put each year the required amount of labor or improvements thereon. If he does not care to continue to do the required amount of work on his lode each year, he may apply for a patent, and, having complied with the conditions prescribed by statute, he receives a Government title, and is thus absolved from doing further work on his claim. The Government gives the possessor of a lode his choice, to hold it without patent or to take patent. If he attempts to take a patent and finds that he is met with obstacles not anticipated, he may relinquish his attempt to secure a patent, and continue to hold by right of possession. Thus, when the applicant to enter a lode claim is met with an adverse claim, he may, if he choose so to do, avoid a legal conflict by dismissing his application for a patent, and rely on his title by possession given him by the local laws and customs, and a compliance therewith. If the adverse is for a portion only of the claim of the applicant, he may elect to take patent for the portion of his claim that is not in controversy, and he may withdraw from his application so much of his original claim as is in controversy. By such withdrawal he leaves the part of his claim claimed by others in the condition it was before his application.

He may then abandon his claim thereto, or he may litigate as to his rights with the party claiming adversely. In other words, a party owning mining property, to a part of which the title is disputed and a part is not, may, if he so chooses, make his application for so much of his property as is not in controversy; and if he makes his application and finds that his title is to be disputed as to a part, he may eliminate that portion from his application and proceed on the other.

Numerous affidavits, hereinbefore referred to, show that no work has been performed either by Dulaney or by any one in his behalf upon the claim embraced in survey No. 204; that whatever expenditures have been made by Dulaney were upon workings upon ground lying south of the Saco claim, but not upon the premises for which patent is sought. The entry was properly canceled, because it included that portion of the lode found by the court to be the property of the Saco claimants, and because the lode is not within the original location. If Dulaney is still in possession of the lode found to be his, he can relocate the same under the provisions of the statute and renew his application, when all parties claiming adversely to him will have an opportunity to assert their claim in the proper tribunal.

Barring the hereinbefore-mentioned propositions in which I do not concur, your decision is affirmed.

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#### DISCOVERY.

#### 6. JAMES MITCHELL ET AL.

Although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights.

*Commissioner McFarland to the register and receiver at Central City,  
Colo., May 3, 1884.*

GENTLEMEN: I have considered the application of James Mitchell and Thomas Hampton, filed by their attorneys D. K. Sickels & Co., of this city, for a review and revocation of my decision of October 29, 1883, holding for cancellation their mineral entry No. 1726, made October 4, 1881, for the Cotton lode claim.

The reasons for my said decision are fully set forth in my letter of October 29, 1883, to you in this case. Briefly stated they were: (1) That the location of said claim was, when made, invalid, being based upon an alleged discovery of a vein within ground already appropriated by the entry of another party, and subsequently patented to that party, and excluded from the application of the Cotton lode claimants; (2) that there was no proof of the discovery of a vein or lode within the ground applied for; and (3) that labor and improvements to the value of \$500 were not shown to have been placed upon the claim for the devel-

opment of a vein or lode within the claimed surface ground. December 6, 1883, claimants, by Hal. Aayr, their attorney, filed their application and evidence in support thereof, for a hearing to enable them to show that patent for the ground upon which their alleged discovery was made was improperly issued, and that this ground ought of right to have been free and open to exploration at the date of the Cotton claim location. The application for a hearing was denied January 9, 1884, and the conclusions reached in said decision of October 29, 1883, expressly adhered to.

January 23, 1884, notice of appeal from said decision and specifications of error were filed. March 15, 1884, claimants withdrew their appeal, without prejudice, filed application for a review as hereinbefore noted, and several affidavits in support thereof. March 31, 1884, additional argument and affidavits and also surveyor-general's certificate showing labor and improvements to the value of \$500 were filed.

Claimants undertake to show that a vein or lode was discovered within the ground claimed prior to location. I am unable, from the evidence before me, in view of the fact that claimants were fully advised by my said decision of the absence of proof upon this point, to find that a discovery within the ground claimed was made *prior to location*.

The evidence on file shows, however, that a vein or lode was discovered within the ground claimed *prior to application* for patent.

No adverse rights to said ground appear to have been asserted. When the discovery of the vein or lode within the ground claimed was made there was of record a sufficient notice to all the world of the claim of said Mitchell and Hampton to the ground applied for. In the absence of any showing to the contrary it is assumed that the boundaries of their claim were then plainly marked upon the surface thereof.

Under these circumstances it would, in my opinion, have been wholly unnecessary, after said discovery, to have again marked the boundaries and again filed notice of location of the ground applied for. The question of their right to a patent for the ground claimed is between these parties and the United States alone.

I think this case comes within the decision of the honorable Secretary in Maid of Erin Mine (Brainard's Legal Precedents, vol. 1, 478) and that upon the discovery as aforesaid the said location became good and sufficient. My said decision of October 29, 1883, is therefore revoked, and the case will proceed toward patent in its regular order.

*LOCATION BY REGISTER—BONA-FIDE PURCHASER.*

## 7. RUST AND CRITESER.

Without considering whether a location by a register was in violation of the circular of August 26, 1876, the entry of bona fide purchasers under the location should not be canceled.

*Secretary Teller to Commissioner McFarland, May 29, 1884.*

SIR: I have considered the case of mineral entry No. 36, made October 13, 1882, by John Rust and Thomas Criteser upon the "Rust and Criteser placer," embracing the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 6, T. 34 S., R. 6 W., Roseburg, Oreg., on appeal by Rust and Criteser, from your decision of November 23, 1883, holding their entry as to the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of said section for cancellation.

It appears that April 19, 1873, J. C. Fullerton was appointed receiver of the land office at Roseburg, Oreg., and still holds that office. On July 5, 1882, he located the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section as a placer claim, and July 8, following, he sold and conveyed his right and interest therein to Rust and Criteser. You reject their entry as respects this tract, on the ground that its location by Fullerton was in violation of the regulations of your office.

Without considering your circular of August 26, 1876 (Copp., November, 1876), which prohibits registers and receivers from making entries of public land on penalty of removal from office, or whether a mineral location by one of these officers is within the prohibition of the rule, cancellation of the entry in question would be, in my opinion, manifest injustice to the entrymen. They purchased in good faith from Fullerton, for a valuable consideration, in ignorance of the rule, and have since expended more than \$500 upon the claim. There is no evidence of improper conduct on their part, and Fullerton—in whose integrity I infer you confide from the fact of his retention in office since 1873—states that he made the location and sale in good faith, not supposing either to be in violation of your rule. If, however, he knowingly disobeyed it and is subject to removal therefor, that fact should not affect the rights of his grantees against whom nothing appears.

I reverse your decision and allow the entry to stand subject to the further proofs you require.

## VIII.—MILL SITE.

## CONSTRUCTION—SEVERAL TRACTS.

J. B. HOGGIN.

Under section 2337, Rev. Stat., a mill site embraced in an application and entry for a lode claim may include such number of pieces or tracts, within the restriction of 5 acres, as may appear to be necessary to the proprietor of the lode claim for mining and milling purposes.

*Secretary Teller to Commissioner McFarland, June 2, 1884.*

SIR: I have considered the appeal of J. B. Haggin from your decision of November 17 last, in the matter of his mineral entry, No. 174, for the Mariposa quartz mine and mill sites Nos. 1 and 2, Coso mining district, Inyo County, California. For such mine and mill sites payment was made and final certificates issued to Mr. Haggin, February 7, 1883.

Mill site No. 1 contains  $4\frac{1}{2}$  acres, and No. 2 one-half of an acre.

In your said decision you hold "that the United States Statutes, and the regulations thereunder of this office, do not contemplate that more than one mill site or tract of land for milling purposes may be embraced in an application for patent for a lode claim," and therefore direct the cancellation of one of said mill-site tracts, permitting the claimant to designate which of the two he will retain. From this decision an appeal has been taken; and thus is presented for my consideration the single question whether, keeping within the restriction of 5 acres of non-mineral land, more than one mill site may be embraced in an application for a vein or lode and patented therewith.

Section 2337 of the Revised Statutes is as follows:

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 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 of such non-adjacent land shall exceed 5 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.

Paragraph 72 of the regulations of your office, approved October 31, 1881, and referred to in your decision, is as follows:

To avail themselves of this provision of law (section 2337), parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth

herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

You call attention to the last clause of said section 2337, which provides that the owner of a quartz mill "may also receive a patent for his *mill site*, as provided in this section," and to that part of said paragraph 72 which provides for holding "*a piece of non-mineral land*" for mining or milling purposes.

It appears from your decision that your construction is placed, at least in part, upon the ground that in said section and paragraph the singular number only is used. If there were any force in that view under general rules of construction, it would not avail here, because the Revised Statutes provide, in section 1, that "words importing the singular number may be extended and be applied to several persons or things; words importing the plural number may include the singular."

The regulation (paragraph 72) which follows the statute should in that respect be construed in like manner as the statute.

It is my opinion that there is nothing in section 2337 which requires the construction you have placed upon it; and since the amount in both locations does not exceed five acres, I think in this instance both mill-site entries should be permitted to stand.

I may add that in some instances it might be necessary for the proprietor of the vein or lode to use or occupy only one piece of non-adjacent surface ground for mining or milling purposes, and in other instances more than one piece might be quite necessary and proper. I think the practice under said section should be to allow the entry of such number of pieces, within the restriction of five acres, as may appear to be necessary for such mining and milling purposes.

I therefore reverse your decision; and return the papers transmitted with your letter of March 3, 1884.

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#### IX.—NOTICE.

##### EXCLUSION.

###### 1. HUGHES ET AL. v. GILBERT ET AL.

Where the plat and notice were posted within the limits of the claim as located, the posting was sufficient, although on ground which was excluded from the application.

*Commissioner McFarland to the register and receiver, Leadville, Colo., November 17, 1882.*

**GENTLEMEN:** I have considered the protests of Charles Hughes and John M. Winne, which were transmitted with your letters of June 22

and September 9, 1881, against the application of F. B. Gilbert *et al.*, for patent to the Bloomington lode.

The Bloomington lode, as located, embraced a claim 1,500 feet in length by 300 feet in width. The discovery was made by tunnel, the position of which, as shown on the survey, is near the southern side line of the claim. Due notice of the application for patent was given by publication and by posting in your office during the statutory period. A diagram of the claim and notice of application were also posted—

In a conspicuous place \* \* \* upon a tree about 5 or 6 feet east of the mouth of the discovery tunnel, where the same could be easily seen and examined. .

The tree upon which this notice and diagram were posted is situate within the limits of the Bloomington lode claim, as located. This location, however, conflicts with mineral survey No. 902, the Continental lode claim, to the extent of a little more than half an acre. The mouth of the discovery tunnel of the Bloomington lode lies within this area, which is excluded from the pending application. The tree upon which the posting was made, "about 5 or 6 feet east of the mouth of the tunnel," also stands within this excluded tract.

The protestants call attention to the provisions of section 2325, Rev. Stat., viz, that the applicant "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," etc., and contend that inasmuch as the notice was not posted on the land actually applied for, the application for patent should be dismissed. This comprises the entire burden of the protest, and no other objections are stated.

I am of opinion that the objection is insufficient to warrant this office in dismissing the application. The law requires that the posting upon the claim shall be performed before application for patent is filed, and in a conspicuous place upon the land embraced in the plat of survey. The plat of survey embraces the entire claim, and the posting was made in a conspicuous place upon the land embraced in the plat. The fact that the application subsequently filed relinquished or excluded that portion of the land embraced in the plat upon which the notice was posted does not, in my opinion, vitiate the notice.

The posting was evidently in a conspicuous place, hard by the mouth of the discovery tunnel, and thus the letter and spirit of the law have been observed.

*PUBLICATION—DISCRETION OF REGISTER.*

## 2. WILLIAM A. ARNOLD.

The selection of newspapers for publication of mining notices is a matter resting in the sound discretion of the register. Other things being equal, the convenience of the applicant should be consulted.

*Commissioner McFarland to the register and receiver, Leadville, Colo., February 19, 1884.*

GENTLEMEN: On October 23 last I received a letter from Mr. William A. Arnold, of Denver, Colo., complaining of the register's action in refusing to publish notices of intention to apply for patent for mining claims in the Summit County Journal, a newspaper published at Breckenridge, Colo.

The grounds of complaint were substantially as follows: Before making application for patent, on behalf of certain clients, for four mining claims, Mr. Arnold obtained terms from the Summit County Leader and the Summit County Journal, both newspapers published at Breckenridge, Colo. The Leader offered to publish notices of the four applications for \$90, the Journal for \$48, thus making a difference in cost to the applicants of \$42. Upon filing the applications, he requested the register to direct publication in the Journal, both papers being published equidistant from the claims. This the register refused to do unless the proprietor of the Journal would enter into bonds with him for the continuance of regular publication of his paper during the sixty days required by law.

On November 10 last I called upon you for a full report in the matter, which the register furnished by letter of November 26 last. He explains his action by stating that he did not at the time, and does not now, regard the Journal as "a reputable newspaper of general circulation"; also, that in cases where he has doubts as to the stability of a newspaper, it has been his custom to require bonds for the continuance of publication, similar to that mentioned above, and that such bonds have been promptly furnished by other papers.

The complainant raises the question, What is the legitimate discretion of the register in regard to the publication of notices?

Section 2325, Rev. Stat., provides that the register shall publish the notice "in a newspaper to be *by him* designated as published nearest to such claim." This section, according to the construction adopted by the Department, vests a discretion in the register even as to papers published at unequal distances from the claim, and he may exercise his official judgment in designating a paper which is not the one published nearest the claim, under certain circumstances. (See *Tomay et al. v. Stewart*, Department and Office Decisions, 583.) Where papers are published equidistant, or very nearly so, from the claim, the decision

rests entirely with him. (See case of the Omaha Quartz Mine, Copp's U. S. Mineral Lands, 2d ed., 198.)

The power of designation in the latter class of cases, to which the one under consideration belongs, being given by the law to the register, I do not feel authorized to interfere with his decisions. Moreover, he assigns as the reason for his action a fact that would justify him in declining to order publication in the Journal, even if that paper were published nearer the claim than any other paper, viz., that in his opinion it is not "a reputable newspaper of general circulation," as required by the rulings of the Department.

It does not seem to me that the register has exercised the power conferred upon him in an arbitrary manner. He has offered to publish notices in the Journal if its proprietor would assure him, in a manner which does not appear unreasonable, that its publication would not be interrupted. No objection has been made to similar demands in other cases. Without some such assurance, and entertaining doubts as to the stability of a paper, he would violate his duty if he should direct publication to be made therein. His action in the present case seems to me entirely proper.

For these reasons I must decline to interfere in the matter.

I wish to add, however, that where two or more papers of repute and general circulation are published equidistant, or very nearly so, from a mining claim for which application has been made, the register should be guided in the exercise of his discretion by a due regard for the convenience of the applicant, all other things being equal.

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## X.—PATENT.

### *SUIT TO VACATE—RES ADJUDICATA.*

#### 1. THOMAS STARR ET AL.

Where full opportunity has been given for adverse interests to be heard, and the questions involved have been decided by the Secretary of the Interior, the institution of suit to set aside the patent will not be recommended upon a petition which rests upon allegations before considered, and where no fraud is shown.

*Secretary Teller to Commissioner McFarland, November 19, 1883.*

SIR: I am in receipt of your letter of the 15th ultimo, in the matter of the application of T. A. Green, esq., as attorney for certain citizens of Leadville, Colo., for permission to bring suit, in the name of the United States, to vacate placer mineral patents issued to Thomas Starr, Stevens & Leiter, and others.

You recite very fully the facts in the case and the allegations contained in the affidavits of the witnesses on the part of the applicant. It is not my purpose to refer to these facts any further than to say that

upon them I agree with your conclusions, and that upon the presentation and the questions raised there is no justification for recommendation of favorable action upon the application. I desire, however, to remark upon the efforts that are made to disturb the possession of the property, which has been held by the original locator and his assigns for a number of years. The patent was issued in the early part of 1879. Before patent was issued a hearing was had, at the instance of citizens of Leadville, to determine the character of the land involved, it having been alleged to be non-mineral. Testimony was taken and full opportunity was afforded to present all the facts, *pro* and *con*, involved in the application for location of this claim, under the placer mining law, before the local office in Leadville, and to be heard by the General Land Office and the Secretary of the Interior. Parties claiming interest adverse to the claimants had an opportunity to file an adverse claim, and have their rights determined in court. The Commissioner, on the evidence so taken, at that time decided that the application of Starr should be allowed, giving at length his reasons for this conclusion, and on the appeal of the case to the Secretary the decision of the Commissioner was affirmed. Here was a deliberate adjudication by the Secretary of the Interior, after (as we are bound to conclude from the Departmental record of the proceedings) a most careful and thorough investigation of the facts and the law in the case.

The present applicants for action to set aside this solemn and important act of the Land Department now set up substantially the same circumstances and allegations both of law and fact which were considered before the issuing of the patent, and seem to think that there never is a time when litigation should end and vested rights be settled beyond recall. I know that in times past a certain liberality in granting similar requests has prevailed in this Department, but I am informed that of late years a more conservative rule has been adopted in regard to such matters. The Supreme Court, as well as the circuit courts of the United States, has laid down principles and requirements as conditions precedent to granting a decree to set aside patents issued by the Land Department which have been construed, I think, very properly as an expression of views by the courts to the effect that the officers and Departments of the United States Government should not, without very good and sufficient reasons, institute proceedings of the character asked for by the applicants in this case.

If I were convinced that the patent to Starr and others was issued upon false and fraudulent evidence, so introduced without opportunity for proper examination or rebuttal, as to necessarily affect the judgment of the officers of this Department, I should feel it my duty, unless innocent purchasers had acquired possession of the property, to request the Attorney-General to institute the appropriate proceedings; but mere general allegations of fraud and misrepresentation will not suffice, and to deliberately decide in effect, in the absence of such absolute

proof of fraud, that my predecessor, and the officers under him, reached an erroneous conclusion is to invite not only want of respect for the adjudications of this office and the dependent patents, but endless litigation. It is obvious that if such a course were to be adopted titles in the Western country would be of little value, and the growth of communities upon the public lands would be retarded or stopped altogether.

You will please furnish to Mr. Green a copy of your letter to me and of this letter, as an answer to the application which he makes in behalf of certain residents of Leadville, Colo.

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*APPLICATION TO SET ASIDE PATENT—HEARING—EXPENSE.*

**2. ALEXANDER MOORE ET AL.**

Where one attacks an existing patent on allegations of fraud with the purpose of himself entering on vacation of the patent, and a hearing is ordered to ascertain the facts, he should make such full *prima facie* showing at his own expense as will enable the Land Department to decide whether it will request suit to vacate the patent.

If the party attacked desires to rebut such *prima facie* showing, he should submit his testimony at his own expense.

*Secretary Teller to Commissioner McFarland, February 27, 1884.*

SIR: On June 18 last I considered the respective applications of Alexander Moore *et al.* for proceedings to set aside the patents under the pre-emption laws, and the lists to the State of California for the subdivisional parts of Sec. 12, T. 1 N., R. 1 E., in the San Francisco, Cal., land district. The applicants claiming that the tracts in question are coal lands, and not subject to such patents and listing, applied to purchase them under the act of March 3, 1873 (17 Stat., 607), and filed affidavits tending to show that the lands were of such character. As preliminary to the proceedings asked for, I directed that you order a hearing to ascertain the facts.

Under date of the 20th instant you transmit to me a letter from the local officers to you, from which it appears that they ordered such hearing, that all parties in interest were present upon the day assigned, but that no testimony was submitted in consequence of disagreement between them as to which party should deposit money therefor. The local officers thereupon asked instructions from you "to govern this and similar cases," and also "where (aside from a homestead entry) an entry is attacked for non-compliance with law, which party is to be held responsible, and required to deposit for cost of testimony, or whether each must pay for testimony submitted by them," and you transmit the same with accompanying papers to this Department.

Without intending to establish any new rule of general practice, I think that where one attacks an existing patent on allegations of fraud,

with the purpose of himself entering the land on vacation of the patent, and a hearing is ordered to ascertain the facts, he should make such full *prima facie* showing at his own expense as will enable this Department to decide whether it will request suit to vacate the patent. If the party attacked desires to rebut such *prima facie* showing, he also should submit his testimony at the hearing at his own expense, unless he elects to let the matter proceed and take the risk of making his defense in court, and you will direct the local officers to apply this ruling to the present case.

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*DECEASED OWNER—APPLICATION BY ADMINISTRATOR.*

**3. HENRY WOOD, ADMINISTRATOR.**

A patent upon an application made by the administrator of a deceased owner should issue to the heirs of such deceased owner.

*Commissioner McFarland to the register and receiver, Salt Lake City, Utah,  
May 24, 1884.*

**GENTLEMEN:** In the matter of mineral entry No. 941, made by "Henry Wood as administrator of the estate of Isaac S. Waterman, deceased, and in trust for said estate and the heirs, devisees, and legatees thereof," September 27, 1883, for the Summit lode claim, the register's certificate of posting notice is herewith returned that the register may attach thereto the notice therein referred to as attached. In all cases where such proof of posting notice is submitted, the notice therein referred to should be attached to the register's certificate.

The *application* for patent is made by said Wood, who, as administrator of said estate, therein alleges himself to "be in the exclusive possession of said mining claim as trustee for the heirs, devisees, and estate of said deceased." Following my decision in the Union lode claim mineral entry 478, communicated to you under date March 23, 1883, the register's final certificate of entry is herewith returned, that if, after due notice to the parties in interest, no objection is made, the register may correct said certificate so as to show entry of said claim by "the heirs of Isaac S. Waterman, deceased."

**XI.—PLACER CLAIM.*****ADDITIONAL LOCATION—EXPENDITURES.*****1. JOSEPH M. KNAPP.**

Where an application for patent embraces a placer location properly made and assigned to applicant, and also additional ground claimed by virtue of a relocation by himself of the original location, enlarging its boundaries, such additional ground must not exceed the amount of 20 acres. As such application embraces land claimed under two separate locations, \$500 must be shown to have been expended upon or for the benefit of each location.

*Commissioner McFarland to the register and receiver at Leadville, Colo., October 16, 1883.*

GENTLEMEN: In the matter of mineral entry No. 1573, made January 17, 1883, by Joseph M. Knapp, upon the "Corkscrew Placer," I find on examination that the applicant, in his affidavit that plat and notice remained posted on claim during the sixty days of publication, has failed to give the date of posting. A new affidavit is required giving date of posting. The application for patent embraces two locations, and the applicants have failed to furnish a certificate of the surveyor-general that not less than \$500 worth of work has been expended upon or for the benefit of *each separate* location.

You must require applicant to comply with paragraph 8 of circular of this office of the 9th of December, 1882.

I find, further, that the original location was made by Leonard S. Ballow and William H. Strohm, and embraced *thirty-eight* acres, which was subsequently sold and conveyed by them to the applicant for patent; that afterwards, to wit, on the 16th day of June, 1882, the said Knapp, applicant for patent as aforesaid, made an additional location, embracing the 38 acres acquired by *purchase* from Ballow & Strohm, with the addition of enough more to make the area of his claim 66.23 acres, to wit, an addition of 28.23 acres.

Thus, as *purchaser* under the location made by Ballow and Strohm, applicant claims 38 acres, and by virtue of the *relocation* made by him on the 16th day of June, 1882, he claims 28.23 acres additional. Applicant's claim as *purchaser* to said 38 acres is *perfect*, as shown by the abstract of title, and would be to that extent, in the absence of the relocation, approved for patent on receipt of satisfactory proof on the points indicated.

Under the regulations of this office, said relocation of June, 1882, must be restricted to 20 acres additional to the area covered by the purchase from Ballow and Strohm, and said amended location being in excess of 20 acres additional to the 38 acres acquired by purchase from the original locators, the same is null and void as to such excess, and to that extent must be canceled.

Outside of his original purchase the applicant will, however, be allowed

to designate the 8.23 acres or portion of the claim to be canceled, and after such designation has been made, the survey will have to be amended to conform thereto.

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*CONSTRUCTION—LEGAL SUBDIVISIONS—UNNAVIGABLE STREAMS—USUFRUCT.*

2.\***WILLIAM RABLIN.**

Sections 2329 to 2331, Rev. Stat., should be construed as requiring placer claims situated upon surveyed lands to conform to the legal subdivisions thereof, only where reasonably practicable.

A placer location may include the bed of an unnavigable stream, and the locator has an usufruct in the water therein.

*Secretary Teller to Commissioner MoFarland, January 5, 1884.*

SIR: I have considered the appeal of William Rablin from your decision of January 16, 1883, holding for cancellation his mineral entry No. 819, for the Bear River Extension Placer, in Secs. 12, 13, and 14, T. 15 N., R. 9 E., Sacramento land district, California.

It appears that the location was made since 1872, and after official survey of the adjacent territory, that it covers the bed of Bear River for some 12,000 feet and a small quantity of surface-ground along its banks, and that it does not conform to the system of surveys. From the evidence on file it appears that the "Bear River" is a very small, unnavigable stream, winding through a cañon, with precipitous, non-mineral, and uncultivable banks, wherein have accumulated extensive placer deposits, which are embraced in said location.

Your decision is grounded on the alleged fact that the location does not conform "as near as practicable" to the system of public surveys, for the reason that the law requires "that placer locations upon the surveyed lands shall conform to the public surveys in all cases, except where this is rendered impossible by the previous appropriation or reservation of a portion of the legal subdivision of ten acres upon which the claim is situated." I think that sections 2329 to 2331, Rev. Stat., should not receive so narrow a construction. While they provide for ten-acre subdivisinal surveys, they also contemplate cases where it is not practicable to conform the location to such subdivisinal lines. They do not limit such cases to those where there has been a prior appropriation of a part of the subdivision, but extend it to every case where it may be impracticable to so locate the claim. The expression "as near as practicable" is therefore to be read "as near as reasonably practicable," and in each case presenting itself a sound discretion must be exercised in determining the question of practicability. It would be manifestly improper to limit it to a single case, namely, a prior appropriation of part of the subdivision, as your office seems to have done; for such a case is provided for by the general laws concerning the disposal of public lands, and in

the placer-mining statutes, Congress has evidently intended to provide for cases where the situation of the deposits is such that conformity of the location with subdivisional lines is unreasonable. It was the intention of the mining laws, generally, to permit persons to take a certain quantity of land fit for mining, and not to compel them to take such a quantity irrespective of its fitness for mining. The act of July 9, 1870, which expressly required placer locations to conform to the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established custom of the mining regions; therefore it was modified by the act of May 10, 1872, so as to provide for exceptional cases where reason and common-sense required a different regulation. Such an exceptional case, in my judgment, is that now before me, where the entire placer deposit in a cañon within certain limits is claimed, and where the adjoining land on either side is totally unfit for mining or agriculture.

As to the additional reason for cancellation suggested in your decision, namely, that it is against public policy to allow placer-mining in the beds of unnavigable streams, and that the patentee would obtain a right to and control over the water, it is not necessary to discuss these points at length, I think. It is well settled that if the beds of unnavigable streams contain mineral deposits they may be appropriated for mining purposes, and that, as to the water, the locator obtains only an usufruct in it.

For these reasons your decision is reversed.

Herewith are returned the papers accompanying your letter of March 20, 1883.

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## XII.—PRACTICE.

### *HYPOTHETICAL CASES.*

#### 1. WILLIAM LLOYD PEACOCKE.

The Department will not decide questions irregularly presented.

*Commissioner McFarland to William Lloyd Peacocke, Salida, Colo., December 14, 1883.*

SIR: Your letter of the 1st instant to the honorable Secretary of the Interior, asking a decision as to the validity of your coal declaratory statement No. 5, at the time it was made at the land office at Del Norte, has been referred to me for reply.

You are advised that the Department declines to express an opinion on hypothetical cases. When the case comes up in proper form it will be decided.

I have stated substantially the same thing in three former letters to you on this subject. You will no doubt see the impropriety of a decision in a case irregularly presented, without a full knowledge of the facts, and without opportunity for other parties to be heard.

*NOTICE—HEARING.*

## 2. MOYLAN C. FOX.

The Rules of Practice in regard to notice must be strictly followed.

Because of failure to do so, the case is remanded for rehearing after due notice.

*Commissioner McFarland to the register and receiver, Salt Lake City, Utah,*  
*March 5, 1884.*

SIR: I am in receipt of your letter of January 15, 1884, transmitting the testimony taken in the matter of the application of Moylan C. Fox, for the Selah lode, lot No. 148, Ophir mining district, Tooele County, Utah.

The record in the case shows the following facts:

On July 10, 1883, the above application was presented to you and rejected, because it conflicted with four prior applications, viz: Mineral applications Nos. 107, upon the "Miami" lode; 392, upon the "Etna" lode; 393, upon the "I. X. L." lode; and 395, upon the "Grecian Bend" lode.

The applicant for the "Selah" lode alleged the abandonment of the mining claims upon which said prior applications had been made, and at his request the papers in the case were forwarded to this office for review. On October 10, 1883, I directed you to order a hearing, in accordance with the Rules of Practice, to determine whether or not the "Grecian Bend" lode (lot No. 116), the "Miami" lode (lot No. 52), and the "I. X. L." lode (lot No. 115) had been abandoned. The "Etna" lode (lot No. 117) was made the subject of a separate letter and order.

On October 23 following you issued notice of a hearing, to be held on November 30, 1883, to Henry W. Lawrence and Clara C. Darling, applicants for patent for the "Grecian Bend" lode claim; Theodore F. Tracy and William A. Rooks, applicants for the "Miami" lode claim; and Charles H. Raymond, applicant for the "I. X. L." lode claim. Upon a proper showing that personal service could not be made upon Tracy, Rooks, and Raymond, you ordered publication of the notice for thirty days in the Salt Lake Weekly Tribune. The record shows that such notice by publication was properly given from October 25 to November 29, 1883. There is, however, no proof that a copy of the notice was mailed to Tracy, Rooks, and Raymond, or posted upon the land in controversy, as required by Rule 14 of the Rules of Practice.

Personal service was made on Lawrence and Darling on November 2, 1883, as appears by the affidavit of Samuel L. Spray, United States deputy marshal.

On November 13, 1883, the contestant, Fox, appeared with counsel and witnesses, and, after filing "due proof of service of notice," as you state, submitted testimony, upon which you decided that the "Grecian Bend," "Miami," and "I. X. L." lode claims had been aban-

doned. You report that the parties in interest were duly notified of your decision and of their right of appeal, and that thirty days had elapsed after such notice at the date of your letter, and that no appeal had been filed.

I cannot, however, approve your decision, in view of the irregularities apparent on the face of the record. Besides the defect in proof under Rule 14 of Practice, mentioned above, which might possibly be supplied now by the contestant, the notice to Lawrence and Darling was insufficient under Rule 8, which requires *at least* thirty days' notice of a hearing to be given. Notice was not served until November 2 of a hearing to be held on November 30 following—a plain disregard of the rules of procedure. See my letter of August 13, 1883, to the register and receiver at Fargo, Dak., requiring a strict compliance with the above rule. (10 Copp's Land Owner, 189.) In cases like the one under consideration, where the superior standing before the Department acquired by the former applicants is to be attacked, the contestant, in order to destroy that precedence, must strictly observe the rules of proceeding which govern such action. See office decision in O'Dea v. O'Dea (10 Copp's Land Owner, 290), where a rehearing was ordered because the affidavit for notice by publication was filed *after* such notice.

Because of the irregularities mentioned, the case is remanded to you for rehearing after due notice.

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*CERTIORARI—APPEAL—ABANDONMENT—ENTRY—PUBLIC DOMAIN—PATENT.*

3. F. P. HARRISON.

*Certiorari* is not a writ of right, but whether it shall issue in any case lies within the discretion of the tribunal to which the petition has been addressed.

Where it appears that the failure to appeal is not due to the laches of the party, it does not prejudice his rights.

Entry gives the purchaser complete equitable title, which is not subject to forfeiture under the provisions of section 2324, Revised Statutes. An entry made before the circular of July 6, 1883, went into operation might properly embrace more than one lode location.

Where an entry has been erroneously canceled the claim covered thereby cannot be appropriated by mere strangers to the record, who had located it while the entry was still subsisting. Such entry should be reinstated.

The right to a patent is not traced beyond the entryman.

*Secretary Teller to Commissioner McFarland, June 2, 1882.*

SIR: I return herewith the papers certified by you November 20, 1883, pursuant to my direction of the 7th of that month, in the matter of the application of one F. P. Harrison for patent for the Gold Blossom quartz mining claim, designated as survey No. 39, situate in the Ophir mining district, Placer County, Sacramento district, California.

It appears that Harrison applied, November 13, 1875, for 3,000 linear feet of the Gold Blossom quartz lode, 1,500 feet whereof having been located November 9, 1872, by J. H. Crossman *et al.* (who conveyed same to him by deed dated July 2, 1875), and 1,500 feet March 20, 1873, by himself.

Notice of such application was duly given by publication and otherwise, pursuant to legal requirements, and no adverse claim having been filed during the period of publication, Harrison paid for and entered his claim, per mineral entry No. 457, January 22, 1876.

Two days thereafter he sold and conveyed by deed, dated January 24, 1876, the westerly 1,500 feet of said claim "to James H. Crossman and Mrs. Johnson."

February 21, 1877, Harrison died at Auburn, Placer County, California.

December 12, 1878, your office held said entry for cancellation, upon the ground that the application embraced two separate locations surveyed as one claim, and that the plat and notice were not posted on each location.

September 2, 1880, the register reported to your office that Harrison had been notified by letter dated January 8, 1879, of said decision of December 12 preceding, but that he had not appealed therefrom.

December 30, 1880, the register reiterated his former report.

No further action appears to have been taken until January 20, 1883, when Crossman's attorney forwarded his affidavit to your office, alleging sole ownership in the whole of said claim by virtue of a certain deed from Harrison executed and delivered shortly after he had made the entry in question; that he did not learn of the said action of December 12, 1878, until the autumn of the year 1882, when he requested that the surveyor-general of California be instructed to so modify and amend the survey of said claim as to embrace only the western 1,500 feet thereof.

January 30, 1883, the register forwarded to your office the petition of W. H. Power and P. C. Du Bois (signed by both, but only sworn to by Du Bois) for a hearing to determine the question of the applicant's abandonment of his claim, said petitioners alleging failure on his part, and on the part of his privies in estate, since the year 1875, to perform the requisite amount of annual assessment labor or make such improvements upon said claim; that on August 13, 1880, one D. W. Spear, finding said claim "vacant, unoccupied, and open to location, proceeded to locate and did locate" the western "1,500 linear feet of said Gold Blossom ledge," etc.; that Spear continuously thereafter held and worked his claim until the 29th November, 1882, "when these petitioners succeeded by purchase and conveyance to all the right, title, and estate acquired by said Spear by virtue of said location, etc., \* \* \* and are now in possession thereof, working the same," for which they desire to apply for patent.

March 10, 1883, you denied Crossman's application for an amended survey of said claim, and canceled the entry in question, but held that if he desired to obtain a patent for 1,500 feet thereof, he could apply to the surveyor-general to have the same surveyed. April 9, 1883, Crossman appealed from such action, but October 20 ensuing you denied his right of appeal. Wherefore he applied for *certiorari* pursuant to Rules 83 and 84 of Practice.

The action of your office was based upon the ground that the claim in question had been surveyed as one claim; that the plat and notice were not shown to have been posted separately upon the several locations; that no appeal having been taken from the aforesaid decision holding the entry for cancellation, such decision had become final; and that the applicant having had his day in court, and the time within which he could have exercised his right of appeal having expired, neither he nor his assignee could be heard as a matter of right.

Certiorari is not a writ of right, but whether it should issue in any case lies within the discretion of the tribunal to which such petition has been addressed. Inasmuch as such petition in the premises seemed to discover a *prima facie* basis for the issuance of such writ, substantial injustice appearing to have been done by the action of your office, I accordingly, by my letter of November 7, 1883, directed you to certify the proceedings in question to this Department.

It is true that no appeal was taken from the aforesaid decision of December 12, 1878, but the record discovers *prima facie* proof of the decease of the applicant, Harrison, February 21, 1877. Such proof would seem to account for his alleged laches or failure to appeal from said decision, and if no dereliction is chargeable to decedent, none can be charged against his privy in estate, Crossman, he never having been notified.

By your aforesaid decision of March 10, 1883, you very properly held that "so long as Harrison's entry remained uncanceled, a second application for patent could not be allowed;" but you further held that "the entry being now disposed of, the land will be subject to appropriation by the application of the first qualified applicant, and any person having adverse rights may have them determined and adjudicated by the local courts."

The entry in question had lain dormant in your office for upward of seven years before it was finally canceled, and all the antecedent basic proof was presumably regular and sufficient.

It is an elementary principle of law that when any judicial or official act is shown to have been performed in a substantially regular manner, it is presumable, and it may be generally assumed, that the formal prerequisites have been complied with. But said entry having been erroneously canceled, I do not regard the claim covered thereby as subject to appropriation by these petitioners, who are mere strangers to the record.

They have attempted to relocate a portion of the mining claim, which had been entered and paid for by decedent Harrison, with full knowledge of the existence of the entry. The theory of their protest seems to be that they have a legal right to relocate the claim in question at any time prior to the issuance of patent, based upon the failure of the mineral applicant or his privy in estate, Crossman, to perform the annual labor or make the requisite improvements upon said claim.

The sole question, therefore, to be considered is, whether such claim is subject to relocation by strangers, in the interim of entry and the issuance of patent, even though the entryman may have failed to perform the labor or make the improvements required by section 2324 of the Revised Statutes.

Section 2324, Revised Statutes, has reference solely to title by right of possession, and does not in any way conflict with titles acquired by purchase; for, in the latter case, both must be in one and the same person. The mining laws require certain acts, in the nature of conditions precedent, to be performed before an entry is made, and the validity of the entry is made to depend upon the facts existing at the time it is made, and not upon anything which the claimant may do, or omit to do, afterwards. \* \* \*

The true rule of law governing entries of the public lands, to which mineral lands form no exception, is that when the contract of purchase is completed by the payment of the purchase-money and the issuance of the patent certificate by the authorized agents of the Government, the purchaser at once acquires a vested interest in the land, of which he cannot be subsequently deprived, if he has complied with the requirements of law prior to entry; and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is a part performance of a contract of sale which entitles the purchaser to a specific performance of the whole contract without further action on his part. When the proofs are made, and the purchase-money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts, and relates to the date of entry, to the exclusion of all intervening claims.

In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.

As the doctrine is firmly established that where several concurrent acts are necessary to make conveyance the original act shall be preferred, and all subsequent acts shall have relation to it, it is held that an entry made is equivalent to a patent issued, within the meaning and intent of section 2324 of the Revised Statutes.

See decision rendered by this Department March 4, 1879, *in re American Hill Quartz Mine*, Copp's U. S. M. L., 255 for a résumé of the intentment of the law in question.

The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued. When, in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants. (*Stark v. Starrs*, 6 Wallace, 402; *Witherspoon v. Duncan*,

4 *id.*, 218; Opinion of the Attorney-General, 8 Copp, 72; and Graham v. Hastings and Dakota R. R. Co., 9 *id.*, 236.)

Section 2324, Rev. Stat., contemplates that the prescribed amount of labor or improvements be performed and made annually upon each and every mining claim until patent shall be issued therefor; but it will be observed that such requirement is inapplicable to a case where the applicant has paid for and entered his claim, as has been done in the premises; inasmuch as the language of the section has reference merely to the right of possession—which is the very lowest grade of title known to the mining laws or any other law. The preliminary act of location is a basis for the vested possessory right, which is recognized by law, and of which the claimant cannot be dispossessed save upon the ground of absolute abandonment.

Section 2324, the only statute affecting this question, must be construed in connection with section 2325. Both have reference to the possessory title of an applicant for patent, and the mode of acquiring patent; the latter providing that, if no adverse claim is filed during the period of publication, it shall be assumed that none exists. It would, therefore, seem immaterial, after proceedings under section 2325, whether or not the requirement of section 2324 is complied with to the extent named in your decision, because, if parties have not been properly notified, or have paid their share of the assessment work, they must still file their adverse claim under the proceedings contemplated in section 2325. They waive their rights by failure to file such claim; and upon such failure, the law not only assumes that no such claim exists, but if the antecedent publication and attendant proceedings have been regular, all that might be set up by suit in court has been adjudicated in favor of the applicant. (Grampian Silver Mining Company, 9 Copp, 113; Copper Prince Mine, *The Reporter*, vol. 1, p. 118.)

It was not a part of the public domain, being in the possession of the applicants for patent under at least a color of title. Whether they had complied with all the provisions of the law or not, there had been such a compliance that full and complete notice was given to protestants and all others that the occupants thereof claimed to hold it under the laws provided for the acquirement of title to mineral lands. The law had fixed the time and method by which parties disputing this claim might be heard, and they did not avail themselves of that provision." (Maid of Erin Mine, *Brainard's L. P.*, 478.)

With respect to the several grounds upon which the aforesaid decisions of your office were based (see same recited *supra*, p. 4), and more especially the ground upon which the decision of December 12, 1878, was based, and reiterated in those ensuing, to wit, "The established rule of this office precludes the embracing of more than one lode claim in one application for patent," &c., it will be observed that while you may have regarded the first utterance in question as in accord with the full measure of the light you then possessed upon the subject, the subsequent reiterations of such utterances cannot now be so regarded, in the light of recent judicial interpretations of the law of this case, especially those of the United States Supreme Court.

As was thereby very aptly said in the case of *Smelting Co. v. Kemp* (104 U. S., 636):

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. \* \* \* It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the Department, and its propriety has never before been questioned. Patents, we are informed, for mining ground of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the propositions assumed by the defendants could be sustained.

In the light of the aforesaid precedents, I am of the opinion that the several grounds of your objections, hereinbefore recited, are wholly untenable; that the entry canceled pursuant to your decision of March 10, 1883, should be reinstated forthwith, and patent issue thereupon to F. P. Harrison, his heirs or assigns, for the 3,000 linear feet covered by such entry.

This is, of course, intended to apply only to cases like the present, arising anterior to the circular instructions of 8th June, 1883, approved by me the 6th of July, and is in harmony with modified instructions of 20th December, 1883.

It will be observed, however, that notwithstanding Crossman's allegation touching his sole ownership in the whole of said claim, by virtue of a certain deed from Harrison, executed and delivered only two days after he had made said entry, such deed conveyed only the western 1,500 feet of said claim, according to the immemorial rule that invariably obtains in the construction of the descriptive clause of deeds and similar instruments touching the title to real estate. But as your office never pursues the patentee in such a case beyond the entryman, any possible difficulty that might otherwise have arisen by reason of the discrepancy between his alleged title and that shown to have been vested in him by said muniment thereof will be obviated by the issuance of said patent for the premises in the manner suggested—in the name of the decedent, etc. Thus the paramount right, if any, to the eastern 1,500 feet of said claim will inure to the benefit of him whose right may so appear.

The certificate of the clerk of the district court for Placer County, California, that no suit is pending "involving the right of possession

to any portion of the Gold Blossom quartz mining claim," &c., is filed in lieu of the judgment-roll, and is equally satisfactory for the purposes of this case.

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### XIII.—SURVEYS.

#### *DEPOSIT—FIELD WORK—OFFICE WORK.*

GEORGE B. FOOTE.

No deposit is required to accompany an application for a survey in the field. For platting or office work a deposit must be made.

*Secretary Teller to Commissioner McFarland, November 2, 1883.*

SIR: I have considered the appeal of George B. Foote from your decision of November 18, 1882, rejecting his application unaccompanied by a deposit of money with the surveyor-general, for survey by an United States deputy surveyor, whom he had personally employed for the purpose, of the Transit lode and mill site.

Your decision affirmed that of the surveyor-general.

The third section of the act of July 26, 1866 (14 Stat., 251), required an applicant for mineral patent to pay all the expenses incident to the survey of the tract applied for, and your regulations required from him a deposit equal to the estimated cost of the survey, plat, and publication of his notice, before commencement of the survey.

The ninth section of the act of May 10, 1872 (17 Stat., 91), repealed several sections of the act of 1866, including said section 3; but section 12 of the act (1872) continuing the requirement that the applicant should pay the expenses of survey and publication of notices authorized him to obtain the same at the most reasonable rates, and to employ any United States deputy surveyor to make the survey. It also empowered the Commissioner of the General Land Office to establish the maximum charges for such surveys and publications, and in case of excessive charges for publication to designate any newspaper published in the proper district, and fix the rates to be charged; and to the end that he might be fully informed on the subject the applicant was required to file with the local officers, for transmission to your office, a sworn statement of all charges and fees paid by him for publication and surveys, with all fees and money paid such officers. This section was intended, apparently, to protect applicants for mining patents from unjust charges for survey and publication; authorizing them, in respect to the survey, personally to contract with a deputy surveyor for his services upon such terms as they might agree upon, and your office to control the cost of publications. This section was incorporated into the Revised Statutes as section 2334, and is still in force.

Your published mining laws and regulations of October 31, 1881 (clause

83), after saying that surveyors-general would, in pursuance of said section, appoint "as many competent deputies for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States," further says: "The system of making *deposits* for mineral surveys as required by previous instructions being hereby revoked as regards *field work*, the claimant having the option of employing *any* deputy surveyor within such district to do his work in the field."

I understand *field work* to be the surveyor's notes of bearings, distances, etc., in the field, or a determination on the land of its form, extent, position, etc., by means of certain measurements. This constitutes the survey, and it is in relation to such work that the applicant for patent is authorized to contract as he pleases, and in relation to which also your regulations revoke the former rule requiring a deposit with the surveyor-general; no such deposit being now required. Your decision, however, rejects Foote's application for survey, because he did not make a deposit, and is inconsistent with the regulations, and erroneous under the law.

The *platting* of the claim is no part of the survey, but shows only what the surveyor has done, and is *office work*, for which your regulations properly provide that the claimant must make a deposit.

Your decision is reversed, and the survey applied for by Foote to be made by a deputy surveyor employed by himself will be made without deposit therefor with the surveyor-general.

The papers transmitted with your letter of February 24, 1883, are herewith returned.

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#### XIV.—WATER RIGHT.

##### PLACER CLAIM.

WILLIAM A. CHESSMAN.

Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right the application will be rejected.

*Secretary Teller to Commissioner McFarland, December 11, 1883.*

SIR: I have considered the appeal of William A. Chessman from your decision of February 3, 1883, rejecting his application for a placer claim in the Helena, Mont., land district.

The case shows that after location of the claim in 1871 improvements were made thereon to the value of over \$5,000, consisting of two dams, a tail race, a supply ditch, and a cabin (the latter valued at \$25 only). The land is (or was) almost wholly covered by a reservoir of water, leaving but a small portion of exposed land.

The original application did not show the discovery of any mineral on the claim; and although subsequent affidavits tend to show there is a deposit of gold in the gravel, and notwithstanding the principal dam was "washed away" in 1876, thus affording opportunity for mining operations since that date, there is no proof that any mineral has ever been extracted from the land or that work has been expended for that purpose.

I concur with you in the opinion that the patent is not in fact sought for a placer claim but for a water right, and that as such right cannot be patented under a mining claim the application should be rejected.

I affirm your decision and return the papers transmitted with your letter of May 22, 1883.

## DIVISION P.—SPECIAL SERVICE.

- I.—CUT TIMBER.
- II.—FRAUDULENT ENTRIES AND ILLEGAL FENCING OF THE PUBLIC DOMAIN.
- III.—HOMESTEADER.
  - 1. Trespass by, on adjoining lands.
  - 2. Remedy for trespass on claim.
- IV.—PRE-EMPTION.
  - 1. Timber on; protection by whom.
  - 2. Fraudulent entry.
- V.—REFUSE OR SURPLUS TIMBER OF RAILROAD CONSTRUCTION.
- VI.—TIMBER CUTTING.
  - 1. By homesteaders, pre-emptors, and squatters.
  - 2. By railroad on land not selected.
  - 3. In railroad indemnity limits.
  - 4. On Indian reservation.
  - 5. On military reservation—lands abandoned.
  - 6. On mineral and coal lands.
  - 7. On unsurveyed lands.
- VII.—TIMBER TRESPASS.
  - 1. Condonation.
  - 2. Measure of damages.
  - 3. Mill men.
  - 4. Prosecution.

### I.—CUT TIMBER.

#### *NOT OF THE REALTY—TITLE.*

Timber cut before purchase of the land is not part of the realty, and does not go to the purchaser.

The Government may sue for the value after parting with the title to the land.

*Commissioner McFarland to M. Engleman, June 29, 1883.*

SIR: I am in receipt of your letter of the 23d instant, transmitted by the Hon. B. M. Cutcheon.

In reply I will state that no report in relation to the matter forming the subject of said letter has been as yet submitted by Special Timber Agent John H. Welch.

An examination of the records of this office touching the status of the lands referred to shows that title to said tract passed from the Government to William H. Loveless on the 15th of September last. The question of trespass, therefore, depends upon whether the date at which the timber was felled was prior or subsequent to the date of the purchase of the land. If prior, then title thereto did not pass from the Government with title to the land, it being held by this office that cut timber is not

a part of the realty and does not go with the land; that it is personal property, and the value of the same can be sued for after the land has been parted with by the Government.

A copy of your letter will be forwarded at once to Agent Welch, with directions to submit a careful report in the matter. Upon receipt of which—due time being allowed for you to submit the statement, based upon a survey of the lines, referred to in your letter—all the facts and circumstances in the case will receive due consideration, and such action taken in relation thereto as the same appear to warrant.

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## II.—FRAUDULENT ENTRY AND ILLEGAL FENCING OF THE PUBLIC DOMAIN.

*ADDITIONAL HOMESTEAD—ABANDONED WIFE—ACT OF MARCH 3, 1879.*

LOTTIE J. COLE.

Additional homestead entry under act of March 3, 1879, by an abandoned wife on her husband's original entry, which had been patented to him, is illegal.

The right to an additional entry follows from and grows out of the original homestead, and can only be exercised by the original entry man, or by some person who has succeeded to all of his rights under the homestead laws.

*Commissioner McFarland to register and receiver, Montgomery, Ala., November 16, 1883.*

GENTLEMEN: I have this day examined additional homestead entry No. 14,376, in the name of Lottie J. Cole, widow of Thomas D. Cole, deceased, covering the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 10, T. 22 S., R. 2 W.

This entry was made June 20, 1883, under the act of March 3, 1879, and is based on original homestead No. 3,674, covering the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  Sec. 10, T. 22 S., R. 2 W. Thomas D. Cole made final proof on said entry, and the land was patented to him November 1, 1877.

Special Agent Samuel Lee having investigated the case, reports, under date of October 5, 1883, that Thomas D. Cole is still living, and is residing in Selma, Ala.; that he deserted his wife, Lottie J. Cole, in 1877, and has not since lived with her; that the abandoned wife has resided continuously on the original homestead with her children; that she can neither read nor write, and the error in describing her as the "widow of Thomas D. Cole, deceased," was made by Adolph Munter, the person who prepared the papers in the case, and that it was done without her knowledge or consent. The report is accompanied by several affidavits setting forth the facts in regard to how the mistake occurred, and stating that Mrs. Cole is an honest and industrious woman, and would not be guilty of a disreputable act. Munter states that when he

prepared the papers he was under the impression that Thomas D. Cole, with whom he was not acquainted, was dead, but he was not so informed by Mrs. Cole. The clerk of the court before whom the homestead affidavit was made states that the papers in the case were not read over to Mrs. Cole in his presence. Considering that there was no intentional fraud committed by Mrs. Cole, the additional entry must be considered illegal for another reason.

An additional entry under the act of March 3, 1879, can only be made by the original entryman, or by some person who has succeeded to his right, and who, by virtue thereof, holds the original homestead. The additional is based upon the original entry, and the right to the same must follow from and grow out of the original homestead; and the additional cannot be made by a person who does not own, in his or her right, the original.

In this case the original entry was perfected by Thomas D. Cole, and, so far as this office is informed, he still owns the land.

It follows, therefore, that the abandoned wife, whatever her rights might have been had the original entry not been perfected by her husband, could not, after the patenting of the land to him, exercise the right of making an additional entry, at least until the original homestead was cast upon her by operation of law.

The entry must accordingly be held for cancellation. Mrs. Cole is, however, entitled to make an original homestead entry in her own right, she being, as an abandoned wife, regarded as the head of a family for that purpose. If she so elects she may relinquish the additional entry, or waive her right of appeal from this decision, and when the entry is canceled she may make an ordinary entry in her own name, with credit for fees and commissions already paid. In such case it will be necessary for her to establish a residence on the tract within six months after making such entry. Sixty days will be allowed to show cause why the additional entry should not be canceled. Report promptly any appeal or other paper that may be filed showing cause for not canceling the entry, and should none be filed during the period allowed, you will, upon the expiration of such period, report that fact to this office.

You will also advise this office of any waiver of appeal or relinquishment of the entry that may be filed in your office.

*PURCHASERS FROM PRE-EMPTORS—SALES BEFORE AND AFTER ENTRY.*

## CHARLEMAGNE TOWER.

The purchaser from a pre-emptor has no standing before the Land Department. If patent issues, it issues to the pre-emptor, though it may inure to the purchaser's benefit.

The Land Department is prohibited from issuing patent on a void pre-emption entry. Section 2262, Rev. Stat., refers to sales before, not after, entry, and the clause protecting innocent purchasers has reference to the effect of the conveyance as between grantor and grantee, and not to its effect as between either party and the Government.

*Secretary Teller to Commissioner McFarland, December 7, 1883.*

I have considered the appeal of Charlemagne Tower from your decision of February 6, 1883, refusing to dismiss pending contests against certain lands in the Duluth, Minn., land district, and to issue patents therefor, which application he made on the ground that he was a *bona fide* purchaser of said lands after entry, for value, and without notice of any defect in the title of the holders of the certificates.

The record shows that the entries of the said lands are suspended under contest, and that it is alleged that they were procured by fraud and perjury and for speculative purposes. If these allegations are sustained at the hearing the lands will revert to the Government, by express provision of section 2262, Rev. Stat., and the entrymen can never perfect their titles. Consequently the Land Department cannot issue the patents, as Mr. Tower suggests, until the facts are determined at the hearing, and then only in the event that the said allegations are not proved.

As to the request to dismiss the contests because they are clouding the title acquired by his purchase, and for his relief, the Land Department cannot comply, for the reason that it has no relations with Mr. Tower as grantee of those pre-emptors. Any rights which he has acquired by said purchases is a question for adjustment between him and his vendors, and not between him and the Government. If patents are issued, they will issue to the pre-emptor, though they may inure to his benefit.

In his appeal Mr. Tower cites and relies on that clause in section 2262, Rev. Stat., which provides that, in case of fraudulent settlement by a pre-emptor, "Any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void." In the first place, said clause refers to grants and conveyances made *before* entry, as appears by the context—which is the construction given it by the Supreme Court in *Myers v. Croft* (13 Wall., 291)—whereas in this case the conveyances were made *after* the entries; and, in the second place, said clause has respect to the effect of the conveyance as between grantor and grantee, and not to its effect as between either party and the Government. Consequently it furnishes no basis for the aforesaid requests by Mr. Tower.

He also cites *Smith v. Van Cleef* (6 Land Owner) as holding that "an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned." Whilst this is true, an examination of that case, and of the authorities on which it is based, will show that the said rule refers only to entries that are not fraudulent.

For these reasons your decision is affirmed.

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#### CHARLEMAGNE TOWER (ON REVIEW).

*Secretary Teller to Commissioner McFarland, February 20, 1884.*

I have considered the motion of counsel for Charlemagne Tower for a review of my decision of the 7th ultimo (see 10 Land Owner, 297) dismissing his appeal.

Said decision held, first, that the Land Department was prohibited from issuing to the pre-emptor a patent on a void entry; second, that Mr. Tower purchased from the pre-emptors *after* entry, and therefore was not protected by the clause in section 2262, Rev. Stat. (which refers to purchasers *before* entry, as was held in *Myers v. Croft*, 13 Wall, 291); and third, that, even if protected by said clause, the Land Department has no jurisdiction in the case, for the reason that said clause has respect to the effect of a conveyance as between grantor and grantee, and not to its effect as between either party and the United States. The argument now filed with the motion for review attempts to controvert each one of the said rulings.

As to the first ruling, the contention is that, if Mr. Tower's rights as a *bona fide* purchaser are protected by section 2262, the statute contemplates the issue of patent to the pre-emptors notwithstanding the fraud. I think that such a view is untenable. The section is specific in declaring that a fraudulent entryman forfeits "all right and title" to the land. As the patent is a conveyance of the title, if the entryman has not acquired a right to the land, he has not acquired right to a patent for it (*Levi v. Thompson*, 4 How., 17). The words declaring the forfeiture are unambiguous, and, considered by themselves, they require no construction; nor do they conflict with the succeeding clause in the section, so as to produce ambiguity upon this point. If we read the clause thus, "A person who makes a speculative settlement shall not acquire title to the land, but his conveyance of it shall not be void in the hands of an innocent purchaser"; and if we construe this to mean that, though he may not acquire title himself, he may, nevertheless, vest title in his grantee, who is an innocent purchaser (which construction, however, I do not think sound), still it is clear that the entryman, having no right to the title, has no right to the patent, and that, if patent issues at all, it must issue to his grantee. Therefore, upon reconsideration, I adhere to said first ruling.

As to the second ruling, the contention is that the clause which validates a pre-emptor's conveyance in the hands of a *bona fide* purchaser has respect to such conveyances as were made to Mr. Tower, namely, conveyances made after entry and before patent. If we place together the parts of section 2262 material to this case, they will read as follows:

Before any person is allowed to enter lands, he shall make oath that he has not settled upon and improved such lands to sell the same on speculation, and that he has not made any agreement or contract by which the title which he might acquire should inure to the benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void, except as provided in section 2288.

It is clear that the claimant must make oath to two facts, namely, that he did not settle for speculative purposes, and that he has not made such a contract that his title will inure to another person. That a person made a speculative settlement may be proved by a contract before entry to convey after entry; and thereupon the entry is void, as expressly ruled in the case of *Harkness v. Underhill* (1 Black, 316), and impliedly in *Myers v. Croft* (*supra*). That he made settlement, and before entry made such a contract that any title he might acquire would "inure" to another, could only be proved by a formal conveyance of the land; such a conveyance, when the settler procured title, would inure by operation of law to his grantee (*Ellwood v. Fannigan*, 104 U. S., 562), whilst a mere executory contract would not so inure to him. And such a conveyance would be void under the above authorities, and could not be enforced in the courts against the grantor, unless expressly protected by statute. It is clear, however, that the last clause of the section, as above cited, indicates an intention to protect it, and therefore the two clauses are to be construed together as providing that the settler shall not convey the land to another prior to entry, and, if he does, the conveyance shall be void, except in the hands of a *bona fide* purchaser. Thus, from a consideration of the subject-matter, it appears that the "grant or conveyance" referred to is one made prior to entry.

This view is enforced by the grammatical structure of the clauses. The former refers to an agreement which the settler "has made," and the latter to a conveyance which he "may have made," and they thus indicate that the times of making were one and the same; since the agreement must have been made before entry, the conveyance must also have been made before entry. Again, the last clause avoids a conveyance, excepting, however, a conveyance made under section 2288. Said section provides for a conveyance made before title is acquired, and hence made before entry, and therefore the reasonable inference is that the only conveyances contemplated were those made before entry.

I have said that this construction was adopted by the Supreme Court in *Myers v. Croft*, and this counsel deny on the ground that that case

only decided a question arising under section 2263 Rev. Stat. In that case one Fraily had made a conveyance immediately after his entry, and that part of the opinion which is pertinent reads as follows:

In case of false swearing the pre-emptor forfeited the money he paid for the land, and any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of *bona fide* purchasers for a valuable consideration. It is contended by the plaintiff in error that Congress went further in this direction, and imposed also a restriction upon the power of alienation *after* the entry, and the last clause of the twelfth section of the act is cited to support the position. \* \* \* The object of Congress was attained when the pre-emptor went with clean hands to the land office and proved up his right, and paid the Government for his land.

The words in the citation which are emphasized were emphasized by the court, and I would hesitate to believe that they would thus emphatically express their view of the construction of section 2262 without having fully considered it. Furthermore, it is expressly decided that Congress has placed no restriction on the power of alienation after entry, and that decision could not have been reached if the conveyance, which section 2262 declared to be void, was a conveyance made after entry. Again, if the conveyance contemplated was one made after entry, it would have been necessary to decide whether Fraily's conveyance was void on the ground that it strongly pointed to a speculation, or whether it was valid on the ground that the grantee was a *bona fide* purchaser. But that question was not mooted by the court, or by counsel, it would appear; and it is an irresistible inference that it was only ignored after a mature consideration, which is tantamount to a decision that section 2262 does not refer to a conveyance made after entry. For these reasons I must regard the question as decided by the Supreme Court, and I therefore adhere to said second ruling.

I desire it to be understood, however, that I do not decide that a purchaser prior to patent of land claimed by a pre-emptor is such a "*bona fide* purchaser" that the law will protect him, notwithstanding that the pre-emptor's claim is invalid for fraud or for other cause. This question came up in *Root v. Shields* (1 Wool., 340), prior to the decision in *Myers v. Croft*, and therein Mr. Justice Miller held that such purchasers were not *bona fide* purchasers "in the sense in which the terms are employed in courts of equity"; and he also held that, the entry being invalid for the reason that the land was not subject to pre-emption, the entryman acquired no interest in the land by the entry, and could therefore convey none. It is not necessary for me to rule on this particular question, and I merely decide that the language of section 2262 concerning *bona fide* purchasers applies to the case of conveyance before entry, irrespective of the legal effect of such a conveyance.

In regard to the third ruling, the contention is that section 2262 vests in the Land Department the power to protect the interests of a *bona fide* purchaser of a fraudulent pre-emption claim by the issue of patent.

I have shown above that, if we construe said section as permitting the settler to convey a title which he could not acquire, it would result in the issue of patent to the grantee. I would hesitate to adopt such a construction, however, on the ground that an issue of patent to a transferee has always been regarded as forbidden by the laws relating to public lands, unless expressly permitted (*Whitaker v. S. P. R. R. Co.*, 7 Land Owner, 85). Congress has been in the habit of indicating clearly the cases in which such a practice was lawful, as in the acts of January 23, 1832 (4 Stat., 496), and June 15, 1880 (21 Stat., 237), and I am therefore of opinion that a mere construction which reached such a result must be a false construction. In general it may be said to be the business of the Land Department to transfer legal titles, founded on the equities acquired by *bona fide* settlement. As against the United States the fraudulent settler has no equities, and hence can vest none in his grantee; and the Land Department cannot convey the legal title to a grantee who has no equities against the United States, whatever he may have against the grantor. Therefore the courts must be invoked in any case not expressly provided for where the equitable rights of the grantee are to be asserted.

This view is supported by the obvious purpose of the enactment of the provision relative to *bona fide* purchasers. Since Congress had forbidden the settler to convey his land prior to entry, and since such a conveyance would inure to the benefit of the grantee after entry, and vest full title in him upon patent, it became necessary to declare the conveyance null and void—not to prevent the settler from selling, but to prevent others from buying. The effect of the provision then is, in my judgment, to declare not only that the speculative settler shall not acquire title, but that if he does acquire title by entry and patent the conveyance cannot be enforced by his grantee, unless he is a *bona fide* purchaser for a valuable consideration. And it necessarily follows that any action under this provision must be brought in the courts of justice, and not in the Land Department. For these reasons I adhere to the said third ruling.

On the whole, the argument presented with the motion for review attempts to controvert the power of the Land Department to adjudicate the question of fraud in the entries of the pre-emptors who have conveyed to Mr. Tower, and to declare said entries null and void; but such a power is expressly upheld in the case of *Harkness v. Underhill*, above cited, and the question is therefore beyond the reach of an argument.

The motion for review is dismissed.

*SPECIAL AGENT'S REPORT—NOTICE—CANCELLATION.*

## THE LE COCQ CASES.

A filing or entry cannot be canceled by the Commissioner of the General Land Office on the mere *ex parte* report of a special agent. In cases of alleged fraud, a hearing must be ordered before the local land officers, and the defendants duly notified and allowed an opportunity to be heard in defense of their rights.

*Secretary Teller to Commissioner McFarland, December 13, 1883.*

SIR: On December 19, 1882, you canceled upon your records 110 pre-emption declaratory statements, and 100 timber-culture entries, upon lands situate in T. 99 and 100, R. 64, 65, and 66, in the Yankton, Dak., land district.

These cancellations were made upon the report of a special agent of your office, to the effect that the filings and entries in question, although made in the separate names of a colony of Hollanders, were in fact made in the interest of one Le Cocq, their real or nominal agent. Appeals from your action have been taken by many, if not by all, of the parties of record.

The report of a special agent is wholly *ex parte*, and, in the absence of notice to the party in interest upon the record, insufficient to base cancellation upon. No one must be deprived of his rights without due notice of the proposed action against him. This has not been done in these cases.

In order, therefore, that the pre-emptors and entrymen in question may have an opportunity to test their respective rights, I direct that you order a hearing to ascertain the facts in each case; and as, apparently, all the filings and entries rest under the same general conditions, and great expense and delay would result from separate hearings, one may suffice for all the cases, with such arrangement and procedure that no one may lose any right.

Upon report of the hearing, you will re-examine the cases and dispose of them as the law requires.

Your decision of December 19, 1882, is modified accordingly.

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*SPECIAL AGENT'S REPORT—PRE-EMPTION FILING AND PROOF.*

## AUGUST PEACHY.

Notwithstanding adverse report of special agent, which contains no tangible allegation of fraud as to settlement, the pre-emption filing is sustained and entry thereon allowed to remain intact upon the unimpeached proof of claimant.

*Secretary Teller to Commissioner McFarland, January 30, 1884.*

I have considered the case of August Peachy, involving the NW.  $\frac{1}{4}$  of Sec. 25, T. 59 N., R. 18 W., Duluth, Minn., on appeal from your decision of May 28, 1883, holding his pre-emption entry No. 6,323 for can-

cellation, on the ground of non-settlement prior to filing and subsequent non-compliance with the requirements of the law, as shown by reports of Special Agent Marshall.

It appears that Peachy filed his declaratory statement on September 8, 1882, alleging settlement during the preceding January, and that his final proofs show that residence was established in the latter part of said September, and that the requisite residence and improvement existed for six months prior to April 12, 1882, when said entry was made. The special agent's report in November, 1882, does not deny the alleged settlement, and it confirms the allegations touching the commencement of residence. The settler's witnesses seem to have been his neighbors, and their credibility is not impeached. A supplementary report of the special agent shows that Peachy was not residing on the land on July 1, 1883, but that the said improvements were there. There is no tangible allegation of fraud in the settlement, and I fail to discover any reason why the entry should be canceled.

Your decision is therefore reversed.

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*CONTEST OF TIMBER-CULTURE ENTRY FOR FRAUD—SUSPENSION  
DURING INVESTIGATION.*

**THE SPENCER CASE.**

The statute gives an individual no right to contest a timber-culture entry for fraud, but provides for contests of such entry for failure to comply with the law only.

When an entry is undergoing investigation for alleged fraud, all proceedings regarding the disposition of the land are suspended, and no contest to cancel the entry will be allowed.

*Commissioner McFarland to register and receiver, Huron, Dak., March 24, 1884.*

GENTLEMEN: I am in receipt of your letters bearing date November 10, December 7, 17, 27, and 29, 1883, January 10, 12, 18, and 22, 1884, respectively, transmitting appeals from your action rejecting applications to contest certain timber-culture entries known as the "Spencer" case, viz :

\* \* \* \* \*

Said applications were rejected by you for the reason that at the time they were presented the entries in question were suspended pending proceedings by the Government looking to their cancellation for fraud, notice of such proceedings having been given you by Special Agent W. W. Burke.

Appeals are taken upon the ground that applicants had no statutory right to contest, and upon the further ground that the suspension of the entries was made upon the request of the special agent.

All the applications are embraced in the same category in respect to the facts and circumstances attending them, except that several involve

the same tracts and entries, and they will therefore be treated together. Nearly all of them were made before the expiration of one year from date of entry, and are based generally on allegations of fraud and speculative intent in the inception of the entry.

The statute gives no *right* of individual contest on the ground of fraudulent intent or perjury committed in timber-culture entries, but provides for contests of such entries only in case of failure to comply with the law, and such failure cannot be alleged until after the expiration of one year from date of entry.

Experience has shown that frequent efforts are made to take advantage of a knowledge of facts revealed by the special agent's investigation to found a contest thereon, and that in other cases parties to fraudulent entries endeavor to protect the same against the investigation through the institution of collusive contests.

It is believed to be the right and duty of this office to prosecute to completion all proceedings which the Government has instituted against an entry to the entire exclusion of third parties; and accordingly in every instance, when addressed regarding the pendency of an investigation, local officers have been directed to suspend all action affecting the disposition of the land until the termination of the proceedings which have been instituted by the investigation.

In the cases under consideration, your authority to reject the applications to contest was not derived from the *request* of the special agent, but from instructions repeatedly given you from this office.

On November 2, 1883, all except a few of the entries in question were held for cancellation for fraud on the special agent's report; and since that time, to wit, January 25, 1884, upon report that notices were duly issued informing the entry men of my action of November 2, 1883, and advising them to appear and defend their claims, sixty days being allowed for that purpose, and that the sixty days expired without entry of appearance by or for any of them, the entries were canceled subject to the right of appeal for sixty days further.

Those which were not held for cancellation on November 2, 1883, were at that date canceled outright; relinquishments of the same which had been executed and placed in the hands of third parties for sale having been voluntarily surrendered and filed in this office.

These relinquishments were so filed on October 5, 1883, a date previous to any application of contest. The following are the register and receiver numbers of the entries relinquished: 814, 1,013, 1,039, 1,062, 1,064, 1,065, 1,068, 1,082, 1,083, and 1,340. In three of the cases, viz., Nos. 1,062, 1,064, and 1,065, the contest applications were dated respectively, October 23 and 31. In the remaining cases the contest applications were not presented until after the entries had been finally canceled and notice thereof received at the local office. In none of the cases was there an entry subject to contest at the date of contest applications. Contest-

ants are therefore without standing, and their appeals cannot be recognized.

In the following cases, not relinquished, but held for cancellation, viz, register and receiver numbers 807, 808, 998, 999, 1,000, 1,001, 1,002, 1,004, 1,005, and 1,007, the applications for contest were filed *after* the investigation had been made and reported, and while action thereon was pending in this office. Contests are not allowable under such circumstances, and your action in rejecting the same is approved.

In the remaining cases held for cancellation on November 2, 1883, viz, register and receiver numbers 816, 991, 992, 1,003, 1,066, 1,067, 1,069, 1,070, 1,081, 1,084, and 1,841, the contest applications were not filed until after the entries had been held for cancellation, and notice of such action had been received at the local office. Your action in rejecting the contest applications was correct, and contestants have no appellate standing.

In the following cases, viz, 808, 998, 999, 1,007, 1,065, 1,081, and 1,084, second contest applications appear, but as no contest can be recognized in the cases, the conflicting applications need not be further considered.

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*FINAL PROOF—INVESTIGATION OF FRAUD.*

THOMAS WRIGGLESWORTH.

A hearing may be ordered after final proof has been made in a pre-emption case, to ascertain fraud reported by a special agent.

*Secretary Teller to Commissioner McFarland, April 3, 1884.*

I have considered the appeal of Thomas Wrigglesworth from your decision of August 23, 1883, in which you have declared his cash entry canceled for fraud.

It appears that Wrigglesworth made declaratory statement No. 2920, for the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 5; the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec 4, and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 9, T. 55, R. 10, Duluth, Minn., September 13, 1882, alleging settlement June 22, 1882. Final certificate issued June 16, 1883.

On June 16, 1883, when final proof was made, three witnesses, including Wrigglesworth, testified that he first settled on the land June 22, 1882, and that his first actual residence was established thereon June 28, 1882.

On June 18, 1883, a special agent of the Land Office forwarded a report, accompanied by sworn statements, from which it appears that Wrigglesworth and a companion named Frederick Fox (who was one of the witnesses for Wrigglesworth at the time of making final proof) hired a guide, who piloted them to the land, and assisted in the selection of adjoining tracts and also the erection of cabins thereon in January 1883; they admitted to him at the time that they had never been on the lands prior to accompanying him, which is evident from the fact that

they were entirely dependent on him to ascertain the location and situation of the respective tracts.

This *prima facie* showing calls into question the good faith of Wrigglesworth with reference to his settlement and residence prior to January, 1883, as sworn to by himself and witnesses in his final proof. You are directed to order a hearing, at which Wrigglesworth with his witnesses as well as those for the Government will be cited to appear, in order that a proper determination of the question at issue may be obtained.

The cash entry will remain in suspension subject to a final decision of the question.

Your decision is accordingly modified.

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*SPECIAL AGENT'S REPORT—MINING CLAIM—HEARING.*

FRANKLIN L. BUSH ET AL.

Where a special agent reports non-compliance with the mining law in the matter of expenditures, notice should be given the mining claimants that a hearing will be had, and the special agent should be directed to produce witnesses to sustain his report.

*Secretary Teller to Commissioner McFarland, April 15, 1884.*

I have considered the appeal of Franklin L. Bush *et al.*, applicants for patents for the General Jackson Placer Claim, M. E. No. 1647 (Bevan and Minnesota mining districts, Summit County), Leadville district, Colorado, on appeal from your office decision of August 14, 1883, holding the entry for cancellation.

It appears that Franklin L. Bush, Henry W. Baldwin, Abbie C. Kellogg, and Arthur B. Bullis, located the same (containing 69.23 acres) on or about September 16, 1882. The application was filed January 15, 1883, and notice thereof given by publication and posting from January 20 to March 24, 1883, during which period no adverse claim was filed.

Said decision states that Special Agent Robert Berry investigated the case under instructions from your office, and it appears from his report dated July 31, 1883, that—

The claim is situated on the top of a mountain, 3 miles east of Breckenridge; that the country rock is quartzite and porphyry, with very little erosion; that the land is covered with spruce and white pine trees of good size for mining timbers; that the claim is totally destitute of water, and with no facilities for obtaining it; that there are no placer improvements thereon of any character, and that the only work on the land was done on two shafts, sunk evidently in exploring or prospecting for veins of mineral.

The said decision is based upon the foregoing alleged state of facts as set forth in said report, from which your office found that "the report shows clearly that the claimants have not made the expenditure required

by law, and that the claim is so located that it cannot be worked with profit as a placer mine, and hence it has no value for such purpose. The entry is accordingly held for cancellation."

The record shows, however, that these applicants have complied in all respects with legal requirements, as a basis for making final entry. In the absence of any allegations touching their good faith, or tending to show failure to comply with such requirements, it would be presumable that they are entitled to patent. But the record as made by them is traversed by the aforesaid special agent's report. An issue of fact is thus raised. This is sufficient, perhaps, to put the Department upon its inquiry; but it is insufficient basis for cancellation of such entry.

The report of a special agent is wholly *ex parte*, and in the absence of notice to the party in interest upon the record, insufficient to base cancellation upon. No one must be deprived of his rights without due notice of the proposed action against him. This has not been done in these cases. Le Cocq Case (10 Copp, 305.)

In order, therefore, that these applicants may be heard touching said allegations, I direct that you order a hearing upon due notice to all the parties in interest, and to said special agent (who should be directed to produce the proper evidence to sustain his report, by calling witnesses in behalf of the Government), to the end that the exact state of facts in the premises may be ascertained.

Upon report of such hearing, you will re-examine the case, and dispose of the same according to law and precedent.

I accordingly vacate said decision.

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*FRAUD—ADDITIONAL TIME.*

**CLARENCE LARABEE ET AL. (ON REVIEW).**

Certain pre-emptors who had thirty-three months in which to make their proof, made the same within six months from date of filing, and their entries were ordered canceled for fraud, in respect to residence and improvements. They are allowed to offer further proof of compliance within the said thirty-three months.

*Secretary Teller to Commissioner McFarland, June 11, 1884.*

On March 6 last I affirmed your decision of August 17, 1883, which rejected the final proofs and held for cancellation the filings of Clarence Larabee and nine others upon certain timber lands in T. 42, Rs. 25, 26, and 27, in the Taylor's Falls, Minn., land district, for the reasons that the filings appeared to be made in the interest of John Martin & Co., lumber dealers at Minneapolis, Minn., and also that the proofs as to the residence and improvements of the respective pre-emptors were insufficient to base entries upon, and showed also a purpose upon the part of each to acquire a tract of public land in violation of the requirements of the law. (See Copp, April 1, 1884, p. 5.)

Motion is now made for reconsideration of my decision on the ground that Martin & Co. are not interested in the cases (and affidavits are filed to that effect), and asking also that further time be allowed the pre-emptors within which to show their compliance with the law.

The alleged settlements and filings in each of the cases were made in November, 1882, and final proofs were offered in May following.

I have re-examined the testimony and am confirmed in the opinion that neither in respect to residence nor improvements had the parties sufficiently complied with the law to entitle them to enter the respective tracts at the date of their proofs, but that, on the contrary, they sought to acquire valuable pine timber tracts without such compliance. The lands, however, are "unoffered," and they were allowed thirty-three months within which to make their proofs; instead of which they made them in about six months from their alleged settlements.

As there are no adverse claimants, and the cases are between the parties and the Government only, I grant the motion for reconsideration and allow the parties to offer further proofs at any time hereafter within said thirty-three months, showing continuous residence on the respective tracts for the period of six months from the date of their former proofs (May 17, 1883), and also satisfactory proof of their respective improvements and good faith; but they will not be allowed to cut any timber, except so far as necessary to their actual improvements of the tracts; and, as each of the parties now rests under suspicion of bad faith in respect to their settlements and filings, the local officers will require from them the most satisfactory proofs of their compliance with the law when the same are offered, and also that Martin & Co., or either of said firm, are not and have not been directly or indirectly interested in said cases, or either of them. The local officers will also notify the agent of your office of the time and place when said proofs are to be offered, that the interests of the Government may be duly protected.

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UNITED STATES CIRCUIT COURT—COLORADO DISTRICT, OCTOBER TERM,  
1883.

THE UNITED STATES v. THE SOUTHERN COLORADO COAL AND TOWN  
COMPANY.

1. *Evidence—negative averment.*—A plaintiff who in his complaint makes the basis of his suit to consist of negative averments, takes the burden to show that, at least *prima facie*, they are true.
2. *Same—same.*—In suit to set aside patent on the ground of conspiracy and fraud, and that the pretended grantors were fictitious, and never entered the lands nor resided in the county, proof by a large number of witnesses, who were in a position to know, that no such persons resided in the county or upon the lands at the time, is sufficient to shift the burden and make it necessary for those claiming under such supposed grantors to establish their existence.
3. *Fictitious grantee.*—A grantee is as necessary to the conveyance of land as the grantor. Hence, a grant to a fictitious person is simply void.

4. *Same—claimants under.*—Those claiming under such fictitious grantee are not protected as innocent purchasers for value, for the reason that the original patents were absolutely *v. id.*, and so no title passed from the United States, and of course none to those claiming under the grantees in such void patents. A person who has acquired title by fraud may make a valid conveyance to a *bona fide* purchaser; but one who has never acquired title cannot convey it.
5. *Laches* cannot be imputed to the Government. After a lapse of time sufficient to raise the presumption that witnesses are all dead, a court of equity may, on that ground, refuse to entertain the controversy.
6. *Estoppel.*—The United States is not estopped by the frauds of its public officials.

MCURARY, circuit judge:

The important allegation of the bill is, that the patentees named in the patents sought to be set aside—sixty-one in number—as well as the witnesses by whom proof of pre-emption purports to have been made, were all fictitious persons, having no existence in fact. It is averred that the pre-emption papers, together with the signatures thereto, were fraudulently manufactured by certain conspirators named, or other persons unknown, for the purpose of cheating and defrauding the complainant out of his title to the lands in question. In other words, the contention of the complainant is, that the officers of the General Land Office were by fraud induced to execute patents to fictitious persons, so that there were in fact no grantees capable of taking title. We will first inquire whether the proof sufficiently shows that is true as a matter of fact.

The bill sets out the names of supposed pre-emptors and patentees, to the number of sixty-one, and charges the same are fictitious persons, and that the names are fictitious names; that no persons by such names ever have lived or been known to the county of Las Animas, Colorado, where said lands are situated. It also sets out the names of persons purporting to have appeared as witnesses in these several cases, and makes the same averments as to them.

Although these averments are negative in character, yet as the complainant has made them the basis of its suit, the burden is upon it to show that they are at least *prima facie* true. (Greenleaf, sec. 78; Wheaton on Evidence, chap. 7.)

The complainant accordingly called fourteen witnesses who have resided in Las Animas County for a number of years, and who testify that they were well acquainted there, at, before, and since the dates of several patents, and that during the years from 1870 to 1874 none of the persons named as patentees, with the exception of Juan B. Martine, were known to the county; and as to Martine, the proof is that a common laborer was known in Trinidad of that name, but that he never occupied any of the land in question. It is not probable that he was an actual pre-emptor if all the other sixty were myths. It clearly appears by the evidence that none of the lands were occupied or in any way improved prior to the issuing of the patents, although in each case what purports to be an affidavit of the claimant is filed, setting forth

that he is a citizen of Las Animas County, and has made settlement on and improved the land in good faith, &c., describing the improvements.

The proof is very clear that, with the possible exception of Martine, no such persons as those named as patentees either occupied the land or resided within the county at the time that the pretended entries were made. It was then a very new county, but sparsely populated, and it is incredible that so large a number of persons could have lived in the community, and that all could have been unknown to the leading citizens. At all events, the proof produced by the complainant is sufficient to shift the burden, and make it necessary for respondents to come forward with proof to show that these patentees were real persons. If such be the fact, it would have been easy for respondents to show it, although quite difficult for complainant to prove the negative. If sixty-one persons bearing the names of these parties ever existed and actually appeared before the land officers at Pueblo, applicants for pre-emption, and if they produced living witnesses to testify for them, it certainly would not be difficult for respondents to identify them, or at least some of them; but if they never existed it must, in the nature of the case, be difficult, if not impossible, to prove the fact of their non-existence by clear and positive evidence. All that is possible in such a case is to call as witnesses those who would probably have known them, if they had lived at the time and place in question. The fact of their non-existence could be proved in no other way. It is suggested in the argument that the proof is insufficient, because it only goes to show that none of the patentees or witnesses ever lived in Las Animas County, and does not tend to prove that they did not exist elsewhere. It would, however, be manifestly impossible for the plaintiff to call witnesses to testify as to all localities; and besides, each of the supposed patentees must have resided in Las Animas County, and actually occupied and improved the land patented to him, in order to be entitled to a patent at all, and each was required to swear to such residence, occupancy, and improvement. If none of them were ever in the county, and no improvements were made upon the land, then the proofs upon which the patents issued were false, and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees, is not more unreasonable than would be the inference that sixty-one actual persons committed perjury themselves, and subpœnaed as many others to perjure themselves as witnesses, in order to acquire the title. At all events, I am clearly of the opinion that complainant can be required to do no more than to show that the supposed patentees did not live in Las Animas County, and that the lands in question had neither been occupied nor improved. If this is not sufficient to shift the burden, then it must follow that we should require the complainant to make the same showing with respect to every other community in the United States, and this can scarcely be insisted upon. It would be

very difficult to prove that these supposed persons did not exist in all space.

But jurisprudence has to do with no such vague domain. Its territory is limited. It inquires whether, in a particular spot, at a particular time, open to human observation, a particular thing existed. \* \* \* It is possible, within such limited range, to call all witnesses who were likely to have been at the given spot, at the particular time, and so to approach the negative by generally exhausting the affirmative. (Wharton on Evidence, sec. 356.)

The amount of proof requisite to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slender evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into. (Digest of the Law of Evidence, Stephen, article 96.) In the present case, to hold the respondents bound to produce evidence in support of the affirmative of the proposition—that these supposed patentees were actual persons—is, under the circumstances, both reasonable and just, because the proof of that fact, if it be a fact, is within their reach. The papers could not have been fabricated, as alleged, in the names of fictitious persons, without the knowledge of the register and receiver of the land office at Pueblo, and the bill distinctly charges that both these officers were parties to the fraud and conspiracy. What purport to be transfers from each of the supposed patentees to one Jackson, as trustee for the Colorado Coal and Town Company, are shown in evidence. Jackson, however, swears that he dealt only with one A. C. Hunt, who brought him the receiver's certificate properly signed, and he never saw or knew any of the pre-emptors or patentees. He bought the lands from Hunt and paid him for them, receiving what appeared to be the usual evidence of title. It is fair to presume that Hunt dealt with the actual pre-emptors, if any existed; or if he did not, he could state with whom he did deal, and thus put the inquirer on the road which would lead him to the original parties, if any such parties actually existed. It is conceded that the receiver is dead, but no reason appears for not calling either the register or Hunt; and the failure to do so is a circumstance the significance of which the court is not at liberty to overlook. If the court could suppose that an innocent official, thus accused by a bill filed by the Attorney-General of the United States, would fail to demand, or at least request, opportunity to vindicate himself under oath, it would be impossible to doubt that the respondents would have called him if the truth had been otherwise than as the bill alleges. It is insisted that it was the duty of the complainant to call these witnesses, but the court does not think so. The complainant having charged these persons with fraud and conspiracy, should not be driven to the necessity of calling them as its witnesses if it is possible for it to make out a *prima facie* case without doing so. The respondents, whose defense rests, at least in part, upon a denial of the charge of fraud and conspiracy made

against these persons, could with perfect safety have called them if the charge is false.

Thus far no notice has been taken of the testimony of experts upon the question whether the signatures to the papers in question appear to be genuine signatures of different persons. The opinions of the expert witnesses differ, as is usual in such cases; but in my judgment this testimony, considered as a whole, confirms the theory that the papers were fabricated.

Having thus reached the conclusion that the supposed patentees in each and all the patents sought to be set aside were fictitious persons, having no existence, it only remains to determine what the consequences are with respect to the present respondents. And for the purposes of this inquiry, I will assume that it sufficiently appears that respondents had no actual notice of any participation in the frauds whereby the patents were obtained. The rule of law that a grantee capable of taking the title is necessary to the validity of a deed, is elementary. A grantee is as necessary to the conveyance of land as a grantor, and it follows that a grant to a fictitious person is simply void (3 Washburn on Real Property, 4th ed., 265; Muskingum Turnpike *v.* Ward, 13 Ohio, 120; Hulich *v.* Scovil, 4 Gil. (Ill.), 175).

By the common law all grants between individuals must be made to a grantee in existence, or capable of taking; otherwise there could be no such thing as livery of seisin. (*Miller v. Chittenden*, 2 Iowa, 368.)

A patent for land to a fictitious person not in existence carries no title, vests no interest in any one. (*Thomas v. Beeman*, 26 Missouri, 27; *Galt v. Galloway*, 4 Peters, 332; *Galloway v. Finley*, 12 Peters, 297.)

The case of *Sampeyreac et al. v. The United States*, 7 Peters, was a bill for review to set aside a former decree in favor of Sampeyreac, vesting title in him under an alleged grant from the governor of Louisiana, while it was a province of France, and which inured to the benefit of the claimant by virtue of the treaty of 1803. The grant and the decree founded thereon were attacked by the United States on the ground that Sampeyreac was a fictitious person. The court, per Thompson, justice, said:

The original party to the decree being a fictitious person, no title could pass under the patent, if issued. It would remain to the United States (p. 241).

I must hold, therefore, that the patentees in this case being fictitious persons, no title passed from the United States by virtue of the patent in question.

There could be no conveyance of the title where there was no grantee to take the title. The patents were and are absolutely null and void.

The respondents claim protection as *bona fide* purchasers for value, without notice of the fraud; but this defense can only be maintained by showing that the legal title has passed to them. The original patentees being void for the want of the necessary grantees, as we have al-

ready seen, the title never passed from the United States, and the doctrine in question cannot be invoked.

The purchaser in all cases must hold the legal title, or be entitled to call for it, in order to give him a full protection of the defense; for if this title is merely equitable, then he must yield to a legal and equitable title in the adverse party. (Story Eq. Jur., sec. 64 c.)

In the case of *Sampeyreac v. United States, supra*, this defense was interposed by the respondent, Joseph Stewart, who was allowed to intervene and plead that he was a *bona fide* purchaser for value and without notice. The court, however, upon hearing, overruled the defense upon the ground, among others, as stated in the opinion, that "on general principles it is incontestable that a grantor can convey no more than he possesses. Hence, those who come in under the holder of a void grant can acquire nothing." In that case Stewart purchased upon the faith of a grant which had been confirmed by a decree of a court of equity in Arkansas Territory. He was not protected, because both grant and decree were afterwards held fraudulent and void on the ground that the supposed grantor in the one, complainant in the other, was a fictitious person. The case is certainly as strong as the one before us. (And see *Gray v. Jones*, 14 Fed. Rep., 83, S. C., 3 McCrary.)

In the light of these principles and authorities, it is impossible to hold that the respondents, or any of them, ever acquired a right to the land in controversy by reason of their standing in the character of *bona fide* purchasers. The title has never passed from the United States. A person who has acquired title by fraud may make a valid conveyance to a *bona fide* purchaser; but one who has never acquired the title cannot convey it, and much less can the title be transferred by fraudulently obtaining from the owner a deed purporting to convey it to a fictitious person, and then forging a conveyance from such fictitious person to another, however innocent the latter may be.

The counsel for respondents have argued very earnestly that, as this is a suit to rescind and set aside a deed for fraud, the rule which requires the injured party upon discovering the fraud to give notice of his intention to rescind without delay, applies, and bars relief. The bill was filed in January, 1880. It is insisted that complainant had notice of the fraud as early as November, 1873, through a letter received at the General Land Office at Washington, from one C. J. Hubbard. The letter is in evidence, and is as follows:

LAW OFFICE OF GRAHAM,  
Trinidad, Colo., November 28, 1873.

*Honorable Commissioner of United States Land Office :*

SIR : The most gigantic frauds upon the Department you control are being perpetrated in this portion of Colorado. Coal lands are being entered as agricultural lands by *straw men*, and conveyances made to the procurers of these perjuries (who pretend to be innocent in the matter). This portion of Colorado is all coal land. T. 33, 32, and 30, R.

64, are coal lands (every section), except a little on the river bottom. There are over thirty townships north of range 33 and west of 63 that have coal on every section, and the agricultural land does not exceed three sections. These parties even sell out and then apply to the General Land Office to change the location of the lands patented. Of this latter I am advised by common rumor.

The people rely on the laws to protect, and ask the Department to assist them in their rights. There is something out of proportion in our land office. The register and receiver are charged with complicity in these things. If the United States attorney will take the matter in hand the matter can be fastened on the proper parties, but in the mean time, unless your Department is vigilant, and dishonest men thwarted, the Government is defrauded of thousands of acres of its most valuable coal lands.

I am, very respectfully,

E. J. HUBBARD.

[Indorsed.]

Letter K., No. 78,067, to C. J. Hubbard, Trinidad, Colorado Territory, November 23, 1873. Alleges fraud on the Government, &c. Answered December 11, 1873. Referred to Div. N. Received (G. L. O.) December 3, 1873.

It will be observed that this letter designates no particular entries as fraudulent, and describes no particular lands that were being fraudulently entered. The writer's purpose, which was most laudable, seems to have been to induce the Land Department to institute an investigation. It is more than doubtful whether this letter can be regarded as a sufficient notice to the United States of the existence of particular frauds now in question, even assuming that a volunteered communication from a private citizen to a bureau office in the Interior Department could in any case be held to charge the Government with notice of its contents. Waiving, however, the consideration of this question, I am constrained to hold that laches cannot be imputed to the Government. It is true, as a general proposition, that when the Government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, and one of them is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States.

The general principle is, that laches is not imputable to the Government; and the maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The Government can transact its business only through its agents; and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not have saved the public from the most serious losses if the doctrine of laches can be applied to its transactions. (U. S. v. Kirkpatrick, 9 Wheat., 736; U. S. v. Hoar, 2 Mason, 311; U. S. v. Williams, 5 McLean, 133; Gibson v. Chouteau, 13 Wallace, 92; U. S. v. Thompson, 98 U. S. 486; Gorson v. U. S., 97 U. S., 584.)

If, indeed, the lapse of time since the cause of action accrued has been

so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed, a court of equity may, no doubt, on that ground refuse to entertain the controversy. (*U. S. v. Beebee*, 4 *McCravy*, 12.) But this cannot be claimed upon the facts of the present case. At most, the lapse of time here was only six or seven years, and it is not claimed that the witnesses who could testify from personal knowledge of the facts are all dead, nor that the proofs have been lost or destroyed. Independently of these considerations, it is difficult to see upon what principle this doctrine concerning the duty promptly to rescind can be applied to a case of this kind, where there never was a contract in the sense of an agreement between contracting parties. The rule requires the defrauded party to give notice to the party guilty of the fraud of his purpose to rescind and demand a return of the property conveyed. But where the other party has no existence, where the conveyance has been made to a myth, how can the rule be applied? To whom shall notice be given? Upon whom shall demand for a return or recoverance of the property be made? It is also insisted that the United States has not returned the money received for those fraudulent conveyances, and that therefore this suit cannot be maintained without considering whether the Government is bound, as a condition precedent to its right to file a bill to set aside a fraudulent patent, to pay or tender to the patentee the consideration received. It is sufficient to say in the present case that there are no patentees, and therefore no one in existence to whom such payment could properly be made.

The counsel for the respondents insist that the complainant ought to be bound by the patents issued, even though the patentees were myths, because the respondents have acted in good faith, upon the assumption that they were valid, relying upon the record. It is insisted that the facts present a case of equitable estoppel, upon the theory that "when one of two innocent persons must suffer a loss it should be borne by that one of them who, by his conduct, acts, or omissions, has rendered the injury possible." It is a conclusive answer to this contention to say that the respondents are not innocent purchasers within the meaning of the rule, as we have already seen. But I think it proper to add that, so far as I know, it has never been held that the United States can be estopped by the frauds, not to say crimes, of the public officials; and it is apparent that the consequences of such a doctrine would be ruinous. In my opinion the doctrine of estoppel does not apply.

Upon the whole case my conclusion is that there must be a decree for complainant in accordance with the prayer of the bill; and it is accordingly so ordered.

*IN THE SUPREME COURT OF WYOMING.*

THE UNITED STATES *v.* ALEXANDER SWAN, THOMAS SWAN, Z. THOMMASSON, AND C. E. ANTHONY.

The fencing of Government land and its withdrawal from settlement not only subjects the public to inconvenience and annoyance, but it is an inclosure of that which ought to be left free to the public, so that all persons may go thereon until some one lawfully segregates it and makes it his own; and a remedy by injunction on the part of the United States will lie in such a case to compel the abatement of the nuisance.

SENER, Judge:

This case is here upon the amended bill filed by the complainant on the 13th of June, to which the respondents filed a demurrer on the 25th day of July, 1883, and upon which demurrer argument was heard by the court on the 1st day of August, 1883. In view of the magnitude and novelty of the questions involved, time, care, and study have been bestowed upon them, to the end that the best reflection and the best lights might be brought to bear for their solution.

The demurrer has been argued by the respondents from the standpoints that the bill of the complainant is deficient in form and substance. As to form, that it is uncertain and vague; as to substance, that it fails to state such a case, even in bad form, as to entitle the complainant either to the discovery or relief which it seeks. The respondents claim that the bill should with clearness and accuracy show title in the complainant, and that this should be coupled with an allegation that by reason of withdrawal from settlement these citizens have no right to go upon these lands under the laws of the United States as for mining and other proper purposes for which the laws provide.

This objection the court thinks not well taken, because the bill in its entirety shows for all the purposes of a demurrer that these parties are there wrongfully and unlawfully, which excludes the idea that these respondents have a right to be upon these lands.

Besides, the bill further alleges that all the even sections in two certain townships, except parts of two and twenty-two, are part of the public domain, and then proceeds to aver that said lands are now held for disposition under the land laws of the United States; and if they are open to settlement and disposition this excludes the idea that the respondents can be upon them lawfully, since the bill further charges the encroachment and intrusion upon these lands unlawfully.

The respondents claim that the bill is wholly uncertain in its meaning, in not showing what is meant by said lands as used in the charging part of the third clause of the amended bill, they claiming that, as used, the expression "said lands" is vague, uncertain, and indefinite.

Upon an amended bill the court thinks it would be better to make this averment clearer. The respondents also object that the bill is uncertain and vague, in not showing what parts of Secs. 2 and 22 the

complainant has title to, the bill only claiming a part and not all of said section.

This objection is well taken. This bill is an application for an injunction order. Although there is a map filed with the bill and made a part of it as an exhibit, showing the land encroached upon, and intruded upon, yet the map is fatally defective as to Sec. 2, certainly in not showing how much of said section belongs to the United States and how much does not belong to the United States. As to Sec. 22, if the marks and letters "E" in the map are to be considered as the excepted parts, less trouble might be had as to this section, but in a bill of this importance, where an injunction is asked for, the court ought to have before it such a clear and indisputable showing as to what is complained of as that in the event of its granting injunctive relief its order could plainly and with reasonable certainty point out what it is that should be abated, and what it is that should be restrained. In this bill this is not done. As is charged by the respondents, and as was admitted by the complainant in its argument, the bill in this respect is vague and uncertain, and for this reason the court thinks the demurrer ought to be sustained.

The respondents object that the bill wholly fails to show that the fence was built on or across the same sections of land before referred to. It alleges that it was built on certain even and odd numbered sections, in certain townships and ranges, but wholly fails to show that said districts were north, or that the ranges were west of the sixth principal meridian, or where the ranges are.

In an amended bill it might be well to show this; but the allegation contained in the bill that these sections in certain townships and ranges are within Laramie County, and in the jurisdiction of the first judicial district of this Territory, probably would be sufficient.

This case having been twice argued, both upon the structure of the bills and the sufficiency of any bill to give the United States the relief it seeks in this forum upon a proper bill, it seems to the court not just longer to withhold its opinion upon the right of the complainant to relief in cases like this in equity and by injunction. At the first argument of the counsel for the Government, the able district attorney for Wyoming held to the idea that it was a purpresture and not a public nuisance. In the latter argument the learned assistant for the Government, Judge Brazee, held to the theory that the acts charged were a public nuisance. This view was stoutly resisted by the counsel for respondents.

According to Lord Coke, purpresture was defined to be a close or inclosure; that is, where one encroaches or makes that several to himself which ought to be common to many. It is laid down by all the old writers that it might be committed either against the king, the lord of the fee, or any other subject.

In its common acceptance it has been applied to any encroachment

upon the king, or any part of his domestic lands, or in the highways, rivers, harbors, or streets.

The distinguished counsel who argued for the respondents with so much learning and great zeal contended that while there might be an appropriation of these lands by the respondents, so far as this bill shows, yet there was nothing in the bill, or deducible from it, to show that these lands are common to many, and that no adjudicated cases in this country on this question of purpresture went further than to apply the doctrine as Lord Coke applied it to encroachment upon highways, rivers, harbors, and streets.

In the view which we take of this case it may be unnecessary, in order to give the court jurisdiction, to refer it absolutely to either of these branches of equity jurisprudence. The doctrine of relief in equity is now applied both by the English and American courts to any case in which there is an abuse of power given for public purposes, or when there is acting adversely to public policy. It is true this doctrine in English and American chancery has grown up in the necessity of placing restraints on great corporations to prevent them from doing acts detrimental to the public welfare or hostile to the public policy. Lord Eldon, in *Blackmore against Glamorgan Canal Navigation Company*, stated it to be a sound and well-recognized equitable principle, "that parties shall do and forbear all that they are required to do, and forbear as well with reference to the interests of the public as with reference to the interests of the individual."

Quoting Lord Cottenham:

It is the duty of the chancery court to adapt its practice and course of proceedings as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which from the progress daily making in the affairs of men must continually arise, and not from too strict adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy. (1 Mylre & Co., 559; 4 Id., 141, 635.)

It is in this spirit that the supreme court of Pennsylvania spoke and acted in the case of *Kerr v. Frego*, 47 Penn., 292, Chief Justice Lowry delivering the opinion of a unanimous court as far back as 1864, when he said :

This remedy (meaning the remedy by injunction) extends to all acts that are contrary to law and prejudicial to the community, and for which there is no *adequate* remedy at law.

In this case, for all purposes of the demurrer it is conceded that the respondents have, without authority of law, wrongfully taken possession of the public lands of the United States, fenced them in, and thus prevented the exercise, or the power, or the authority, or the enforcement of the homestead, pre-emption, and desert land laws of the United States, as the case may be, within these lands so inclosed wrongfully and unlawfully, and so separated and fenced and converted to the wrongful and unlawful use of these respondents.

A specific injury to the public is averred in the bill, which is that the rights of the homesteaders, the pre-emptors, and parties lawfully seeking to reclaim the desert land of the United States, may be hindered and prevented, if not entirely denied their rights, by the building of these fences.

If it be answered that the parties who are fencing these lands unlawfully may be doing a benefit to these lands, it is sufficient to say in reply that they are fencing and building more than the policy of the land laws of the United States allow to four people. As to what constitutes such an injury as gives a court of equity in such a case jurisdiction, we cannot do better than quote the language of Chief Justice Ryan in the case of the Attorney-General against the Railroad Companies, 35 Wisconsin, 552:

The acts of the defendants charged give the jurisdiction, and it is for the court to judge of the consequent evil. It is not the averment of the pleaders, but the nature of the acts pleaded, which is material in the question of public injury. The conscience of the court must be satisfied, and may be satisfied or not, with or without averment.

If an information should aver public mischief where the court could see that there was none, the averment would go for nothing.

So without averment it suffices that the court can see the public injury. As in that case the court says: "It is hardly questioned that in these cases a public injury is apparent in the acts charged against these defendants," so may we repeat here: Directly or indirectly, this injury reaches many. Continuing, that able court says: "We can only see the direct public injury, and the acts charged satisfy the conscience of the court of the public injury. If the acts be illegal, that is sufficient."

Upon the question of the right of a court of equity to enjoin a great public wrong the same supreme court (35 Wisconsin, p. 534) further says, after speaking of the jurisdiction to enjoin private wrong at the suit of the person wronged:

It is almost a logical necessity to admit the other branch of the jurisdiction to enjoin at the suit of the State such a general wrong common to the whole public as interests the State, and could be remedied by private person only by a vast multitude of suits, only burthensome to each and impracticable for (their) very number, more conveniently, effectually, and properly represented by the attorney-general as *parens patriæ*.

But jurisdiction of informations of this nature has sometimes been denied here—courts of equity in this country, singularly enough, being sometimes more timid to control corporate power, and less willing to protect the public against corporate abuse than the English chancery. In both branches, says the court, of this jurisdiction, it proceeds as for *quasi nuisance*, and it is difficult to understand why the jurisdiction should be asserted as to private nuisance and denied as to public nuisance. But fortunately we find this wholesome jurisdiction sustained here by the great weight of authority, and with modern experience we deem it only a question of time when it must be universally asserted and exercised.

But do the acts charged in the bill of complaint, and for all the purposes of this hearing treated upon demurrer as true, constitute a public nuisance?

In 1837 the supreme court of Alabama, in the case of the State of Alabama against the mayor and aldermen of the city of Mobile (5 Porter, 299), Collier, chief justice, delivering the opinion of the court, held the right of chancery to exercise its jurisdiction in case of a nuisance, in restraining the exercise or erection of, and in some instances to abate that from which irreparable damage to individuals or *great public injury would ensue*. The court further said:

Courts of equity can interpose to restrain and prevent such nuisances threatened or in progress, as well as abate those already existing, and by perpetual injunction the remedy is made complete through all future time; whereas, an information or indictment at common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought; and, in the next place, remedial justice may be prompt and immediate before irreparable mischief is done, whereas at law nothing can be done except after trial and upon the award of judgment.

In 1860 the supreme court of Georgia cited with approval this case, and said, in Mayor and Council of the City of Columbus *v.* Arnold (30 Georgia, 508):

It is claimed that no such jurisdiction exists, because the remedy at common law is adequate and complete by indictment, &c.

It answered by citing approvingly this statement in Story's Equity: The grounds of this jurisdiction of courts of equity in cases of purpresture, as well as of public nuisance, undoubtedly is their ability to give more complete and perfect remedy than is attainable at law, etc.

And also Eden on Injunction to this effect, that—

The remedy for this species of injury is by information of intrusion at common law, or by information of the attorney-general in equity.

In addition to the foregoing, the supreme court of Georgia in this case added, as a reason why a remedy by indictment might be unavailing, the influence and integrity of the gentlemen against whom an indictment might lie would more than likely protect them before a jury.

In regard to public nuisance, the supreme court of New Jersey, 1 Stockton, p. 523, Attorney-General against Hudson River Railroad Company, decided in 1853, state that the jurisdiction of the courts of equity in regard to public nuisances seems to be of very ancient date, and has been definitely traced back to the reign of Queen Elizabeth.

Is the building of such a fence on the public lands a public nuisance as well as a public wrong? Blackstone defines a nuisance to be anything that worketh hurt, inconvenience, or damage; and Bacon defines a nuisance as anything that annoys, incommodes, or offends—anything that renders the enjoyment of life and property uncomfortable; and Brown, "anything which unlawfully annoys or does damage to another."

A nuisance is either public or private. A public or common nuisance is such as affects or interferes with the king's subjects in general. Tried by these definitions, can there be any doubt that an inclosure of the Government domain, held either for the benefit of all the people, or else under the terms of the bill, as admitted by the demurrer, held for disposition and sale for the benefit of the settler, whether in his character as a homesteader, pre-emptor, or as one reclaiming the waste lands of the desert, is a great public nuisance, is an infringement of public right, and as such can be relieved against, if not by abatement, action for damages, or criminal prosecution, certainly by the more speedy, powerful, and all-sufficient remedy of injunction? But it is contended by the learned counsel for the respondents that there may be a remedy at law, and therefore no remedy in equity lies.

Our answer to the learned counsel is in the language of Judge Collier, in Alabama, in the case hereinbefore cited: Not that there may not be a remedy at law, but that in such cases the jurisdiction of the courts of equity is predicated upon the ground of the ability of equity to give a more complete and perfect remedy than is attainable at law. The relief is not grantable because, *strictissimi juris*, there may be no remedy at law, but is grantable because there is a remedy more adequate in equity.

While courts of equity will hesitate, and have hesitated in England and in this country, in cases of public nuisances to act except in strong cases, yet they will always speak with no uncertain sound, and should so speak, where the public rights are invaded or a great public nuisance is threatened or in existence.

Are the acts complained of a purpresture? The supreme court of Wisconsin, in the case of the Attorney-General *v.* the Railroad Company, before cited (35 Wisconsin, p. 532), going a step beyond the old-time technical definitions, perhaps, and applying the law to new necessities, after the spirit of Lord Cottenham, before quoted, says: "Any intrusion upon public right is in the nature of a purpresture." Such is, we think, sound equity at this day. That eminent jurist, Cooley, in the case of the Attorney-General *v.* The Evarts Booming Company (34 Michigan, p. 472), says: "A purpresture may be defined as an inclosure by a private party of *a part of that which belongs to and ought to be open and free to the enjoyment of the public at large*. Surely a better definition of the public domain of the United States could not be made, and further, he says that "a purpresture is not necessarily a public nuisance."

A public nuisance is something which subjects the public to some degree of inconvenience or annoyance, but a purpresture may exist without putting the public to any inconvenience whatever.

The fencing of these lands, their withdrawal from settlement under the homestead, pre-emption, and desert land laws, not only subjects the public to some degree of inconvenience and annoyance, but it is an

inclosure of that which belongs to or ought to be left free to the public, so that all the public may go thereon until some one lawfully segregates it and makes it his own; and if it can be decided that such a remedy as injunction does not lie in a case like this, then not only might these respondents fence up such large tracts of land as are mentioned in the bill and keep them fenced, as by their demurrer is admitted, but other citizens sing'y or in small groups might do likewise, and so the authority of the Government might be set at naught, and the rights of the immigrant and the citizen coming to these plains to take up small portions of land under the laws of the United States would be utterly unavailing.

The learned counsel for the respondents objects that the fourth clause of the bill, while alleging that the respondents have intruded and encroached upon a part of the public domain, does not show what part of the public domain they have intruded and encroached upon. To this it may be sufficient to reply that the map filed with and made a part of the bill would seem to point out the encroachment and intrusion, but lack of definiteness in this respect may be supplied in an amended bill by describing the fencing by words, showing what line or lines on the map were intended to point out the fence or fences complained of.

To the argument of the learned counsel for the respondents that the act of so encroaching or intruding is not shown to be in any manner wrongful or unlawful, it seems only necessary to say that the words "intrusion" and "encroachment" of themselves mean an unlawful going upon the rights or possession of another, as when a man sets his fence beyond his line (*vide* Bouvier's Law Dictionary, "Encroachment").

To the objection that the United States is only entitled to the same remedies for the protection of its property as an individual, we think the best answer is to be found in the words of Justice Miller, in the case of the United States *v.* Duluth (1 Dillon, 471):

If the allegations of this bill be true, we have no doubt of the right of the officers of the Federal Government to bring this suit in the name of the United States, and to protect her rights, and we deem it a much more appropriate mode of doing so than by the physical force of the War Department.

Not only may equitable intervention on the part of the court prevent this, but any attempt at force by parties thinking themselves entitled to enter on these lands under the respective land laws of the United States.

To the suggestion that an individual could not maintain a suit for an injunction on a bill such as is filed in this case, it would be sufficient to say that no individual could stand in relation to any other individuals possibly as in this case, unless it might be that of a trustee holding for others; and surely it would not be denied that a trustee would have the right to resort to a court of equity to protect the lands of his *cestuis*

*que trust* from such intrusion and encroachment, if they were threatened or being persisted in by many parties, rather than to drive such *cestuis que trusts* to a multiplicity of actions on the law side of the court. May not the United States under their liberal land law system be deemed as but holding these lands in trust for those who under their laws are ultimately entitled to them, and so not only may not the United States, but ought not the United States, to protect as well as defend these lands for those ultimately entitled to them?

To the objection that injunction will not lie in this case as in a case of purpresture, because of the common law definition of purpresture, the answer is to be found in the decisions in which, in Wisconsin and elsewhere, it is held that a prepresture (already quoted) is any intrusion of public right. Any intrusion of public right, while not probably strictly a purpresture, is in the nature of purpresture, and as such is enjoinable.

To the objection that irreparable injury must be shown to entitle the court to jurisdiction, we think we may only repeat the words of the supreme court of Wisconsin (35 Wis., case hereinbefore quoted, p. 552). "Such an inquiry in such a case is a conclusion of fact rather than a fact. The conscience of the court must be satisfied, and may be satisfied with or without averment." In this case a public injury is apparent in the acts charged against these defendants and admitted by the demurrer, in that eleven even-numbered sections, a part of the public domain, are withdrawn by the intrusions and encroachment of these defendants from settlement under the land laws of the United States. Leaving out of view the timber-culture laws, this intrusion and encroachment may deprive eleven persons of their rights to reclaim and settle upon this land if it be simply desert land. If it be such as is open to the homesteader, forty-four persons may be deprived of their rights under the laws of the United States, and if pre-emptors forty-four persons may be deprived. The character of the land is not shown in the averments of the bill. Surely this statement is sufficient to show the great public injury, the wrongfulness and unlawfulness of the enclosure being admitted by the demurrer. To the objection that injunction will not lie in any case of trespass with no other elements in the case than are contained in the amended bill, it may be sufficient to answer that this bill alleges not only a trespass and a wrong, but a continuing wrong, against the Government of the United States and against such of its citizens as may be entitled to this land under the homestead, pre-emption, or desert land acts, and that the ouster of the Government is not only a mere trespass, which is an unlawful act committed by violence by one private individual against another, but is in this case an act of disregard and of unlawful dispossession, encroachment, and intrusion upon the lawful power and authority of the Government of the United States, this additional element never being found where one individual trespasses upon another merely.

The learned counsel for the respondents maintained that as there was

no right of common to the citizens of the public domain, the United States holds such public domain as property for disposition, and no prerogative remedy is given it to protect such property, citing several authorities, the last one being 37 Wisconsin, Attorney-General *v.* Eau Claire, 446, 447.

The learned counsel must have misconceived that reference. What the court there says we will quote; it was speaking of public rivers:

They are highways; they are in charge of the State, and the State cannot abdicate its charge of them. That charge is a duty to the Federal Government and a trust for the whole people; not of the State only, but of the several States. An unauthorized encroachment upon any of them is a violation of the duty assumed by the State in its aggregate and sovereign character to keep them forever open. Every such encroachment is a purpresture which concerns the solemn prerogatives of the State and the prerogative jurisdiction of this court.

Original jurisdiction of such cases here is too manifest for discussion.

In Wisconsin, under their then constitution, the supreme court had original jurisdiction in cases of injunction, it is proper here to say.

It is true that none of the cases cited and relied on in this opinion are upon questions exactly such as that raised in the argument upon the bill and demurrer here.

But the doctrines enunciated and the language employed, even if it be conceded that they are in every case mere *obiter dicta*, which is not admitted, yet they are so convincingly persuasive and seem to the court so well in point in restraining what to the court seems to be so great a public wrong, that with becoming diffidence, and yet with sufficient confidence in their authority by persuasion, the court adopts them and makes them applicable to the case at bar.

Having answered all the objections of the counsel, and reached conclusions in this case at least to its own satisfaction, the court proceeds now to say that upon the filing of an amended bill, for which on application leave will be given, and if an amended bill when so filed shall have the errors hereinbefore pointed out corrected, and shall show on its face that the United States district attorney for Wyoming acts under the direction of the Attorney-General of the United States in bringing such a bill, which statement this bill does not contain, this court will hold that a remedy by injunction does lie in such a case, provided the facts are such as are admitted by the demurrer to this bill, and are averred according to the well-known rules of equity courts, and such bill shall be otherwise conformable to equity and the statutes of Wyoming governing equity practice.

The demurrer to this bill must be sustained for the defects herein pointed out.

Was the act of 1865 passed in consequence of this case, to give federal courts jurisdiction?

*RELATIVE TO HEARINGS ORDERED UPON SPECIAL AGENTS' REPORTS.*

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., May 8, 1884.*

To REGISTERS AND RECEIVERS, AND SPECIAL AGENTS GENERAL  
LAND OFFICE:

These hearings are ordered as a part of the proceedings upon an inquiry instituted by the Government into the validity of alleged fraudulent or illegal entries. The purpose is to give entrymen full opportunity to be heard in defense of their claims.

Hearings will be set at as early a day as possible after the order has been received, so that the special agent who examined the case may be present and while witnesses are accessible.

The register and receiver will consult with the special agent relative to fixing the time and place of taking testimony.

Notice of hearings will be given by the register and receiver by registered letter, addressed to the last known place of residence of the party to be notified; and, where his residence is unknown, to the post-office within the delivery of which the land is situated. The register and receiver will post a copy of the notice in their office for not less than thirty days prior to date of hearing. Personal service of notice (which may be given by the special agent) will also be made within the time fixed for hearing, if the residence of claimant is known or can be ascertained. If the party cannot be found, the notice will be advertised once a week for four weeks in a paper of general circulation in the vicinity of the land.

Proof of mailing, posting, and service of notice (or publication) must be filed with the papers in the case. When personal service is not made, a statement by the register and receiver, or a certificate from the special agent, or the affidavit of an officer or other person, must be filed, showing due diligence has been used and that the party could not be found.

Special agents should so arrange their business as to have testimony taken at the same time and place in as many cases as practicable. They must be present at hearings, with the necessary witnesses, and their testimony and the testimony of witnesses must be given in person, notwithstanding their written reports and the affidavits previously obtained. They will also represent the Government in the conduct of cases and the cross-examination of witnesses, unless they have the assistance of the United States district attorney or of special counsel. They will give their attention to those hearings and to due preparation therefor, to the exclusion of all interfering business.

Special agents are not required to file affidavits for continuances or postponements, nor to make deposits for expenses.

Continuances and postponements will be allowed only for necessary cause, and in no case for the purpose of vexation or delay.

Special agents will not enter into stipulations relative to taking testimony, or otherwise, by which the due course of proceedings will be embarrassed or the purpose of the law frustrated.

The expenses of service of notice and the costs of taking the testimony of witnesses for the Government, including the Government's cross-examination of witnesses for the claimant, will be paid by receivers, who will estimate specially therefor, referring to the date and initial of the letter ordering the hearings.

The cost of reducing testimony to writing, payable by the Government, will be the actual and necessary sums paid out for that purpose, and not fees of local officers. Such fees will not be charged to the Government.

The expenses of the claimant, including the pay of his own witnesses, the costs of taking their testimony, and the cost of his cross-examination of witnesses for the Government, must be paid by himself, and a reasonable deposit for expenses of reducing such testimony and cross-examinations to writing may be required by the officer taking the testimony.

Witnesses for the Government, other than the special agent and his assistants, will be paid by the receiver, upon the approval of the special agent, and receivers will estimate therefor. Special agents will pay their own expenses and the expenses and compensation of their assistants, and return proper accounts and vouchers.

Upon the termination of a hearing, the register and receiver will immediately transmit the record of the proceedings, with their joint opinion thereon, to this office.

Claimants will be allowed the usual right of appeal, and in absence of appeal or in default of appearance will be concluded.

N. C. McFARLAND, *Commissioner.*

Approved May 9, 1884.

H. M. TELLER, *Secretary.*

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### III.—HOMESTEADERS.

#### 1. TRESPASS BY, ON ADJOINING LANDS.

*INADVERTENCE—AMENDMENT.*

WILLIAM O. PERKINS ET AL.

A homestead claimant, who, through ignorance of the lines, resides and cuts timber beyond the limits of his entry, may be permitted to amend his entry so as to include the tract he has been residing upon and improving, and will not be regarded as guilty of trespass.

*Secretary Teller to Commissioner McFarland, February 9, 1884.*

SIR: I am in receipt of your letter of the 12th ultimo, transmitting report, dated December 23, 1883, from Special Agent Kelsey, in rela-

tion to trespass of William O. Perkins and others in cutting 201 trees, amounting to 174,267 feet, board measure, from the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 19, and the SW.  $\frac{1}{4}$  of Sec. 20, T. 1 N., R. 9 W., Louisiana, wherein you recommend civil suit against the parties purchasing the timber.

You state that the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 20 and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 19, comprising the principal portion of the land trespassed upon, are embraced in the homestead entry of William O. Perkins, made November 23, 1881. Concerning said Perkins the agent writes:

I consider that he is deserving of the greatest leniency that can be shown him. He states that at the time he cut and sold the timber his family were in destitute circumstances, and the sale of the timber was his only means of keeping them from starvation.

At the time of cutting, and in fact until I told him otherwise, *he thought he was living on his homestead*. True he cut over more territory than his homestead could cover, even if he was living upon it; but he states that he was entirely ignorant of the measurement of land, and thought he was confining himself to his homestead.

I conversed with his neighbors concerning him, and am convinced that if the man is given a chance he will \* \* \* make a good citizen. At all events, a prosecution would result in no good to the Government and in great harm to his family.

It will be seen that this case, in so far as regards the fact that the alleged trespasser resided beyond the limits of the tract entered by him as a homestead, through a misunderstanding on his part of the limits of the land actually entered, closely resembles that of the two homesteaders, Craft and Jones, in the case of the trespass of W. H. Craft, returned by me to you on the 21st ultimo; and I have the same directions to give in this case as in that, to wit, that you will direct the register and receiver of the proper land office to instruct Perkins how to amend his homestead entry in such manner that it shall describe and include the tract which he has actually been residing upon and improving, and allow him the same credit as regards residence and cultivation that would have been given him had his entry been correctly described originally.

Such amendment, if the description of the land given by the agent is correct, should consist in the exchange of the most easterly or the most westerly of the 40-acre tracts included in his present entry for the 40-acre tract upon which he now resides; of course, he cannot be allowed to make entry of an entirely new tract, returning to the Government all that which he has denuded of its timber. In other words, Perkins's error should be remedied in such a way as to subject the Government to as little loss as possible.

If Perkins is thus permitted to cure his error in the matter of homestead entry, and regarded as not guilty of trespass, inasmuch as the timber was cut from what he considered to be and the most of which will be his own land, it would, of course, be inconsistent to hold the purchasers of said timber liable to the Government for its value; and proceedings against them for trespass in connection with this case should accordingly be dismissed.

**2. TRESPASS ON CLAIM OF P. Houser.***POSSESSION—RIGHT—REMEDY.*

Homestead claimants must seek remedy in the local courts for trespass upon their claims.

*Commissioner McFarland to receiver, La Crosse, Wis., March 26, 1884.*

SIR: I have received your letter of the 7th instant, with its inclosure from P. Houser, who complains of depredations by certain parties upon his additional homestead claim, and desires to know if there is any law under which he can "get any pay for the wood and timber that have been taken off."

Mr. Houser being in possession of the land by virtue of nearly five years' residence, and compliance with the law governing his original homestead entry, is invested with the exclusive right to the timber thereon, and should seek his remedy for the trespass in the local courts. You will so advise him.

The matter of depredations which Mr. Houser states the parties named by him are committing upon other lands in his neighborhood will be referred to Special Agent C. S. Martin at Wausau, Wis.

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**IV.—PRE-EMPTION.****1. TIMBER ON—WHO TO PROTECT.****2. IF FRAUDULENTLY ENTERED.***OCCUPANCY—GOOD FAITH—FRAUD.*

MIKE KERNAN.

So long as the land is occupied in good faith under the pre-emption laws the duty of protecting the timber does not belong to the Government.

Trespass upon land fraudulently obtained, and held simply for the benefit of the timber, requires the attention of the Department.

*Commissioner McFarland to De Witt C. Alexander, Long Pine, Nebr., June 21, 1884.*

SIR: Complaint purporting to be made by you, without date, before J. H. Skinner, J. P., and setting forth that timber trespass had been committed by one Mike Kernan upon N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 32, and N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 31, R. 20 W., Nebraska, located by you, has been received at this office. You "pray that the Government, or United States Land Commissioner, prosecute the above case, and thus protect and vindicate the rights of her loyal citizens, and her power to protect the same."

You are advised that so long as the lands are occupied and claimed

by you in good faith under the pre-emption law, the duty of protecting the timber does not devolve upon the Government.

The cutting and removal of timber from homestead or pre-emption claims fraudulently obtained and held simply for the benefit of the timber, is such a trespass as properly requires the attention of this office.

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## V.—SURPLUS OF TIMBER CUT FOR RAILROAD CONSTRUCTION.

### PROHIBITION—EXPORT.

W. T. VAN NOY & Co.

Surplus or refuse timber cut for railroad construction purposes may not be exported from the State or Territory where cut.

*Secretary Teller to Commissioner McFarland, June 21, 1883.*

SIR: I have received yours of the 13th instant, transmitting report of Special Timber Agent Tullis, dated the 29th ultimo, in relation to the shipment of certain timber and lumber by W. T. Van Noy & Co., from Beaver Cañon, Idaho, to Salt Lake City, Utah; also a large number of affidavits and letters bearing upon the subject, which I return to you herewith.

The (unsworn) statement and petition signed by Van Noy & Co., David Stoddard & Son, Charles Hall, and William N. Thomas, is, in substance, that they are agents of the Union Pacific Railway Company for procuring timber for the construction of the Utah Northern and the Oregon Short Line Railroads; that after supplying the roads of those railroads they find that they have left upon their hands a surplus of 5,000,000 feet of timber and 5,000,000 feet of lumber, not suited to the requirements of the railroads—all cut from mineral lands belonging to the United States in the vicinity of Beaver Cañon, Idaho; that there is no ready nor easily accessible market in their vicinity, nor indeed in Idaho, for the timber and lumber in question, but there is a great demand for timber and lumber of that kind (red pine) in Salt Lake City, Utah; that they accordingly contracted to deliver said timber and lumber to certain parties in Utah, and in fact had sent about 250,000 feet, board measure, to that point, when they were informed that there was a departmental prohibition against the exportation of timber or lumber from the Territory where cut; that until that time they had been entirely unaware of any such prohibition; that, being anxious to fulfill the law and the departmental regulations in every respect, they now desire special permission to ship the remainder of the before-mentioned 5,000,000 feet of timber and 5,000,000 feet of lumber to Salt Lake City; otherwise the buildings now in progress must be stopped, the parties with whom they have contracted, as well as themselves, will suffer loss and hardship, and the timber already cut and sawed will rot on the ground for lack of a market.

Van Noy & Co. *et al.*, in their own statement and petition, do not for themselves ask more than this, but their attorneys and the officers of the railroads for which Van Noy & Co. *et al.* are timber agents, argue in behalf of a removal of the departmental prohibition, and a modification of the rule forbidding exportation, not only in relation to this timber already cut, but to such as they may cut hereafter, not alone as bearing upon this case of Van Noy & Co. *et al.*, but as "applying to such cases as this." So that practically the application is for a removal of the departmental inhibition in all cases and for all time.

I recognize the fact that it is practically impossible for an agent or contractor who is furnishing timber to any considerable extent for the construction of a railroad to cut timber of the exact size desired and to the precise quantity needed and no more.

But the cutting of timber and lumber to the amount of 10,000,000 feet beyond that demanded for construction purposes can scarcely be accounted for under the pretext of such unavoidable surplusage as claimed by the statement signed by Van Noy & Co. *et al.*

Their attorneys (Messrs. Stayner & Simmons) undoubtedly set forth the fact of the case more fully and clearly when they write to you (May 28 last) that the cutting of timbers for the railroad by the parties named was the opening wedge for "their subsequent traffic. \* \* \* Of course we do not suppose that all the lumber they have on hand is classed as exclusively refuse or remnants; there may be some which has been cut aside from this class, for they would naturally, in ignorance of the rules, extend further."

And Mr. F. R. McConnell (in his letter of the 29th instant to Mr. Kimball, forwarded to this Department), writing in the name of the Union Pacific Railway Company, of which he is general agent, and which owns the Utah Northern and Oregon Short Line Railroads, says: "This matter is of vital importance to us. We are *just building up a large lumber traffic* on the Utah and Northern," &c.

In short, the general tenor of the numerous documents forwarded clearly demonstrate that the purpose in view is not merely to enable a saw-mill firm to dispose of a little surplus lumber accidentally left upon their hands, but a deliberately considered, comprehensive business plan on the part of the managers of the railroads to "build up a large traffic" in timber belonging to the Government. Mr. McConnell continues:

We are just building up a large lumber traffic on the Utah and Northern, and along comes an officer from the Interior Department and says these parties cannot ship out of the Territory in which the lumber is cut.

There seems to be some misapprehension here. The Department does not propose to place any restriction upon the railroad transporting its *lumber* or upon any lumber owner shipping *his* lumber to any desired market. But it cannot consent that the lumber belonging to the Gov-

ernment, in yet comparatively unpopulated districts, which it holds in trust for the benefit of the few actual settlers who are now there, and the many who shall make their homes there hereafter, shall be sacrificed to subserve the special interest of any private organization or corporation. The farmers who in coming years may wish to till the soil in the Beaver Valley, or the miners who may prospect for ore in the adjacent mineral lands, if they find the hill sides denuded, by Government permission, of all the timber that once covered them, will not accept as an adequate excuse that its removal had enabled a railroad running through that section "to build up a large lumber traffic."

Van Noy & Co. *et al.* assert:

We desire to have it understood that in all this proceeding, we were totally ignorant of the regulations established by the Department of the Interior respecting the prohibition of shipments from one State or Territory to another. And it was not until we had already sent some few car-loads to Salt Lake City and vicinity (amounting to probably 250,000 feet) that we learned (being informed by the Hon. James Tullis) that it was a violation of the law and regulations to ship our lumber out of the Territory wherein it was cut.

But I find on file in this Department, under date of November 29, 1879, a letter from C. B. Fox, at that time register of the United States land office at Oxford, Idaho, alleging timber trespass against W. T. Van Noy & Co., upon non-mineral public lands located in Pleasant Valley, near Beaver Cañon.

Register Fox reports that W. T. Van Noy had cut, sawed, and sold (aside from that which they had sold and which had been used in the immediate vicinity) 300,000 feet of lumber for purposes of speculation, to be transported to distant markets; and when warned to desist, Register Fox adds, Mr. Van Noy was "openly defiant of the Department taking any action against him in the premises."

On December 19, 1879, this Department requested the Attorney-General to direct an investigation of the case, and to institute suit, both civil and criminal, if on examination it should be deemed for the interests of the Government.

Whether suits were instituted, and, if so, what was the result, is not shown, and of course would not be shown by the recent records of this Department.

As regards the general request for a modification of the regulation prohibiting the exporting of timber beyond the limits of a Territory, I therefore concur with you in the opinion that—

Such modification would afford the people of Idaho, and of other States and Territories as well, occasion to justly complain of the sending out of their Territory any of the timber supply that is no more than sufficient for their own needs to benefit citizens of another Territory who are not without timber in their own section with which to supply their necessities, and for the profit of lumbermen and railroad companies intent only upon financial gain and speculation.

In regard to the timber already cut and awaiting shipment, you are

directed to instruct Special Agent Tullis to ascertain its value where it now is, the distance to the nearest available market, the value of the timber and lumber in such market, and promptly report the same to you, together with any and all other facts bearing upon matter which will aid the Department in deciding what action will subject the Government to the least loss on account of the timber thus unlawfully cut and removed from the public lands. You will also direct Agent Tullis to see to it, in the mean time, that no more timber in question is removed from its present locality.

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*AGENT—MINERAL LANDS—STUMPPAGE PRICE.*

CHARLES HALL.

An agent employed in cutting timber for railroad construction purposes is not entitled to the surplus or refuse quantity cut from the public lands, mineral or otherwise, without paying stumppage value for the same.

*Commissioner McFarland to George W. Strong, special timber agent, Boise City, Idaho, January 23, 1884.*

SIR : It appears from your report of the 28th ultimo that Charles Hall, of Beaver Cañon, Idaho, is the duly appointed agent of the Union Pacific, Utah and Northern, and Oregon Short Line Railroad Companies, for procuring timber from the public lands for construction purposes, pursuant to the act of Congress of March 3, 1875 (18 Stats., 482) ; that in cutting timber for said companies he has necessarily cut a large amount of surplus timber which would have been wasted had it not been sawed into lumber suitable for domestic purposes ; that this timber was cut from *mineral* lands ; that there is no market practicable for said timber or lumber unless the same is shipped a distance of 175 miles into Utah Territory ; and that Mr. Hall desires permission to export the timber in question to Utah Territory.

Mr. Hall in procuring this timber acted solely as the agent of the railroad companies, and any timber cut by him as such agent, and found to be unsuitable for the construction of the roads is the property of the United States.

The fact that the lands from which the timber was taken are mineral lands is not material, for a railroad company has no greater right to take timber for construction purposes from mineral public lands than from agricultural public lands. This timber cannot be sold by the railroad companies to be used for building, agricultural, mining, or domestic purposes under the act of Congress approved June 3, 1878 (20 Stat., 88), for the reason that it is provided in the first section of said act that its provisions shall not extend to railroad corporations.

Mr. Hall having no title whatever to the timber, his request to be permitted to export the same need not be considered. You are directed

to inform him of the contents of this letter, and to advise him that should he desire to purchase said timber an offer to pay a reasonable stumpage value therefor will be considered.

You will afford him any proper information which he may request as to the form in which such offer should be presented, and, should he forward it through you, you will submit therewith your own report as to the value of the timber which he may desire to purchase.

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#### VI.—TIMBER CUTTING.

##### 1. BY HOMESTEADERS, PREEMPTORS, AND SQUATTERS.

###### CUT BEFORE ENTRY.—RIGHT TO USE.

###### WESLEY PROCOP.

After entry by another party a former occupant of the claim has no right to the timber cut and left thereon.

*Commissioner McFarland to Wesley Procop, Mount Adams, Arkansas,  
April 25, 1883.*

SIR: In reply to your letter of the 2d instant you are informed that no former occupant of the land held by you under homestead entry has the right to make use of the rails to which you refer, or of any other timber cut upon your claim before you had entered it.

You alone are permitted to use the timber in question, applying it to fencing or other needful purposes in improving or cultivating the land.

You are also informed that land embraced in a homestead entry is property of the Government until the entry has been perfected in compliance with law.

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###### RESIDENCE—CULTIVATION—GOOD FAITH.

###### WILLIAM N. B. ALDERSON.

Timber privileges of homesteaders whose entry is in strictly good faith not restricted in amount of timber.

*Secretary Teller to Commissioner McFarland, November 15, 1883.*

SIR: I have received yours of September 27 last, transmitting report of Special Agent Warren, of August 28 last, alleging public-timber trespass against William N. B. Alderson, of Eureka Springs, Ark. in cutting certain cedar posts and railroad ties, and selling the same to Joseph Bobo, the Eureka Springs Railroad Company, and in the open market, said timber having been cut during the summer and autumn of 1882 and winter of 1882-'83, from the land embraced in his homestead entry dated June 4, 1881.

Alderson, in his sworn statement, sets forth that he cut the timber

under the supposition that he had a legal right to do so, and the agent in his report says: "I am of the opinion that Alderson cut the timber through ignorance of the law, on the advice of others, thinking he had the right to do so."

On being informed that he had violated the law Alderson made application for commutation of his homestead entry, depositing the money with the receiver of the land office at Harrison, Ark., for that purpose.

The special agent, visiting the place in March and April last, says: "Alderson resides thereon with his family. He has a small frame house on the land, worth about \$75. Has about five or six acres cleared and planted to corn, potatoes, &c."

You recommend that Alderson "be permitted to settle" the case against him upon payment "of the full market value of the posts disposed of by him in the general market, amounting to the sum of \$54," that Bobo be called upon to pay \$102.90, the full market value of the posts purchased by him, and that suit be instituted against the Eureka Springs Railroad Company for the full value of the timber purchased by it, \$155.50.

I cannot concur in your recommendation.

It appears that Alderson is making his actual home upon the land, and has cleared and cultivated it to an extent which sufficiently manifests his good faith.

It is true, the circular "Instructions to special agents appointed to prevent timber depredations upon Government lands," on page 6, section 9, says:

In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, he may sell or dispose of such surplus; but it is not allowable for him to denude the land of its timber for the purpose of sale or speculation until he has made final proof and acquired title.

But section 10, immediately following, contains this reservation, which clearly applies to the present case:

*Where the facts justify the conclusion that the person has made his entry in good faith, and is cultivating and improving the land with the purpose of making it his home, the agent need not consider it his duty to report every violation of the preceding rule.*

You will therefore direct the special agent to suspend further proceedings in the case; also, that he inform said Alderson of that fact, and that if the money placed by him in the hands of the receiver at Harrison has not yet been turned into the Treasury the same is at his disposal, and he is at liberty to commute his homestead entry or wait until five years from date of entry have elapsed and obtain his patent upon final proof, as he chooses.

*UNSURVEYED LANDS—RESIDENCE—GOOD FAITH.*

JOHN W. BAIRD.

Settlers upon unsurveyed land, with bona fide intent of residence and cultivation, and taking the land under settlement laws, when surveyed, may cut and sell the timber thereon.

*Secretary Teller to Commissioner McFarland, November 27, 1883.*

SIR: I have yours of the 31st ultimo, inclosing report of Special Agent Wilcoxen of the 13th ultimo, alleging trespass against John W. Baird in cutting and removing timber from certain unsurveyed lands in Washington Territory. The agent states that Baird is a "squatter," and, intending to make the claim his home, supposed that he had a right to clear off and sell the timber; that—

Baird has a large family, among the children being two grown sons, who seem to be steady hard workers. From the reputation of the boys for work and character, the value of the claim, and what they have done since squatting there, and no other appearances, I am of the opinion that Baird intends to \* \* \* make this his home, and is working in good faith to that end. \* \* \* Have cleared about 5 acres; built one house 16 by 40 feet, and another under way, one and a half stories, 22 by 30 feet, to be occupied as a family residence.

You recommend—

That no criminal proceedings be entered against Baird, but that the case be referred to the honorable Attorney-General, with the request that the proper measures be taken to secure the timber in question and dispose of it for the United States.

I cannot accede to your request that the Attorney-General secure the timber in question, and dispose of it for the benefit of the United States.

While Baird is a squatter, he is rightfully on the land if he *intends to make his home on it, and take it under the settlement laws when the land is surveyed, and he is allowed to do so.*

If he has taken the land in good faith he is the owner thereof for all practicable purposes, although the title may remain in the Government.

If it appears that he has cut more timber than he was compelled to cut to clear up the land he is not liable, either criminally or civilly, for so doing, if all the time he has the honest purpose of ultimately completing his title under the laws of the United States. A jury satisfied of that fact would not, properly instructed by the court, find him guilty of trespass.

Whether he is, or is not, a trespasser does not depend on how many trees he cuts, but on the bona fide character of his settlement. Baird was justified in doing whatever clearing was necessary to put in a crop, and he might cut and sell the timber to aid him in so doing, or he might sell timber to support his family, while clearing his land and raising his crop, if during all that time he had a bona fide settlement on the land; that is, if he intended to remain on the land and make it

his own, and was not making his settlement an excuse to cut off the timber with the ultimate purpose of abandoning his claim. If he should sell all the timber, and do little or no clearing, it might be reasonably supposed that his occupation was not for the land, but to secure the timber, and it then might be, and doubtless would be, the duty of the agent to report the case to the Department.

But if the agent is satisfied that the *cutting* of the timber is not the primary object of going on to the land he should not report the case.

If a settler desires to make a home on the public land he has the right to select a timber lot if he chooses, and if he does select a timber lot he will not select a poor one if he is wise; the timber may be the real inducement for him to make the selection of the land, but if he goes on the land with the intention of settlement under the laws, and carries out such intention by conforming to the provisions of the statutes, and completes his title, he is not a trespasser.

He must have the time allowed to complete his title, unless from his methods the special agent is satisfied he is not there bona fide, and then, as before stated, he must make his report to the Department, and the question of his good faith is the one to be determined in the first instance by the Department, and perhaps ultimately in the courts, and when that is found for him there is the end of the question. In this case there appears to have been no reason to doubt the good faith of Baird, and he ought not to have been annoyed by the agent after the agent became satisfied of his good faith. It is the purpose of the Department to protect the timber on the public land from spoliation, not simply on account of its financial value, but because the preservation of the timber is a matter of national concern, independent of its financial value; but in so doing there should be great care exercised, so that the agencies of the Government do not become agencies of oppression to the people, and this will certainly be the case if a bona fide settler on the public land cannot make use of the timber on his land until such a time as he shall have secured a fee simple title from the United States.

If, as suggested, the timber cut by the settler is taken and sold, the money covered into the United States Treasury, and ultimately the settler establishes the *bona fides* of his settlement by continuing the required time and securing his patent, how is he to recover the money taken from him by the seizure of his timber? It is better that the Government occasionally suffer by the loss of timber cut on pretended homesteads and pre-emption claims than that the settler should be embarrassed in his efforts to secure the benefits of the liberal laws passed for the express purpose of inducing the people to go on the public lands and make themselves homes.

Paragraphs 8 and 9 of instructions to special agents of the General Land Office appointed to prevent timber depredations, relating to trespasses on lands covered by pre-emption and homestead claims, should be revised to conform with the views herein expressed.

*ACTUAL SETTLEMENT—NOT PRETEXT.***CHARLES A. LAWRENCE.**

Timber cutting allowed a homesteader or pre-emptor if he has taken the land for actual settlement and residence, and not as a mere pretext for holding it while the timber is being removed.

*Commissioner McFarland to C. S. Martin, special timber agent, Wausau, Wis., December 7, 1883.*

SIR. In the matter of timber cutting by Charles A. Lawrence upon his homestead claim, you are advised that, inasmuch as you found the homesteader had with his family established a residence upon the land, and had made legitimate use of the timber in support of his improvements, report in the case was unnecessary.

Hereafter you will make no report of timber cutting upon homestead and preemption claims unless you find that the entry itself is fraudulent, or unless it is established conclusively that the timber was not cut for clearing the land or other legitimate purposes.

Where you find no settlement or improvement of the land, or where it appears that the alleged residence is not the actual residence of the party in good faith, or that the entry was made for the benefit of another, or by a person not qualified to make the entry, or that it is but a mere pretext for holding the land while the timber is being taken away, you should report all the facts which sustain such conclusion.

But it is not expedient to give your attention to alleged trespasses by settlers unless a clear and important case is presented, nor to cases of trivial amount and value. You will devote your energies mainly to investigating the operations of mill-men and other large trespassers.

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**2. BY RAILROAD ON LAND NOT SELECTED.**

**NORTHERN PACIFIC RAILROAD COMPANY AND DE GRAFF & Co.**

In the matter of timber cutting on lands not selected at date of trespass. The indemnity being a float, attaching to no land until selection, the railroad had no right to sell the timber at date of contract with De Graff & Co.

*Commissioner McFarland to Secretary Teller, May 24, 1884.*

SIR: I am in receipt by your reference of March 28, 1884, of a letter from the honorable Attorney-General, inclosing copy of a letter from D. B. Searle, esq., United States attorney, Minnesota, dated Saint Paul, March 24, 1884, relative to a suit commenced against the Northern Pacific Railroad Company and the firm of De Graff & Co., to recover the value of 3,250,000 feet of lumber.

This action was brought by direction of the Department of Justice at the request of this Department, based upon the report of Special

Timber Agent Dodge, alleging trespass by said parties upon certain tracts of land in Secs. 9, 13, and 15, T. 140, R. 33, and Sec. 7, T. 140, R. 32, Minnesota.

The land lies within the indemnity limits of the Northern Pacific Railroad, and at date of the special agent's report and action thereon by this office had not been selected by said company.

Prior to commencement of suit, which was ordered October 24, 1883, the railroad company did select the tracts under the indemnity provisions of its grant, said selections having been made October 17, 1883.

Mr. Searle states that both the railroad company and De Graff & Co. will admit the cutting and claim that the railroad company was entitled to cut the timber as the owner of the land. He therefore desires to know what questions of law are sought to be raised in the case.

I have the honor to state that under decisions of the Supreme Court and of this Department, holding the indemnity privilege a float and attaching to no land until actual selection, it would appear that the railroad company had no right to sell the timber at date of contract with De Graff & Co., or at date of cutting.

It has now selected the land, but such selection to become effective on title needs the approval of this Department. It is not practicable at the present time to consider these selections. If they should be ultimately approved it is my opinion that the suit for trespass should be dismissed.

I therefore respectfully suggest that the case be continued to await the determination of this Department upon said selections.

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### 3. WITHIN RAILROAD INDEMNITY LIMITS.

#### NORTHERN PACIFIC RAILROAD COMPANY.

Until lands within such limits are selected and selection approved the company have no right to take timber therefrom, except for construction purposes.

*Acting Commissioner Harrison to Don A. Dodge, special timber agent,  
Saint Cloud, Minn., May 26, 1883.*

SIR: Referring to your communication of the 8th instant, in relation to the taking of timber from indemnity limits by the Northern Pacific Railroad Company, you are advised that until lands within such limits have been selected by the company, and the selection so made has received the approval of this office, said company have no right to enter thereon and take timber, further than so much as they may require for construction purposes. The taking therefore of timber to be applied to other uses, prior to the time indicated, would constitute a trespass upon the part of the company.

Since you state you are informed said company make a practice of

disposing of timber within the limits in question, you are directed to ascertain the particular sections of land thus entered upon, and report the numbers thereof to this office; upon receipt of which information you will be advised whether or not the same have been selected and approved.

#### 4. ON INDIAN RESERVATION.

##### FOND DU LAC RESERVATION.

Timber cannot be lawfully cut from selections not approved by the Department; nor from approved selections, except to improve or better adapt the land for convenient occupation.

*Commissioner McFarland to Don A. Dodge, special timber agent, Duluth, Minn., May 8, 1883.*

SIR: In reply to your inquiry of March 31, 1883, relative to the cutting of timber for sale from the Fond du Lac Indian Reservation, and the right to purchase such timber, I have to advise you that the matter was referred to the Commissioner of Indian Affairs, who in reply states as follows:

The Fond du Lac Reservation was established by the fourth clause of Article 2 of the treaty with the Chippewas of September 30, 1854 (10 Stat. 1110). \* \* \*

The third article of the treaty provides for the survey, allotment, and issue of patents in respect of the reserved tract. By act of Congress approved May 29, 1872 (17 Stat., 190), the Secretary of the Interior was authorized to remove the Fond du Lac band (with their consent) from the tract so reserved for their use, and to locate them upon the lands (Bad River Reserve) set apart by the second clause of Article 2 of the treaty above referred to, the lands vacated to be appraised and sold for their benefit.

A commission to appraise the lands was appointed in 1873, but the Fond du Lac Indians, in council, denying having ever given any intelligent assent to the sale of their reserve, nothing further was done under the act, and they have continued to reside thereon to the present time.

The reservation lands have been surveyed and subdivided into quarter-sections, but no allotments have hitherto been made, the Indians not until quite recently evincing any desire for title in severalty. It is quite clear that these Indians have no power to cut timber from the common lands for the purposes of sale alone.

Under the George Cook decision the timber may indeed be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, and when rightfully severed there is no restriction upon its sale, but this Department has always held that approval of the selection is a condition precedent to any such action on the part of the Indians.

You are therefore directed to investigate and report upon any case coming to your knowledge of timber cutting on the reservation from selections *not* approved by the Department, and of timber cut from approved selections for any other purpose than to improve or better adapt the land to convenient occupation.

**5. ON MILITARY RESERVATION.—LANDS ABANDONED.****FORT CAMERON RESERVE.**

Timber cutting upon abandoned military reserve lands not restored to the public domain is a matter within the jurisdiction of the Department of the Interior. Timber cut thereon must be released to the United States, and unlawful settlement on such lands is trespass.

*Commissioner McFarland to James Tullis, special timber agent, Salt Lake City, Utah, September 27, 1883.*

SIR: Referring to your reports of July 5 and 23 last, in relation to certain timber unlawfully cut by one John Taylor within the Fort Cameron military reservation, I have to state that inquiry has been addressed by the Department to the Secretary of War with a view to ascertaining the action deemed proper to be taken by the War Department respecting the said timber yet remaining upon the reservation.

Reply is received that the entire question of the present timber depredations upon the above-mentioned reservation is left to the jurisdiction of this Department, and that the military authorities will be advised accordingly.

You will therefore obtain from Mr. Taylor at once a release to the Government of any claim which he may lay to said timber, and forward the same to this office (see Form No. 9, page 35 of Office Circular, dated June 1, 1883) and take possession of the timber.

In regard to the matter of parties trespassing upon said reserve by unlawfully settling thereon or cultivating the same, you are directed to notify all such offenders that since they are on land reserved for military purposes not yet restored to the public domain, they are guilty of trespass, and must at once abandon the same. After which you will report to this office full particulars in each case.

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**FORT CAMERON ABANDONED RESERVE.**

Timber upon abandoned military reservations to be protected by the Interior Department in like manner as timber upon other Government lands.

*Secretary Teller to Commissioner McFarland, October 1, 1883.*

SIR: Referring to the letter of the 14th ultimo from the Secretary of War on the subject of timber trespasses upon the (abandoned) Fort Cameron military reservation, in Utah, which letter was referred to you by me on the 18th ultimo, I have received yours of the 27th ultimo in response thereto, in which you express the opinion that the course proposed by the Secretary of War, to wit, "after the buildings on such reservations have been sold or otherwise disposed of and the troops withdrawn, to transfer the reservation to the temporary custody of this

Department, so that trespass thereon may be prevented," would be for the interests of the Government.

My own view is that this Department should take the same steps to protect the timber on reservations of the kind described as on the public lands of the United States.

There is no appropriation at the service of this Department for the direct purpose of caring for and protecting reservations abandoned by the military; but there is an appropriation for the protection of timber on Government lands, and there is every reason why this should be made applicable to the protection of the timber on abandoned military reservations and for the investigation of trespasses committed thereon.

You are therefore directed to take the same steps to protect the timber on Fort Cameron military reservation and such other military reservations as may hereafter, from time to time, be reported by the War Department to this, as having been abandoned by the military, that have heretofore been taken for the protection of the timber upon other Government lands.

I have so informed the Secretary of War.

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## 6. ON MINERAL AND COAL LANDS.

*PRIOR TO ACT OF JUNE 3, 1878.*

M. W. BREMEN.

Where the timber cutting, prior to the act of June 3, 1878, is such as, by said law, would be lawful if done after that date, the party complained of will not be proceeded against.

*Secretary Teller to Commissioner McFarland, March 26, 1883.*

I have received yours of the 17th instant, wherein you refer to the facts that there have been presented for the consideration of your office several cases of timber cutting upon public mineral lands in New Mexico, wherein the cutting antedates by several years the act of June 3, 1878, authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes. You refer specifically to the case of M. W. Bremen, who, from February, 1869, until some time in the year 1876, cut 1,150,000 feet of timber, chiefly, if not all, from mineral lands of the United States. In March, 1882, Bremen made a proposition to settle by paying at the rate of \$1 per thousand feet, which proposition was accepted by this Department in April, 1882. In May, 1882, this Department made a ruling to the effect that under the act of June 3, 1878, miners and others inhabiting mining districts have the right to cut or employ others to cut timber from the mineral lands of the United States for domestic uses. Mr. Bremen not having at that date actually paid over to the receiver

of public moneys the amount which he had previously offered, now claims that said ruling releases him from any obligation to do so. Whereupon you, directing attention to the fact that Bremen's alleged trespass was committed *prior to the passage of the act* of June 3, 1878, and that said act does not provide for the condonement of any acts of timber trespass committed prior to its passage, request of me a decision, whether or not persons committing such acts prior to said date of June 3, 1878, should be held accountable therefor, or whether the rulings contained in my letter of May 25 last should be applied in such cases, and no further action taken.

In answer to this, I have to say that where the act complained of is such as, by the act of 1878, would be lawful if done after that date, I see no propriety in now proceeding against the party for recovery. It is for you to ascertain, through the register and receiver, in all cases, whether the alleged acts are in violation of the law *as now existing*.

Referring to the case of Mr. Bremen, you say that the timber cut by him was cut "chiefly, if not all, from mineral lands of the United States." It is desirable that in your reports the question as to whether the land from which timber is cut is mineral or non-mineral should be clearly determined, and the reports made with proper discrimination.

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ACT OF JUNE 3, 1878.

SAN JUAN LUMBER COMPANY.

The evidence presented is not sufficient to base criminal proceedings upon. The proposition of the company's agent is accepted. The act of June 3, 1878, liberally construed when the case is not an aggravated trespass and the timber is cut from non-mineral lands for same purposes as are specified in the said act applicable to mineral lands.

*Secretary Teller to Commissioner McFarland, November 26, 1883.*

I have received yours of the 19th of October last, inclosing report from Special Agent Clark, of September 18 last, relative to timber trespass alleged against "The San Juan Lumber Company," transacting business at the time of the alleged trespass on Lightner Creek, near Durango, but at present operating near Hermosa, Colo.; also proposition of settlement from John A. Porter, in behalf of said firm, and affidavits of several parties as to the non-mineral character of the land trespassed upon.

The report sets forth that from January to June, 1881, the company named caused to be cut and removed (through Elbridge A. Withee and John Carmicle, contractors), from 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. 19, T. 35 N., R. 9 W., 514 pine trees, deriving therefrom 205,600 feet of lumber, of which 130,000 feet were used in the construction of the "San Juan and New York Smelting Works," at or

near Durango, and the residue was sold to citizens of said town for building purposes.

The value of the timber is estimated to be, in the standing tree, \$1.25 per thousand feet, board measure; on the ground where cut, \$2.75; at the mill, \$6.75; when manufactured into lumber, \$11.75.

The sworn statement of J. A. Porter, the agent of said company, sets forth that a number of persons were interested in the project of erecting said smelting works; a large amount of lumber was needed for their construction, without delay, hence a saw-mill was erected to manufacture it—the most of the owners of the mill being stockholders in the smelting works. Nearly all the timber from this tract was used by "the smelting company;" but after their works were completed, the company continued to do some sawing, but run upon logs purchased from parties claiming them, for which we paid them large sums of money. The agent says:

Sanford, an employé of the company, and Withee, one of the contractors, pre-empted the ground. Mr. Porter, the agent of the lumber company, informs me that they supposed their pre-emptions gave control of the timber. \* \* \* By request of the agent of the San Juan Lumber Company I state that they presumed that the lumber used in the erecting of the smelting works would not have to be paid for; they thought it exempt under the mineral clause.

The agent of said San Juan Lumber Company, in their interest, in order to make satisfactory settlement and avoid litigation, offers to pay in settlement \$1.25 per thousand for the full amount of 205,600 feet of lumber sawed by them, amounting to \$257.

You recommend that, "as the trespass appears from the statements presented to be a knowing and willful one, \* \* \* said proposition be rejected, and \* \* \* criminal and civil suits instituted against the San Juan Lumber Company; criminal suit for the act of trespass, and civil suit for the full value of the timber in its manufactured state, to wit, \* \* \* \$2,415.80."

This recommendation is of course based upon the theory that the operations of the San Juan Lumber Company were a violation of the provisions of the act of June 3, 1878. Unquestionably, construing the law in its most narrow, literal, and technical sense, they were; for that act authorizes and permits the felling and removal, for certain purposes, of timber "growing or being on the public lands, *said lands* being mineral;" and the lands from which the San Juan Lumber Company cut its timber were not mineral lands. Nevertheless, it seems to me that there was no violation of the intent and spirit of the law. While the title of an act cannot of course override its text, it may give an insight into its purpose and intended scope; and it is worthy of notice that the title of the act of June 3, 1878, is not "An act authorizing citizens \* \* \* to fell and remove timber from *mineral lands*," but "to fell and remove timber from *the public domain*, for mining and do-

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mestic purposes." This seems to be, according to the papers transmitted by you, precisely what was done by the San Juan Lumber Company. If the timber was not cut in the exact locality demanded by the law, it was used for the precise purpose specified in the law, to wit, "for building, \* \* \* mining, or other domestic purposes."

The Government has suffered no damage except what results from the loss of the timber. The price per thousand (\$1.25) is the price of an acre of land. The trespass not having been willful, I think that the Government should receive no more than the value of the trees, which measures the damage suffered. It is possible that the Government might recover more, but it is doubtful whether the net result would be equal to the amount offered; and a prosecution of this character is in no wise calculated to secure the assistance of the people in protecting the timber on the public land. The timber cut was in a mineral district, the lumber was needed to build a new town in a section of country that had theretofore been sparsely settled, and to build smelting works for the reduction of the mineral in neighboring mountains. Its use was very beneficial to the people, and such is the *perversity* of human nature that an act that is calculated in its ultimate results to benefit a whole community, as well as individual members thereof, appears to such a community to be without guilt, even if it is in violation of a statute. The community in which these trespasses are committed will never cease to believe that the timber on the public land used to build cities and towns, school-houses, churches, and public hospitals is properly used, and that the Government ought not to exact of the people who thus use it more than its value, and any attempt on the part of the Government to compel the manufacturer of lumber for domestic use to pay to the Government all that is realized from the sale, thus making it a source of profit to the Government, is calculated to bring the law into disrepute, and make its execution difficult, if not impossible. The money so collected is a tax on the industries of the country, and while the Government has the right to prohibit trespass on the public lands, and to be made whole for all damages sustained, it is not wise or just to demand, unless it is in cases of an aggravated trespass. This does not appear to have been a willful trespass, if Mr. Porter is to be believed. Under such circumstances I do not think the ends of justice would be subserved by instituting criminal prosecution, or by inflicting the most severe and rigorous punishment permissible under the statute upon men for acts which they, not being profoundly versed in all the technicalities of the law, believed to be legal and legitimate, and which aided in the building of the cities, the development of the mines, and the convenience and comfort of the settlers in those frontier regions.

I am therefore of the opinion that the proposition of Mr. Porter should be accepted, and you will direct the acceptance of the same and discontinue further proceedings in the matter.

## H. M. GREGG.

Where coal suitable for fuel exists in the neighborhood, timber needed for use in the mines near by should not be cut from the public land as an article of fuel.

*Commissioner McFarland to H. M. Gregg, Lead City, Dak., July 18, 1883.*

It has been charged that the company you represent prosecute their operations of timber cutting with no apparent limit, having constructed the railroad known as the Black Hills and Fort Pierre, for the purpose of denuding of timber remote localities, which portions of country in some instances contain mines as valuable as those you are working.

It has been stated to the Department that there are large deposits of coal in the vicinity of your mines that could be utilized for fuel purposes, and thus, in a great measure, render it unnecessary to cut and use so great a quantity of timber as is now denuded in the working of your mines.

If the statements relative to the coal deposits are true, this office would feel called upon to interfere, and require that no further use should be made of the public timber as an article of fuel by your company.

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**MINING AND DOMESTIC PURPOSES.**

Coal lands are not mineral lands within the meaning of the act of June 3, 1878, authorizing the felling of timber upon lands in Colorado, Nevada, and the Territories for mining and domestic purposes.

*Commissioner McFarland to John Truan, special timber agent, Trinidad, Colo., January 25, 1884.*

SIR: I am in receipt, by reference from the Secretary of the Interior, of your letter of the 5th instant, in which you state that timber is being cut from the Government land in Burr and other cañons in Las Animas County, Colorado, and sawed into lumber for use in the vicinity, and ask if the fact of the land being coal would give the citizens the right to cut the timber thereon for mining and domestic purposes.

In reply I have to answer your inquiry in the negative. The act of June 3, 1878, authorizing citizens of Colorado, Nevada, &c., to fell and remove timber on the public domain for mining and domestic purposes, applies to such mineral lands as are "not subject to entry under existing laws of the United States, except for mineral entry in either of said States." \* \* \* While coal lands are, in the general sense of the words, mineral lands, yet they have never been held subject to entry under the mining laws, but have always, since a date long prior to the passage of the mining act of 1866, been disposed of under special statutes at private cash entry. Said entries are not *mineral entries* and have never been so designated in this office.

It will be observed that the act referred to is restricted in its operations to lands subject to entry under the mining laws, and that it is the character of the entry by which they may be appropriated, and not the character of the lands themselves that determine the question as to whether timber may be cut therefrom under the provisions of said act for mining and domestic purposes.

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### OSBORN BROTHERS.

*Secretary Teller to Commissioner McFarland, June 25, 1884.*

I am in receipt of your letters of May 14 and June 12, 1884, with the papers therein enumerated, relating to the timber-trespass case of Osborn Brothers, of Trinidad, Colo.

The trespass consisted in the cutting and removal, between October 1, 1882, and January 31, 1884, of 766 pine trees, producing 210,000 feet, board measure, of lumber, from certain described non-mineral lands in Colorado belonging to the United States. The Osborn Brothers admit the cutting, but disclaim willful violation of law in so doing, having been informed that the lands in question were embraced in a coal area, and were thus open to the procurement of timber for domestic purposes. In view of the facts set forth, I concur in the recommendation contained in your letter of the 14th instant, to wit, that the proposition tendered by the Osborn Brothers—to pay stumpage at the rate of 75 cents per thousand feet for the 210,000 feet of timber cut by them, making a total of \$157.50—be accepted. You will notify the special agent and the proper receiver of public moneys accordingly.

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### 7. ON UNSURVEYED LANDS.

#### MONTANA IMPROVEMENT COMPANY.

Though the odd and even sections cannot be determined until survey, the power to protect the timber thereon resides somewhere.

The grantee, the railroad company, cannot exert such power until the land is surveyed and the odd section set over to the railroad company.

It must until then remain in the hands of the grantor, the Government.

*Commissioner McFarland to William F. Prosser, special timber agent, Yakima, Wash., November 6, 1883.*

SIR: I have received your letter of the 17th ultimo, calling attention to the timber operations of the Montana Improvement Company upon unsurveyed Government lands in Montana and Northern Idaho, within the granted limits of the Northern Pacific Railroad, between Spokane Falls and Missoula, and around the shores of Pend d'Oreille Lake; also calling attention to reports previously submitted by you touching the

operations of some of the timber contractors for the Northern Pacific Railroad Company in the same region.

With reference to trespass upon unsurveyed lands within granted railroad limits, you are advised that the Department holds that, although from the fact that the lands have not yet been surveyed it cannot be definitely determined whether the trespass is upon odd or even sections, still, until the land shall have been surveyed and the odd sections set over to the railroad company, it is undoubtedly the duty of the Government to protect the timber thereon.

It is believed that the law could not but intend that the power to protect from trespass the timber upon lands thus situated must reside somewhere; and as the grantee, the railroad company, cannot exert such power until the land is surveyed and the odd sections set over to the railroad, it must remain until then in the hands of the grantor, the Government. \* \* \*

You are therefore requested to visit the locality of trespass, and thoroughly investigate the transactions referred to in order that you may be enabled to submit the actual facts to this office, and thereby afford the Government some definite basis upon which to proceed in protecting its interests and the rights of the settlers upon the public lands, if it should prove from your investigation that those interests and rights are being molested as alleged in your letters.

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## VII.—TIMBER TRESPASS.

### 1. CONDONATION.

*ENTRY—PAYMENT—ACT OF JUNE 15, 1880.*

#### COE AND CARTER.

The act of June 15, 1880, allowed persons who had committed trespasses upon the public lands prior to March 1, 1879, to secure themselves against criminal and civil prosecutions by purchasing the land at the Government price; and where parties had compromised civil suits for trespass, but were criminally liable, they had the right to secure immunity by buying the land from the United States.

*Secretary Teller to Commissioner McFarland, February 23, 1883.*

SIR: I have considered the appeal of Coe and Carter from your decision of April 15, 1882, rejecting their application to purchase, under the first section of the act of June 15, 1880, the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 18; the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 19, T. 11 N., R. 76 W., and the SE.  $\frac{1}{4}$  of Sec. 13, T. 11 N., R. 75 W., Denver, Colo.

This section provides:

That when any lands of the United States shall have been entered and the Government price paid therefor in full, no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for or on account of any trespasses upon or ma-

terial taken from the said lands of the United States in the ordinary clearing of the land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any bona fide settler, or for or on account of any timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for the same, or for or on account of any alleged conspiracy in relation thereto: *Provided*, That the provisions of this section shall apply only to trespasses and acts done or committed, and conspiracies entered into prior to March 1, 1879: *And provided further*, That defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment, and shall pay all costs accrued up to the time of such entry.

Section 4 provides that the act shall not apply to any of the mineral lands of the United States, and that no person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands *after* March 1, 1879, shall be entitled to the benefit thereof.

This statute contemplates that persons who committed trespasses on the public lands—not mineral—prior to March 1, 1879, may secure themselves against criminal or civil proceedings therefor by purchase of such lands at the Government price.

It appears that prior to March 1, 1879, the applicants unlawfully cut timber on the tract applied for; that civil suits were commenced against them for such trespass; that they offered a certain sum of money in satisfaction thereof, which was accepted by this Department; that the agreed price was paid in April, 1880, and the suits were withdrawn. Thereafter the Government had no further claim upon them under *civil* proceedings, and were this the only question the applicants would have no right under that act. Not so, however, as respects a *criminal* prosecution for their acts. Section 1046, Rev. Stat., and the act of April 3, 1870 (19 Stat., 32), provide that no person shall be prosecuted, tried, or punished for any offense—not capital—except for crime arising under the revenue or slave-trade laws, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

These trespasses were committed in 1876 and 1877; but, although their precise date does not appear, it is reasonable to suppose, in view of the allegations of the applicants, that some of them were committed within three years prior to November 9, 1880, the date of the application, and hence that on that date they were not exempt from criminal proceedings, and were then authorized to enter the tracts, in order to secure immunity therefrom.

Although the three years' limitation for commencement of criminal proceedings has *now* elapsed, the question must be considered as of the date of their application, and their right determined accordingly.

I think the applicants were subject to criminal prosecution at that date, and were then authorized to enter the tracts applied for; and therefore reverse your decision, and allow the entry.

*ACT OF JUNE 15, 1880.*

N. P. DILLON.

Trespass prior to March 1, 1879, upon *unsurveyed* land, may be condoned under act of June 15, 1880, after the land shall have been surveyed, if not under act of June 3, 1878, applicable to timber lands only.

*Secretary Teller to Commissioner McFarland, November 13, 1883.*

SIR: I have received yours of the 25th of July last, inclosing report dated June 13th last, from Darwin J. Chadwick, a special agent of this Department, alleging timber trespass by N. P. Dillon, of Cramer, Cal., upon certain described public lands in that State; also the affidavit of P. M. Narboe, that the land in question is non-mineral in character; Agent Chadwick's statement to the same effect, and Dillon's sworn statement and proposition of settlement, dated June 4, 1883.

The agent reports that during the years from 1870 to 1878 the said Dillon cut, or caused to be cut, from (then) unsurveyed public lands near the headwaters of the north branch of the Tule River, about 45 miles east of Visalia, Cal., about 1,000,000 feet, board measure, of pine and redwood timber, which was manufactured into lumber at a mill in that vicinity owned and operated by him.

He states that—

Mr. Dillon evinced a willingness to answer all questions concerning his saw-mill operations, and claimed that he would have been glad to have purchased the lands from which he took the timber, but as the same were unsurveyed he could not; \* \* \* that he had done all he thought possible to do to cause the lands to be surveyed so that he could make purchase under the law of Congress of June 3, 1878; and further, that he had made application for a special survey during July last, and had employed a Mr. Norway, a deputy United States surveyor, to survey the lands upon which his saw-mill stood; and that the surveyor has assured him that there would be no doubt of the approval of the plat and the filing of the same in the land office at Visalia during the fall or winter, but that up to the present time the plat had not been filed.

And Mr. Dillon's present proposition is to pay \$2.50 per acre for the land described—the same that he would have had to pay for it under the law of June 3, 1878 (for the sale of timber land in the States of California, &c.), had it been surveyed and in the market so that he could have purchased it.

You recommend that Mr. Dillon's offer of compromise be not accepted for the reason that the act of June 3, 1878, authorizing the sale of timber lands in the States of California, Oregon, and Nevada, and in Washington Territory, applies to *surveyed* lands only; but you recommend civil suit against him for the full value of the timber after being manufactured into lumber, or \$15 per 1,000 for the 1,000,000 feet cut and removed by him, making a total of \$15,000.

I cannot concur in your recommendation; but I would call your attention to the act of June 15, 1880 (21 Stat., 237), the first section of which is as follows:

That when any lands of the United States shall have been entered and the Government price paid therefor in full, no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon, or for or on account of, or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any bona fide settler, or for or on account of any timber or material taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for the same, or for or on account of any alleged conspiracy in relation thereto: *Provided*, That the provisions of this section shall apply only to trespasses and acts done or committed and conspiracies entered into prior to March 1, 1879.

The facts of the present case bring it within the remedy of this law. The trespass was committed prior to March 1, 1879, and the trespasser has done all he could under the circumstances to comply with the law as regards the purchase of the land. The fact that the land was not surveyed, and that the consummation of the purchase has for this reason been delayed, does not render the law inapplicable to Dillon's case when a survey shall be made.

He should be permitted to have the land surveyed under the special deposit system and to pay for the same under whatever law may be applicable to the land question—possibly, in this case, under the act of June 3, 1878, fixing the price of timber land in certain States and Territories at \$2.50 per acre. This latter, however, is merely a suggestion—the question depending upon whether the land trespassed upon is classified by your office as being among the "timber lands" to which the act of June 3, 1878, is applicable.

You are directed to give to the agent and the proper receiver of public moneys the notifications necessary in order to carry out these instructions.

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*LANDS ENTERED AND PAID FOR AFTER TRESPASS COMMITTED.*

*Commissioner McFarland to C. S. Martin, special timber agent, Wausau Wis., December 1, 1883.*

SIR: I am in receipt of a communication from you bearing date November 23, 1883, submitting the following inquiries:

1. Is it the desire of the Department to follow up the trespasser if, after the trespass, the land has been entered and paid for in money by other parties than the trespasser?
2. Should the trespasser after the trespass had been committed enter and pay for the land himself?

3. Should a part of the lands have been entered by the trespasser or other parties, should the whole trespass be included or only that part where the lands remain vacant?

In reply to the first of the above inquiries, you are advised that it is the desire of this office that all cases coming to your knowledge of unlawful cutting of timber upon public lands prior to the date at which title thereto passed from the Government should be carefully investigated and reported.

The fact that purchase has been made of the lands by parties other than the trespasser, subsequent to the date of cutting, does not affect the question of trespass.

In answer to the second question, I will state that provided the date of trespass was prior to March 1, 1879, should the trespasser avail himself of the act of June 15, 1880, and purchase the tract depredated upon, he would be only exercising his privilege in so doing, and this office would, of course, take no steps to interfere with such a course. In this event, however, the *date* of trespass becomes a matter for careful investigation.

In reply to your final inquiry, you are informed that the entire trespass should form the subject of investigation and report, unless the trespasser should have made entry of the tract in question as above indicated; and, in event of such entry extending to only a portion of the lands cut upon, he would still stand liable for his depredations upon the remainder.

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*POSSESSORY CLAIM—PURCHASER IN GOOD FAITH.*

JAMES McCAGHREN.

Purchasers of possessory timber claims who cut timber thereon not knowing it to be Government land, having carefully inquired concerning title at time of purchase, may be allowed to settle by paying the Government for the land.

*Secretary Teller to Commissioner McFarland, December 12, 1883.*

SIR: I have received yours of the 8th instant, inclosing report of Special Agent Chadwick, and the other papers therein named, all relative to trespass alleged against James McCaghren, of Bodie, Mono County, California, in cutting 1,160 cords of wood during the years 1880 and 1881, from certain described non-mineral land in Nevada, near the California line.

McCaghren in his sworn statement says:

For the past four years my occupation has been principally mining and wood-chopping. About the 1st of April, 1880, I purchased from John Brown and John Flenery an 80-acre tract of timber land, for which I paid \$218. \* \* \* I had no knowledge or information that the same was Government land, but had taken reasonable pains to satisfy myself to the contrary. \* \* \* I chopped wood upon this land from

the time of the purchase until June, 1881, during which time I cut or caused to be cut 1,160 cords of wood. The wood all still remains on the land. \* \* \* I was offered \$1.25 per cord for the wood, \* \* \* and am to wait one year for my pay.

The ground being rough, rocky, and mountainous, requiring pack mules to get the wood to the wagon road, I would not at this price receive what the wood and my supposed title cost. \* \* \* I paid about \$850 on account of help in chopping, or provisions; I owe on account \$580; I am without other means than my daily labor. \* \* \* I was not aware until this day, when your special timber agent informed me, that the land was Government land, and that I was both civilly and criminally responsible for cutting on the same. I honestly purchased the timber claim, supposing it to be owned by the parties, Messrs. Brown & Flenery, from whom I purchased. I had no intention nor idea that I was a trespasser on Government land.

But to save further trouble and the expense of litigation McCaghren executes a release to the United States of the wood in question, and offers to pay the designated officer of the Government 50 cents per cord therefor (he evidently means in the way of stumpage), but says he would have to be allowed to sell the wood in order to obtain the money to make such payment; "that is, 50 cents per cord for what the wood will measure now, as it is generally conceded that it will lose 20 per cent. through shrinkage and loss by bark coming off and small limbs breaking, as it has been cut more than two years."

The agent apparently accepts McCaghren's statement without question. He says:

McCaghren seems to be an honest, hard-working man, and gave me an account of his wood operations with an appearance of perfect candor. It seems to have been the practice here for certain parties to dispose of possessory timber claims, and for other parties to suppose that possession constituted title.

The agent recommends the acceptance of McCaghren's offer, except that he considers 10 per cent. a sufficient allowance for shrinkage, and suggests accordingly that the payment of 50 cents per cord for 1,044 cords be demanded.

You recommend—

That legal proceedings be waived and the proper receiver of public moneys be instructed to take possession of the wood in question, and, after appraising and advertising the same, sell it for cash to the highest bidder for the benefit of the United States.

I cannot concur in your recommendation. In a case like this it seems to me to be the province and the duty of a great and generous Government not to see how much it can wring from an honest, hard-working pioneer who has already been cruelly wronged by his fellow men, and to leave him not only with nothing to show as the result of years of past labor, but burdened with an indebtedness from which he could not release himself for years to come, but rather to plan how to relieve him from the embarrassments of his position with as little expense as possible and yet vindicate the law which he has unwittingly violated.

You will therefore direct the agent to notify McCaghren that if he will, within a reasonable time, purchase the land upon which the trespass has been committed, paying therefor the Government price for lands of that class in that locality (to wit, \$1.25 per acre if it be minimum land, or \$2.50 per acre if it be within the granted limits of any land-grant railroad, or subject to the provisions of the act of June 3, 1878, for the sale of timber lands in California, Oregon, Nevada, and Washington Territory) the wood in question will be released to him.

In this way the Government will lose nothing, since it will receive as much for the land as it would have received had said land been originally purchased with all the timber standing upon it; and under the circumstances it seems to me that this is all the Government ought to ask.

An expression of uncertainty in both the agent's report and McCaghren's statement indicates the possibility that the 80-acre tract which Brown and Flenery pretended to sell to McCaghren may not in all its boundaries coincide exactly with the Government section-lines. In such case it would not be necessary for McCaghren to purchase every sectional subdivision upon which he may have slightly infringed, but such as will cover the bulk of the cutting in such manner as to comply substantially with the spirit and intent of these instructions. He should be allowed to sell a portion of the wood if necessary to comply with the request of the Department as to entry of the land. You will give the agent and the proper receiver of public moneys the necessary notifications.

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## 2. MEASURE OF DAMAGES.

### *INNOCENT PURCHASER—VALUE INCREASED BY TRESPASSER.*

The Government may recover from a purchaser, innocent or otherwise, the value added to the timber by the labor of the wilful trespasser.

*Secretary Teller to Commissioner McFarland, June 18, 1883.*

SIR: Yours of the 15th instant is received, transmitting letter to Special Agent Welch, from Kelley, Weeks & Co., lumber dealers, of Racine, Wis., dated April 6 last; letter to Special Agent Welch from L. F. Parker, of Racine, Wis., dated April 7 last; and letter from Hon. Philetus Sawyer, dated the 6th instant, inclosing one to him from L. F. Parker, dated the 4th instant, all in relation to certain timber purchased by Kelley, Weeks & Co., through Parker, from one Amos F. Ames, which had been derived by said Ames from logs unlawfully cut by him from certain described public lands in Michigan.

This Department has demanded from Parker and Kelley, Weeks & Co., jointly, the full value of said lumber when purchased.

Kelley, Weeks & Co. deny responsibility in the matter, throwing it upon Parker, of whom they purchased.

Parker offers to pay the *stumpage* value of the *logs* from which the lumber was derived, \$2 per thousand feet, board measure; but writes to Agent Welch that he "never for a moment supposed" he "could be held to pay for that which he never had any title to or interest in;" and to Mr. Sawyer he writes that "it appears entirely unjust that he should be made to pay that demand" (the value of the lumber).

And Mr. Sawyer writes that he "thinks the Government ought to accept the proposition."

It certainly is no new thing in the operation of law for the owner of property unlawfully taken to demand restitution thereof or compensation therefor of the party—though he be an innocent party—into whose hands the property is traced.

The measurement of such compensation in cases like the present is fixed by this Department in accordance with the decisions of the Supreme Court.

This case is in all essentials parallel to that of Wooden-ware Company *v.* The United States (106 U. S., 432), in which timber belonging to the United States was "sold to the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase."

What the Supreme Court said in that case is in every respect applicable to this.

The timber at all stages of the conversion was the property of the plaintiff. Its purchase by defendant did not divest the title nor the right of possession.

The recovery of any sum whatever is based upon that proposition.

This right, at the moment preceding the purchase by defendant, was perfect, with no right in any one to set up a claim for work and labor bestowed upon it by the wrong-doer. By purchase from the wrong-doer, defendant did not acquire any better title to the property than the vendor had.

Therefore the Supreme Court decides that the right to recover against the defendant is "just what it was against his vendor the moment before he interfered and acquired possession."

It is worthy of note that in making this decision the United States Supreme Court *affirms* the decision of the United States circuit court for the eastern district of Wisconsin, within the limits of which district the present case arises. In conclusion the United States Supreme Court says:

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the Goverment. \* \* \* To hold that when the Government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of law, the holder can set up a claim for the value which has been added to the property

by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

The fact that Parker and Kelley, Weeks & Co. each seeks to throw the responsibility upon the other renders it necessary for the Government to hold them jointly responsible, and let them settle the question of responsibility between them.

I concur in your view that—

As Mr. Parker and Kelley, Weeks & Co. received no logs in the case, but received lumber derived from logs that were the property of the Government, there seems to be no good reason why the Government should not continue to claim from them, who acquired possession of it, the value of the lumber, which was the property alone.

You will therefore at once notify Agent Welch to that effect.

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***RIGHT AND LIABILITY OF PURCHASER.***

***WILLIAM LANE.***

In settlement of timber trespass how much a purchaser may have already paid a willful trespasser is not a matter for consideration. The buyer can purchase only such right as the seller possesses. Where the seller has no right in the timber the buyer can obtain none.

*Secretary Teller to Commissioner McFarland, July 19, 1883.*

SIR: I have received yours of the 17th instant, inclosing a letter dated the 29th instant, from E. B. Sanders, receiver of the United States land office at Wausau, Wis., also a letter dated the 30th ultimo, from the Hon. Philetus Sawyer, inclosing a letter dated the 27th ultimo, from J. M. Bray and Leander Choate, of Oshkosh, all in reference to trespass committed by one William Lane in cutting timber from certain land in Wisconsin entered by him as a homestead, which timber was sold to said Bray & Choate, who claim to be innocent purchasers.

Messrs. Bray & Choate offer to pay for 150,000 feet, board measure, of timber—which is 6,851 feet less than the amount which a careful count and scaling shows to have been cut—the sum of \$3 per thousand feet, as stumpage, making a total of \$450, and seem to consider it a great hardship that they should be called upon to pay this, as they have already paid Lane, the trespasser, \$3,000 for the timber.

But in law, and in the established and uniform practice of this Department based upon the law, how much a purchaser may have paid a willful trespasser is not a matter for consideration.

Ever since there has been such a thing as human law, the purchaser of stolen property has been liable to have the same reclaimed by the owner. The buyer can purchase only such right as the seller possesses;

and where the seller has no right in the property which he pretends to sell, the buyer can obtain none from him.

In the present case, the timber cut by Lane from Government land belongs to the Government; and the Government has the right to reclaim its own, or to demand its full value where found. The offer to pay the stumpage value only of the lumber is equivalent to a claim on the part of the purchaser to the value added to the property by the act of cutting down the trees and removing the timber; and, as is well said in the case of *Wooden-ware Company v. United States*, originally decided in the United States circuit court for the eastern district of Wisconsin, and affirmed by the Supreme Court of the United States (106 U. S., 432):

To hold that when the Government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow process of the law, the holder can set up a claim for the value which has been added to the property in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen, and compensation for his labor, a policy which [says the court] would be very disastrous to the interests of the public in the immense forest lands of the Government.

It is worthy of note in this connection that when Agent Henry originally reported this case the timber in question was *not sold*, but (the agent wrote) from Mr. Lane's own statement he has bargained to sell the same to the firm of Bray & Choate.

Furthermore, Lane stated to the agent "that he would be willing to pay the full market value," viz, \$6.50 per thousand feet. I concur in your view that it is not reasonable that, for a sum far less than their boom value, and less even by half than their market value where banked before being started on the drive where they now are, the Government should relinquish its claim to the logs, which are its own property, in favor of parties whose only claim thereto rests upon a negotiation or bargain made by them, however innocently, with one who, by his own statement and the facts reported in the case, is shown to have unlawfully obtained the same by an act of fraud, and by trespass upon the public lands of the Government knowingly and willfully committed.

You are therefore directed to instruct the receiver of public moneys for the proper district to demand of Messrs Bray & Choate the sum of \$6.50 per thousand feet, being the value of the timber where banked, for the 156,851 feet of timber shown to have been purchased by them from said Lane; and in the event of the refusal of the said Bray & Choate to pay such amount, to seize the said logs and sell them, after due notice by publication of the time and place of such sale, to the highest bidder for the benefit of the United States.

*UNINTENTIONAL AND WILLFUL TRESPASS.***ROSSER TIBBETS ET AL.**

Purchasers or receivers of public timber are required to pay its stumpage value in a case of unintentional or mistaken trespass; its purchase value in a case of willful trespass.

*Secretary Teller to Commissioner McFarland, May 14, 1884.*

I have received yours of the 7th instant, with the inclosures herein enumerated, all bearing upon timber trespass alleged against Rosser Tibbets, William Tibbets, and William Streeter, of Minnesota, in cutting and removing timber from certain lands belonging to the United States in that State.

The Tibbets are charged with cutting, during the winter of 1882-'83, 108 pine trees from vacant public lands, and selling the logs, amounting to 69,000 feet, board measure, to Wilson & Gillespie, lumber dealers, of Minneapolis, Minn. The Tibbets claim, and the agent is inclined to believe their representation, that the cutting upon public land was inadvertent, as their workmen were logging on an adjoining odd section (railroad land), and the timber was cut not far beyond the dividing line.

Streeter is charged with having cut from vacant public lands, during the same winter (of 1882-'83), 149,000 feet of white and Norway pine, which he sold to the said Wilson & Gillespie.

A part of the land from which Streeter cut said timber appears to have been entered by him as a homestead; but he lived on it but a few months (while denuding it of timber), improved and cultivated scarcely at all, and when the timber was cut off, disappeared, leaving his whereabouts unknown.

Wilson & Gillespie state that they "inquired of Streeter for his land office receipt for the land," which he claimed to own; but "Streeter told them it was at his homestead, 10 miles distant." They offer to pay stumpage at the rate of \$2.25 per thousand feet for the entire amount of timber purchased by them (from both Tibbets and Streeter), making a total of \$490.50.

You recommend that, since it is possible that the Tibbets logs were cut by mistake, and that the trespass on his part was not willful, the above proposition be accepted so far as relates to the logs purchased by Wilson & Gillespie from said Tibbets. This would make a total of \$155.25 for the Tibbets logs.

But the trespass on the part of Streeter being unquestionably willful, the terms stated do not satisfy the measure of damages to which the Government is entitled under the decision in the case of *Wooden Ware Company v. The United States* (10 U. S., 432), upon which is based Department circular of March 1, 1883; and you recommend that for the timber purchased from said Streeter—the purchasers having apparently

too readily accepted his misrepresentations as true—they be required to pay the purchase value of the logs, to wit, \$6 per thousand feet; which will make a total of \$894 for the Streeter logs.

I concur in your recommendation.

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### 3. MILL-MEN, ETC.

#### *RESPONSIBILITY—INSTRUCTIONS.*

Mill-men who instigate the trespass should be held responsible, and not the poor and ignorant men who do the cutting for them.

*Commissioner McFarland to William Roy, special timber agent, Mississippi City, Miss., May 2, 1883.*

SIR: Referring to reports recently forwarded by you in the cases \* \* \* originally reported by late Special Agent Charles B. Routh, you are advised as follows:

Since it is evident from your reports that the actual trespassers in the majority of these cases are poor and ignorant men, and that it has been chiefly at the instigation of certain mill-men that they have been led to depredate upon the public timber, the proper parties to be held responsible are the mill companies.

Instead, therefore, of submitting a separate report in each instance against the ignorant and irresponsible party cutting, you should have made a thorough investigation of the timber operations of the mill-men purchasing the timber, and submitted a full report thereon.

In view of the fact that you have been performing the duties of a special timber agent for the past year it would seem that the experience acquired by you during that time would have been sufficient to have made it evident that in the cases in question, the interests of the Government would not be best served by bringing the individual trespassers to make offers of settlement, but that the proper measures to effectually check depredations upon the public timber would be the institution of legal proceedings against the mill companies throughout that section of country. You are therefore directed to prepare and submit reports in relation to the timber operations in connection with public lands of the following-named mill-men, viz, \* \* \* stating the exact amounts purchased or cut by them in every instance. You will make your investigation of this matter so precise and thorough as to place this office in possession of all the facts, and to furnish a basis for legal proceedings, using the parties who cut the timber as witnesses in each case. \* \* \*

You will extend your investigations to the operations of all the mill-men doing business in the district assigned you, and report thereon at the earliest date practicable.

## CARTER AND SHIVER.

Purchasers who induced the trespass to be required to pay the purchase price to the Government.

*Secretary Teller to Commissioner McFarland, June 25, 1884.*

I am in receipt of your letter of the 4th instant, with the documents therein enumerated, relative to alleged trespass by E. K. Carter and Oliver Shiver, both of Crystal River, Florida, in cutting from certain lands belonging to the United States, in said State, 600 cedar trees, producing an equal number of sticks, equivalent to about 1,500 cubic feet, board measure, of timber, which they sold at \$1 per stick to one George H. Richards, agent of the Eagle Pencil Company (factory at 724 East Fourteenth street, New York).

In view of the facts set forth, particularly that Carter and Shiver are ignorant, improvident men, and in such straits, under the necessity of providing for the support of their families, as led them to accept the inducements held out to them by the agents of the Eagle Pencil Company, I concur in your recommendation that said company be called upon to settle with the Government for the purchase of said timber, at the rate of \$1 per stick, making a total of \$600.

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#### 4. PROSECUTIONS.

Legal proceedings against alleged timber depredators not to be instituted unless directed by the United States Attorney-General, or until an agent of the Department of the Interior shall have investigated the facts reported thereon to that Department and received instructions therefrom.

*Secretary Teller to Commissioner McFarland, June 16, 1884.*

I have received your letter of the 7th instant, inclosing copy of communication from Thomas Mitchell, without date, but postmarked Tombstone, Ariz., in reference to the arrest of certain wood-choppers in that Territory. In accordance with your recommendation, I have transmitted a statement of the facts in the case to the Department of Justice—copy inclosed herewith. I invite your attention to my recommendation that the Attorney-General "instruct the several United States attorneys not to institute legal proceedings against alleged timber depredators unless directed by" him, "or until an agent of this Department shall have investigated the facts, reported upon the same to this Department, and received therefrom instructions what measures to take in the premises—except in certain cases of emergency, when such agents are directed to call upon the United States attorneys for advice and assistance (see page 17 of Circular Instructions)."

In this connection, however, I have to add that the arrest of parties for trivial offenses, or upon insufficient cause, I find to be by no means exclusively the result of injudicious action on the part of subordinates of the Department of Justice. I have before me your letter of March 12, 1884, transmitting report of Special Agent Prosser in the cases of W. A. Cassidy, J. R. Roberts, and W. H. Speahrs, of Washington Territory; also your letter of March 25, 1884, transmitting report of Special Agent Dodge in the case of John Drechler, of Minnesota; and other letters of earlier date, announcing the institution of legal proceedings upon complaint of special timber agents to United States commissioners or United States attorneys, without authority of your office, and without allegation by the agent of any necessity for immediate action. In the last-named case the alleged trespass was upon an odd-numbered section within the granted limits of the grant to the Saint Paul, Minneapolis and Manitoba Railway Company; and the suit instituted was upon complaint made directly contrary to my instructions of February 26, 1883 (in the case of Thomas Jenkins, of Oregon). In the cases in Washington Territory, Agent Prosser made complaint to the United States attorney, and secured the institution of criminal suit against men engaged in cutting ties for the construction of the Columbia and Puget Sound Railroad, on land adjacent to and within a short distance of its track, and on their inability (being poor men, transients, and without acquaintances in that vicinity) to give bail, had them taken first to the county jail, and afterwards to the territorial penitentiary, to await criminal trial for doing what the officials of the railroad company and others had assured them it was legal and proper for them to do. This was a case in which I never should have requested criminal suit to be brought; but suit having been commenced (the Department of Justice thereby acquiring jurisdiction) before report was made by the agent, the hands of this Department were tied by the unwarranted and unjustifiable course of one of its own employés. When it is not deemed proper policy for your office to request of the Department of Justice that suit should be commenced in any given case, but to refer the papers in such case to me for consideration and action, it seems exceedingly inconsistent that a subordinate of your office should be permitted to direct a subordinate of the Department of Justice to do so, without consent of or consultation with the heads of the two Departments.

If no direct and positive prohibition of such a course has hitherto been made, it has been simply because it could not be anticipated that any special agent would take upon himself to exercise at once the executive functions of Secretary of the Interior and Attorney-General—functions more important and responsible than those exercised in regard to the same matter by the Commissioner of the General Land Office, whose subordinate he is. You will therefore direct the attention of special timber agents to the fact that the whole tenor and purport of the instructions issued to them is to investigate alleged timber trespasses (see

Circular Instructions of June 1, 1883, page 13) "in order to be able to report the case" to your office; and that it is *only* (see page 17) "*in case of emergency*, where the offender is about to leave the country, or the property is being removed or concealed and the evidence of the trespass destroyed, so that immediate action is *absolutely necessary* to protect the interests of the Government," that such agent is authorized to apply to the United States attorney to institute legal proceedings.

**BRAMWELL v. CENTRAL AND UNION PACIFIC RAILROAD COMPANIES.**

One Thomas filed declaratory statement May 19, 1869, and relinquished March 29, 1871, on which day Bramwell made homestead entry of the tract. The companies claim, jointly, under the act of May 6, 1870. Held, that since no priority of estate between Thomas and Bramwell is shown, and since Bramwell's claim was initiated subsequently to the date of the grant, the case does not come within the intendment of the proviso in said act, protecting the rights of private persons.

*Acting Secretary Joslyn to Commissioner McFarland, September 12, 1883.*

SIR: I have considered the case of George Bramwell *v.* Central Pacific and Union Pacific Railroad Companies, involving the W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 26, T. 7 N., R. 2 W., Salt Lake City, Utah, on appeal by Bramwell from your decision of July 21, 1881.

The township plat was filed in the local office March 15, 1869.

May 19, 1869, one Elisha Thomas filed declaratory statement No. 574, for the NW.  $\frac{1}{4}$  of said Sec. 26, but relinquished the same March 29, 1871.

It appears that under date of March 20, 1871, Bramwell made homestead entry No. 1072 of the tract, and made final proof December 22, 1877, whereupon final certificate No. 923 issued to him therefor.

The companies claim the tract jointly by virtue of the act of May 6, 1870 (16 Stat., 121), whereby said section was "granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads," subject, however, to the proviso: "That no rights of private persons shall be affected by this act."

You held that as Bramwell's rights were initiated subsequently to the date of the approval of the act cited, his case is not protected by said provision.

I concur with you in this opinion; as it will be observed that the record fails to discover any privity of estate between Thomas and Bramwell, whereby the latter's rights could be made to antedate the grant, or to take effect by relation as of the date of Thomas's initiation of claim to the premises. Moreover, it should be observed that Thomas's right was merely inchoate, he having relinquished without perfecting the same, or doing anything to that end.

Your decision is accordingly affirmed.

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**SAME (ON REVIEW).**

*Secretary Teller to Commissioner McFarland, October 27, 1883.*

SIR: I have considered the motion of the attorneys of George Bramwell for a reconsideration of Departmental decision rendered under date of the 12th ultimo, in the case of Bramwell *v.* Central Pacific and

Union Pacific Railroad Companies, involving the W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 26, T. 7 N., R. 2 W., Salt Lake City, Utah.

Said motion covers the identical points that were duly considered before the decision in question was rendered.

No new evidence is presented, nor is there even a pretense that any such evidence has been discovered; but the motion is based upon the bald assumption that the Department erred in its construction and application of the law governing the facts in the premises, the finding whereof is conceded to have been correct.

Rule 76 of Practice authorizes motions for review or consideration of the Secretary's decisions when "in accordance with legal principles applicable to motions for new trials at law." This motion is not in accordance with such principles, but practically assumes that the Department was either in error in its construction of the statute or derelict in not giving the same a sufficiently careful consideration.

In an appellate tribunal, when a case is decided involving purely questions of law, re-argument is never heard except when based upon the suggestion of some member of the court who concurred in the judgment. Inasmuch as I am unable, even in the light of the persuasive assumption of counsel's argument, to discover error in the construction of the statute, I would decline to disturb the decision in question without further discussion; but independently of the foregoing consideration, it should be observed that said decision cited so much of the granting act as was deemed material in the premises.

Such citation, with its context, was as follows, to wit: "The companies claim the tract jointly by virtue of the act of May 6, 1870 (16 Stat., 121), whereby said section was 'granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads,' subject, however, to the proviso: 'That no rights of private persons shall be affected by this act.'" The act provides primarily—

That the common terminus and point of junction of the Union Pacific Railroad Company and the Central Pacific Railroad Company shall be definitely fixed and established on the line of railroad as now located and constructed, northwest of the station at Ogden, and within the limits of the sections of land hereinafter mentioned, viz:

Section 26 in question (*inter alia*):

And said companies are hereby authorized to enter upon, use, and possess said sections, which are hereby granted to them in equal shares, with the same rights, privileges, and obligations now by law provided with reference to other lands granted to said railroads.

The primal question that arises for consideration is: What are the "rights, privileges and obligations now by law provided with reference to other lands granted to said railroads?"

Counsel cite numerous authorities in support of their theory of the case touching the proper construction of the granting act in connection with the granting acts referred to therein; but, after a careful examina-

tion of each of said authorities, I have failed to discover the applicability or relevancy of the same to this case.

The acts referred to are those of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Id., 356). The latter is amendatory of the former.

It is true they should be construed as *in pari materia*, and that the construction given thereto must necessarily determine the rights, privileges, and obligations of the companies under the act of May 6, 1870. Counsel urge that the only difference between the subject-matter of these acts is that the act of 1870 "fixes the *situs* by naming certain sections within which the said junction shall be located, whereas the former acts leave their situation indefinite." That is certainly a broad distinction, the full scope whereof seems to have been misapprehended by counsel.

It should be observed that each of the former acts makes two distinct grants; one of lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and for certain other purposes, as specified in the title of the acts; the other of the right of way to said company. The land grant consisted of alternate sections, designated by odd numbers, on each side of the proposed road, and was conferred subject to certain express conditions that might be found to exist at the time the line of the road was definitely fixed. (See sections 3 and 4 of the acts of July 1, 1862, and July 2, 1864, respectively.) But the grant of the right of way by the second and third sections of said acts—

Contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason therefore for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the

grant of lands, had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road. (*Railroad Company v. Baldwin*, 103 U. S. 426.)

And in addition to and coupled with such absolute, unconditional grant, Congress conferred the right of purchase, appraisalment, and condemnation by means of arbitration prescribed by the third section of the latter act, in case the owner or claimant of such lands or premises as might be found necessary and proper for the construction and working of said road could not agree with the company as to damages, and if either party should feel aggrieved by such appraisal and assessment they could appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal would "not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary in the construction of its road."

Thus, it will be seen that counsel have confounded these grants, which are separate and distinct in their nature. The act of 1870 limits the scope of its habendum clause by specific reference to the provisions of law touching other lands theretofore granted in like manner to said railroads. In other words, it fixes its basis by such reference to said enactments, not by way of revision, but to indicate an intent to circumscribe the new declaration of the grant by the limitation of the original statute and its amendment, and not to modify or enlarge the provisions, except so far as to grant the absolute right of way to the premises in question. Such specific reference to the same (section 26) in this unconditional, absolute grant, "containing no reservations or exceptions," save the aforesaid proviso that protected existing private rights, precluded Bramwell from acquiring title thereto by virtue of the homestead law; and this, because there was no privity between him and Thomas.

The motion is therefore denied and transmitted herewith.

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#### COLE *v.* MARKLEY.

Saline lands not expressly reserved by law or order, but merely by markings on the official plats, are subject to an agricultural claim, on proof of their non-saline character, and the claim relates back to date of its filing.

*Secretary Teller to Commissioner McFarland, September 19, 1883.*

SIR: I have considered the case of *Hattie M. Cole v. Joseph Markley*, involving the NW.  $\frac{1}{4}$  of Sec. 27, T. 9 S., R. 7 W., Concordia, Kans., on appeal by Markley from your decision holding his timber-culture entry for cancellation.

It appears from the record that certain parts of said township, including the tract in question, "were returned by the surveyor-general July 9, 1862, as 'saline lands,' and withheld from entry accordingly;" that

on September 17, 1878, one Robert W. Pratt filed an affidavit contesting said return, and that at a hearing held under the provisions of circular October 1, 1878, the land was shown to contain no salines, and was adjudged to be agricultural by your decision of September 23, 1880, and declared to be open to entry.

It appears further that on January 27, 1879, and before said hearing and adjudication, Markley filed application, No. 2301, to enter said tract for timber-culture, which application was held subject to the said adjudication, and that on March 20, 1879, Miss Cole filed her declaratory statement No. 9882, alleging settlement December 20, 1878. By said decision of September 23, 1880, the local officers were instructed to make these applications of record "as of the date on which they were filed respectively," which instructions were repeated in your decision of December 8, 1880; but it appears that the local officers made the Cole application of record as of September 29, 1880, and the Markley application as of January 13, 1881.

Now, it is well settled that the rights of parties to the public lands, when formally recognized, relate back to the date of the inception of said rights, as against each other, and that they are not to be prejudiced by any failure of the local officers to do substantial justice in the premises. As between the parties to the record, if either acquired a right to the land, Markley, who was fully qualified, obtained an inceptive right by his application to enter January 27, 1879, and Miss Cole by her settlement on December 20, 1878, if duly qualified. But the record shows that she was disqualified by reason of non-age, and that she did not come of age until March 15, 1879; consequently her rights must yield to those of Markley, who has duly tendered the fees, provided he could acquire an inceptive right on January 27, 1879. This, your decision of July 17, 1882, holds that he could not do, for the reason that "March 14, 1882, this (your) office decided, in the case of *Forbes v. Hatcher*, involving land in the same township, that the former ruling, allowing filings and entries to date back of the time when the land was adjudged agricultural in character, was erroneous, and that rights thereto could only attach from and after the decision ordering its restoration, September 23, 1880."

This decision was founded on the alleged reservation of the tract in question as "saline land." How was the reservation created? The law reserves generally "lands on which are situated any known salines," and it has been the policy of the Government from the earliest date to reserve salines from settlement and entry, and to dispose of them by act of Congress. But here we are met by the fact that the land in question is not saline, and it follows that it was never the intention of Congress to reserve it. I am informed that no express reservation of this tract has been made by your office, although the record shows that in fact there has been a reservation of it; but it needs no argument to show that no mere *de facto* reservation or appropriation of land can affect the rights

of qualified claimants, and such is the rule in your office and in this Department (*Lewis v. Town of Seattle*, 9 Land Owner, 103). It is true that it has been the practice of your office, and of the local officers, to regard and to treat this tract as reserved; but "the practice of the officers of the Land Office" does not impair "the real and just rights of claimants" (*Irvine v. Marshall*, 20 How., 558, 567). The only evidence before me of the manner of creating this reservation is to be found in your decision in the case of *Forbes v. Hatcher*, above referred to, where it is said that "the land in controversy was reserved by the surveyor-general's letter of July 9, 1862;" but I am of opinion that such reservation is presumptive merely, and may be overcome.

It appears that the surveyor's field-notes, and the plats made from them, show the tract to be saline land; but I fail to find any law authorizing erroneous markings in the field-notes or plats to be construed as reservations, or making these markings conclusive evidence of the character of land. In the act of May 18, 1796 (1 Stat., 464), it was provided that "every surveyor shall note in his field-book the true situations of all mines, salt-licks, salt-springs, and mill seats, which shall come to his knowledge," and that "these field-books shall be returned to the surveyor-general, who shall therefrom cause a fair plat to be made," which "shall be recorded in books to be kept for that purpose," and "a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies sent to the places of sale and to the Secretary of the Treasury." Such has been the law from that date, and such is the language of section 2395, Rev. Stat., with the exception of the substitution of "the General Land Office" for "the Secretary of the Treasury." Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land, for they may be erroneous, and, as was justly remarked by the supreme court of Oregon in *Mining Company v. Ish* (Copp's Mineral Lands, 365), "to hold that the failure of the surveyor to fully discharge his duty could operate to defeat the rights of the appellant would be violation of the plainest principles of justice."

Where this question has arisen in the courts, they have so held expressly, or by clear implication. In *Robinson v. Forrest* (29 Cal., 321), where the plats showed swamp land, the court say:

The descriptive field-notes on the plat are not conclusive evidence of the character of the land; for, when the bounds of a tract are given, the question whether the tract is or is not included within the lands granted as swamp or overflowed land is a question of fact.

In *Railroad Company v. Smith* (9 Wallace, 95), the court declared testimony to the fact of a swampy character to be competent, and said: "The matter is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or

before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had;" and such has been the ruling of this Department in regard to swamp lands, as, for example, in *Millard v. State of Oregon* (5 Land Owner, 179), the swamp grant to Minnesota (4 Land Owner, 149), and the swamp grant to Florida (7 Land Owner, 9), in the last of which cases it was held that field-notes are not "due proof" of the character of land. In these cases, also, and in others, it appears that it has been customary to allow entry on lands returned by the surveyor-general as swamp lands, on hearing and proof of the facts by agricultural claimants.

Mineral lands are reserved by the same laws and in the same terms as saline lands, and in the same language it is provided that the field-notes and plats shall record their situations. But it has never been held that these notations created reservations of the lands so marked. General Circular, May 16, 1868 (Copp's Mining Decisions, 249), declares that "the return of a deputy surveyor, although entitled to respect as coming from a sworn officer, is not to be taken as conclusive in these cases, when disputed, but the matter must be investigated by the examination of witnesses;" and a claim to such land has always been permitted, subject to such investigation. The same circular, in order "to give effect" to section 11, act of July 26, 1866, authorizing the Secretary of the Interior to designate and set apart such lands in the mineral belt of California as were clearly agricultural, required surveyors "to describe in their field-notes and designate on township plats such lands as are agricultural," and declared tracts so designated to be open to agricultural settlement; but, so far from such designation and declaration operating as a reservation of the land from mining entries, the circular expressly provides for contests and hearings by the mineral claimants in order to determine the true character of the land. These views of the effect of the surveyor-general's returns have never changed, and accordingly it was held by Mr. Secretary Schurz in *Scogin v. Culver* (Sickels' Mining Laws, 450), where "the plats of survey of this township, showing it to be agricultural land, were approved," that "whether or not the lands entered by Culver were such lands is a question of fact to be determined by proof, and it is immaterial that they had been previously borne on the official records as agricultural lands."

The timber-culture laws, confining entry to "lands devoid of timber," as effectually reserve timbered lands from such entries as other statutes reserve saline and mineral lands. In 1874 it was held by your office in the cases of *Dyer* and *Walker* (Copp's Land Laws, 658), that "the official township plat, showing timber on a certain tract, must be accepted as determining the character thereof," and as reserving from entry; but the ruling was long since overruled by this Department, and it was held in *Linden v. Gray* (3 Land Owner, 181), that "the statements contained in the field-notes may be modified or contradicted by evidence taken in due form." In *Lamb v. Reeser* (3 Land Owner,

73), where, as in the case at bar, an application was made but entry refused pending an inquiry into the character of the land, and meanwhile a homestead entry permitted, it was held that, where the evidence established the non-timber character of the land, "it follows that the marking on the plat was erroneous, the land was subject to Lamb's entry, and he should now be permitted to make it as of the date he offered it."

It thus appears that the rulings of the courts and of the Land Department are consistent in their view of the effect of the surveyor-general's returns of swamp, mineral, and timbered land, and I can perceive no reason why there should be a different ruling in relation to the returns of saline lands. That the ruling should be the same appears by plain implication from cases which have arisen in the courts, where the broad rule obtains that there is no reservation except by force of the law. In *Indiana v. Miller* (3 McLean, 151), it seems that a certain tract was marked on the field-books as containing a salt spring, because wild animals had been observed to drink the water; but the evidence showed that in fact it was of no value as a salt spring, and it was held that it did not pass to the State by the grant of April 19, 1816. In *Morton v. Nebraska* (21 Wallace, 660), where the question of saline reservations in Kansas and Nebraska was directly raised, the court refute the argument that a reservation of the land depends upon the notation on the plats, and they say:

The salines in this case were not hidden, as mines often are, but were so incrusted with salt that they resembled "snow covered lakes," and were *consequently* not subject to pre-emption. \* \* \* The salines in question were noted on the field-books, but these notes were not transmitted to the register's general plats, and it is argued that a failure to do this gave a right of entry. But not so, for the words of the statute are general and reserve from sale or location *all* salines, whether marked on the plats or not.

These cases seem to be decisive of the issue raised in the case at bar, and to establish the rule that a notation of "saline" on the plats, or its omission, is immaterial, and that no land but that in fact saline is reserved from agricultural entry. And the act of January 12, 1877 (19 Stat., 221), providing for the sale of saline lands, strengthens this view by requiring a hearing, when it is made to appear to the local officers that any lands in their districts are saline in character. This was the view expressed in my opinion of July 12, 1882 (*Henry C. Horton, 9 Land Owner, 121*), where agricultural and railroad claims were in conflict, namely, "If the lands are saline in character they are excepted from the grant, and are reserved to the United States. If, on the other hand, they are not saline in character, they are, so far as appears, subject to the appellant's claim, if, as alleged, the company has received other lands in lieu thereof." The character of the lands is a question of fact, to be determined by due proofs, and the qualified party who first settles on them, or applies to enter them, and otherwise conforms

to the law, has priority of right when their non-saline character is determined.

Your decision is accordingly reversed, and the land awarded to Markley.

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NORTHERN PACIFIC RAILROAD COMPANY *v.* CURREY.

In view of the irregularity in the procedure, and of Curry's good faith, his case falls within the exceptions to the rule laid down in *Owen v. Russell* (9 L. O., 111), and his second timber-culture entry will be regarded as an amendment of his first entry.

*Secretary Teller to Commissioner McFarland, February 19, 1884.*

SIR: I have considered the case of the Northern Pacific Railroad Company *v.* Thomas Curry, involving the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 23, T. 13 N., R. 18 E., Yakima district, Washington Territory, on appeal by the company from your decision of February 15, 1882.

It appears that Curry made timber-culture entry No. 723 (Walla Walla series) November 21, 1878, of the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 14, and the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 23, but the entry was declared to be illegal and accordingly held for cancellation by your office letter of May 17, 1879, (copy whereof was not, but should have been, transmitted with the case upon appeal to this Department), "for the reason that timber-culture entry could not embrace land in more than one section." By the same letter your office also instructed the register and receiver to advise Curry that upon his relinquishing the tract in either one section or the other he would be permitted to select another tract contiguous to and situated in the same section with the one he might elect to retain, provided such claim should not aggregate more than one hundred and sixty acres; or he could elect to have his entry canceled and make a new one in lieu thereof. (You say: "At this time the land in said sections was *public land*, and subject to disposal by the Government.") Curry does not appear, however, to have acted upon such advice, neither appealing from your action nor relinquishing pursuant thereto, nor has his entry been canceled. But under date of September 30, 1880, he made timber-culture entry No. 1199 (Walla Walla series) of the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 23. October 19 ensuing, one James O. Grier made desert-land entry No. 3, of the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 14, but such entry was declared to be illegal by your office letter of June 17, 1881, whereby Curry's second entry was held for cancellation, because the same covered land within the withdrawal limits of the Northern Pacific Railroad Company's amended branch line. Section 23 is within the limits of the company's withdrawal of July 18, 1879, and since then no land in said section has been subject to disposal by the United States, unless valid claims thereto had been previously initiated.

In reply to the register's letter of November 21, 1881, touching entry No. 723, and requesting your office to suspend final action thereon, you advised the register and receiver February 15 ensuing, on this wise:

It is evident that an error was made at the local office in allowing said entry to be made without a relinquishment of the tracts embraced in the original entry, but, in view of all the circumstances, I am of the opinion that the last entry, No. 1199, should be considered and treated as an amendment of the original entry, in so far as the tract in section 23, which is embraced in both entries, is concerned, and that Mr. Curry's right to said tract relates back to the date of the original entry, and that the making of said new entry was a virtual relinquishment of all claims on his part to the tract in section 14.

The decision of 17th June last is hereby modified accordingly, and the entry 723 will be cancelled, as to the tract in section 14, and his claim to the land in section 23 will remain in abeyance pending the result of an application to the Northern Pacific Railroad Company for relinquishment of its claim to the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , in favor of Mr. Curry, under the provisions of the act of 22d June, 1874. Should the company consent to relinquish, Mr. Curry's entry, No. 1199, will be canceled, and the papers in entry No. 723 will be returned for amendment.

From such action the company appeals, specifying as grounds therefor, to wit: (1), that you erred in deciding that Curry is entitled to hold the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 23; and (2), in your not cancelling his entry upon his failure to appeal from your decisions of May 17, 1879, and June 17, 1881.

It further appears that said appeal was inclosed in a letter dated March 14, 1882, from the company's resident attorney, in reply to your letter of February 15th preceding, touching said relinquishment, wherein he states:

I have to reply that I laid the case before the company, who reply that they see no good reason for relinquishing; that the claimant himself does not seem to desire it, for he has acquiesced in the decision holding his entry for cancellation for said tract. I have therefore to request that you will cancel finally said entry for said W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 23.

Without discussing the minutiae of the several points of exception specifically raised upon appeal by the company's attorney, touching the incompetence of your action by reason of Curry's failure to appeal from your predecessor's action of May 17, 1879, aforesaid, it will suffice to state generally in this connection that the manifest irregularity of procedure in the premises has been such as to bring this case within the category of exceptions to the general rule laid down by me in the case of *Owen v. Russell* (9 Copp, 111).

By your letter of February 15, 1882, you held aright that entry No. 1199 should be regarded as an amendment of entry No. 723, so far as the N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of Sec. 23 is concerned, and that Curry's right thereto relates back to the date of the senior entry, inasmuch as at the date of the aforesaid letter of May 17, 1879, whereby he was permitted to elect which tract he would retain, the land in both of said sections 14 and 23

was public land, subject to disposal by the Government. Such having been the status of the land at that time, the usual limitation of time is waived in which he might so elect, and you will therefore allow the amendment as provided in your decision, and also including the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , that being the tract which he elected to take in satisfaction of his right as authorized by your original instructions.

Your decision as thus modified is accordingly affirmed.

J. B. RAYMOND.

Under section 2261, Revised Statutes, a pre-emptor may file but one declaratory statement. Decision in the case of W. L. Phelps (8 L. O. 139) overruled.

*Secretary Teller to Commissioner McFarland, February 27, 1884.*

SIR: I have considered the case presented by the appeal of J. B. Raymond from your decision of July 7, 1883, refusing to allow said Raymond to make a second pre-emption filing.

It appears that Raymond filed a declaratory statement February 12, 1880, for the SE.  $\frac{1}{4}$  of Sec. 21, T. 2, R. 26 W., Oberlin, Kans., alleging settlement February 2, 1880. On April 30, 1883, he applied to the local office for permission to make a second filing for the same land, alleging as a reason therefor that he has made valuable improvements on his claim, but, having failed to raise any crops on account of drouth, that he was unable to pay for the land within the time provided by law for such purchase; he therefore desired to file a second declaratory statement for the same land, for the better protection of his rights in the premises.

June 16, 1883, you affirmed the decision of the local office rejecting Raymond's application.

June 28, 1883, Raymond filed an application for a reconsideration of his case, accompanied by an affidavit showing that he has seventy acres in cultivation, but that owing to the nature of the soil and the climate he had found it impossible to raise a good crop from his claim, and asking that he be permitted to file for the same or other land, preferring to retain his present claim in the hope of utilizing it as a stock farm.

July 7, 1883, your office held that the facts stated do not constitute sufficient ground for the allowance of a second filing for the same land, and again refused his application.

Section 2261 of the Revised Statutes 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.

Raymond's application to file for other land is clearly met and denied by the second clause in the statute quoted, and his application to file for the same land is denied by the first clause of said statute, if he has already attempted to exercise the "one pre-emptive right" therein specified. It therefore becomes necessary to inquire into the meaning of the phrase "one pre-emptive right," and to ascertain when, under the law, such right has been so exercised as to preclude any further benefit of the same.

The first clause in section 2261 is taken from a provision found in the tenth section of the act of September 4, 1841 (5 Stat., 453), where it occurs in the following form, "No person shall be entitled to more than one pre-emptive right by virtue of this act." The second clause in said section is from the fourth section of the act of March 3, 1843 (5 Stat., 619), which provides :

That where an individual has filed, under the late pre-emption law, his declaration of intention to claim the benefits of said law for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract.

The pre-emption law as it now stands was substantially formulated in the acts of 1841 and 1843. Under the act of 1841 no declaratory statement was required, except in the case of "offered lands," but the requirement to file for "unoffered lands" was prescribed by the act of 1843.

Section 2259 of the Revised Statutes provides that persons possessing certain specified qualifications may "enter" 160 acres, but this section does not in any manner designate such entry as a "pre-emptive right."

Sections 2265 and 2267 provide for the filing of a declaratory statement in the case of unoffered lands, and for making proof and payment thereafter. By the terms of these sections thirty-three months from the date of his settlement is accorded to the pre-emptor, in which to comply with the law. During this time he is protected by the law in the quiet enjoyment of his claim, and no payment for such privilege is required. Before such an occupation of public land is lawful, certain acts on the part of the would-be pre-emptor are necessary. He must settle in person upon the land, and within three months after such settlement file his written notice of intention on his part to purchase said land. By these acts, when followed by residence and improvement, he is enabled under the pre-emption law to practically own the land claimed by him for thirty-three months before payment is required. But when he does make payment therefor he is precisely upon the same footing as though the land had been open to private cash entry, so far as the actual purchase is concerned. The right, then, to hold the land before payment is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time, is the "pre-emptive right" referred to in section 2261, and such right is initiated by settlement and filing a declaratory statement, and has had its full life when

the time stipulated for purchase arrives. If for any reason the pre-emptor does not perform his part of the contract the fact yet remains that he has once enjoyed the pre-emptive right. He has held the land the full period of time allotted him under the law, and by what further right can he ask the Department to double the time named by the statute? Such a construction would in effect be equivalent to legislation on the part of the Department.

Section 2272 of the Revised Statutes provides that—

Nothing in the provisions of this chapter shall be construed to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption, from the right allowed by law to others to purchase such tract by private entry *after the expiration of the right of pre-emption.*

By the concluding clause of this section it will be seen that Congress contemplated such a possibility as an "expiration of the right of pre-emption," without title being acquired under the pre-emption law, and in such case made provision therefor. If a pre-emptive right may thus expire, it follows that this clause furnishes a good definition of the true extent of one pre-emption right.

The history of this section is as follows: A general circular, dated September 28, 1842 (Lester's L. L., 369), was issued by your office, in which the act of 1841, which required among other things a declaratory statement to be filed in the case of "offered lands," was construed, and the following language used:

Where such settler, instead of entering the land, as he might, at private entry, elects to enter the same under the provisions of the law of September 4, 1841, (whereby he obtains a year's time from the date of settlement to make the payment), he is bound to comply with all the requirements of that law. A failure to do so in regard to any of these requirements renders the land subject to the entry "of any other purchaser," and any person so failing is positively debarred by the law from the privilege of making a private entry of the same under any pretense. Instances have been made known where persons filed the declaratory statement, as required, without any improvements having been made, merely with a view of keeping the land from being entered by any other person for a year, intending near the expiration of that time to abandon their pretended pre-emption claim and enter the same at private entry. The consummation of all such cases must be prevented, and this can be done by requiring a rigid compliance with all the provisions of the law, as above directed.

This construction continued to be received as the proper interpretation of the law until the passage of the act of 1843, which contained in the ninth section thereof, substantially, the provision now forming section 2272.

By this provision Congress, in effect, recognized the construction adopted by your office as a reasonable deduction from the law, but said that, while the preference right conferred by the law might expire and the pre-emptor thereafter lose the right of purchase under said law, nothing therein should be so construed as to prevent him from exercis-

ing the common right which belonged to all persons to purchase the land at private entry. The section in no manner extended the operation of the pre-emption law, but on the other hand provided that whenever a pre-emptor had used his pre-emptive right and failed to acquire title thereby he should thereafter be relegated to the right "allowed by law to others to purchase said tract."

Section 2262 requires the settler to make oath "that he has never had the benefit of *any right of pre-emption* under section 2259."

It cannot be held that said oath could be consistently taken after one declaratory statement had been filed and the thirty-three months had elapsed, simply because the pre-emptor for some reason did not buy the land during such period.

The pre-emptor's right was defined in *Bowers v. Keeseker* (14 La., 307), to be "a right to purchase at a fixed price, in a limited time, in preference to others." (See also *Lytle v. Arkansas*, 9 How., 314; *Myers v. Croft*, 13 Wall., 291.) Under this doctrine no right *as a pre-emptor* to purchase after the expiration of the limited time is recognized, such right having expired with the time. In *Moore v. Besse* (43 Cal., 511), referring to the pre-emptor, the court said, "he could at any time abandon his possession and deprive himself of his right of pre-emption."

In construing the clause which now forms the first part of section 2261, your office said, September 15, 1841:

A person who has once availed himself of the provisions of this act cannot at any future period, or at any other land office, acquire another right under it. (Lester's L. L., p. 360.)

By the act thus referred to the pre-emptor could file on offered land, hold the same a year, and then, if he so elected, buy it. The right conferred, including the privilege to buy, was fully enjoyed at the expiration of the year, whether the pre-emptor bought the land or not. This was for him to determine. If after availing himself of the provisions of the act he saw fit to not buy the land, he was nevertheless precluded from a further exercise of the pre-emptive right.

In denying the right to file a second time for the same tract it was held by this Department, in *Minor v. Briggs*, that "but one pre-emptive right is extended to the settler, and the filing of a declaratory statement is an essential feature of that right" (Copp's L. L., 1882, 580). Such was the interpretation of the law in the Department until the decision of the *Phelps* case (Copp's L. L., 1882, p. 581), in which my predecessor, following the case of *Cumens v. Cyphers* (56 Cal., 388), allowed a second filing for the same tract in the absence of adverse rights. The court in the California case, in construing section 2261, held in substance that the first clause thereof in effect declared that no person shall be entitled to enter with the register and thus acquire from the Government, under the pre-emption laws, more than one tract of land, but did not prohibit a second filing for the same tract, holding that if this were not so the second clause of said section was nugatory.

I cannot concur in such a construction of the act, for it involves the proposition that until a settler has acquired title under the pre-emption law he never loses the right to file anew for the land; that if he elects on the expiration of the time fixed by law to not buy the land, such election gives him, in the absence of adverse right, the privilege of again excluding the settlement rights of the public for another period of thirty-three months. When the whole of this section is considered together it becomes apparent that Congress by the first clause said, "no man shall have more than one pre-emptive right," and by the second, "that right shall be restricted to one tract of land." Full effect is thus given the whole section without giving to the pre-emptor the exclusive right to hold the land beyond the time fixed by law, and thus receive *more* than one pre-emptive right.

If Congress had not intended by the clause under consideration to limit the right of a pre-emptor to one filing, or rather if Congress had intended to permit more than one filing for the same tract by the same person, apt words could have been readily found for the expression of such intent. If it is conceded that the meaning of Congress is left in uncertainty, and that for the purpose of discovering such meaning rules governing statutory construction are to be applied, then the effect of the construction may be fairly considered in such a case as this. In the case of *Fisher v. Blight* (2 Cranch, 389), the court said:

That the consequences are to be considered, in expounding laws, where the intent is doubtful, is a principle not to be controverted, but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied.

In the case of *Litchfield v. Dubuque and Pacific Railroad Company* (23 How., 88), it was said that, "if the words admit of different meanings it would be right to adopt that which is more favorable to the interests of the public." The construction which would admit a second filing for the same land would allow a third and a fourth, and, in effect, permit the pre-emptor to hold the land indefinitely without payment, a result in direct conflict with the letter and spirit of the law, and in derogation of the general rights of the public. (*Minor v. Briggs*, Copp's L. L., 1882, p. 580.)

If a second filing is permitted for the same tract, the second declaratory statement, in order to apparently comply with the law, must of necessity set forward the date of settlement at least thirty months, for section 2265 provides that—

Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

In the case now under consideration, the new declaratory statement which is sought to be filed alleges settlement on April 25, 1883, whereas in fact such settlement was made February 2, 1880, as appears from the original declaratory statement. Thus, in order to secure a right not conferred by the law, it becomes necessary for the pre-emptor to falsify the facts and to stultify himself.

While the pre-emptor in this case has exhausted his pre-emptive right so far as the priority of his settlement right can be protected under a declaratory statement, he is not on that account denied the privilege of purchasing the land. The law prescribes no penalty for failure to make final proof and payment, within the statutory period, beyond rendering the land subject to the claim of the next settler, in order of time, who has complied with the law; hence, in such cases the Department has held, following by analogy the rule in *Johnson v. Towsley* (13 Wall., 72), that in the absence of a valid adverse claim the pre-emptor may purchase the land on making the proper proof under the pre-emption law. (*Walker v. Walker*, Copp's L. L., 293; *Watson v. Missouri River, Fort Scott and Gulf R. R. Co.*, *ibid.*, 1882, p. 902; *Ramage v. Maloney*, 1 Rep., 106.)

This decision is not to be taken as affecting cases already adjudicated under the ruling in the Phelps case, which is hereby overruled.

Your decision is therefore affirmed.

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#### NORTHERN PACIFIC RAILROAD.

No proceedings can be taken, even by Congress, to declare a forfeiture of this grant, if breaches thereof have occurred, until one year after the time fixed for the completion of the road, namely, July 4, 1880.

*Secretary Teller to Hon. George F. Edmunds, May 26, 1884.*

SIR: Replying to your dispatch of yesterday relating to the Northern Pacific Railroad, I have the honor to transmit herewith a tabular statement which will show "the respective dates of the acceptance of completed sections of the road, and what sections after July 4, 1876," as requested by you.

The other part of the telegram refers to the joint resolution of May 31, 1870 (16 Stat., 378), and requests that you be informed when, "according to that, the main line should have been completed." I presume that you refer to that part of the act (1870) which provides—

That 25 miles of said main line, between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, A. D. 1872, and 40 miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points.

Said western terminus was Tacoma, Wash. Ter. The distance between that point and Portland is 142.40 miles as the road is constructed; 25

miles to be completed by January 1, 1872, and 40 miles annually thereafter, would require the road between those points to have been completed by January 1, 1875. Of the 142.40 miles, 65 miles were accepted September 10, 1873; 41.10 miles May 12, 1874; and 36.30 miles October 4, 1883.

Upon the general question of the time within which the Northern Pacific road should have been completed, I call your attention to section 2 of the resolution of May 7, 1866 (14 Stat., 355), and the joint resolution of July 1, 1868 (15 Stat., 255), and to the construction given to those acts by Secretary Schurz, in his decision of June 11, 1879 (General Land Office Report, 1879, page 109). In this decision the Secretary holds that, under those acts, considered in connection with section 9 of the original act (13 Stat., 370), "no proceedings can be taken, even by Congress, to declare a forfeiture of this grant, if breaches thereof have occurred, until one year after the time fixed for the completion of the road, viz., July 4, 1880."

Whether the provision in the resolution of May 31, 1870, above cited, relating to the time for the completion of that portion of the main line between the western terminus and Portland, affected or abrogated existing legislation as to the time for the completion of the other portions of the main line, has never been considered by this Department.

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