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AND

GENERAL LAND OFFICE

IN

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Dowling

DECISIONS

RELATING TO

THE PUBLIC LANDS.

RESERVED LANDS—ENTRY—SETTLEMENT.

SETTOON v. TSCHIRN.

Though the act of March 2, 1889, restoring to the public domain certain lands reserved on account of private claims, covers in its descriptive terms only a part of the Conway claim, the obvious intent of Congress was to embrace all the lands within said claim.

No rights are secured, as against the government, by an entry of land withdrawn from such appropriation; but as between two claimants for such land, after it is restored to entry, priority of settlement may be considered.

In the adjustment of conflicting settlement claims asserted for lands restored to the public domain by said act of 1889, the settler first in time must be recognized as having the superior right.

A homestead entry irregularly allowed of land reserved therefrom may remain intact on the restoration of the land, and in the absence of any adverse interest.

*Secretary Smith to the Commissioner of the General Land Office, July 2,
(J. I. H.) 1894. (F. L. C.)*

The land involved in this dispute is lots 1 and 2, Sec. 7, T. 9 S., R. 5, E., New Orleans, former South Eastern land district, Louisiana.

The record shows that on August 7, 1884, Charles Tschirn, the defendant, made entry of said lots under the homestead law, and on January 9, 1888, he submitted final proof, after due notice by publication, setting forth therein that he had resided upon the land in question since 1874.

Before your office had taken any action on the proof, Mary Settoon, the plaintiff, under date of February 26, 1889, instituted contest proceedings to set aside the entry, alleging in substance that the entry was illegal by reason of the land being within the alleged claim of John McDonogh and Company, or Conway grant; that said land was used for purposes of trade, and had been selected by the State as swamp and overflowed land in 1881, and that said land was unfit for cultivation and that claimant did not make the entry in good faith for a home.

At the day of trial, November 25, 1889, both parties appeared with counsel and submitted testimony, upon which the local officers decided in favor of the defendant, recommending the dismissal of contest and that the entry be held intact.

From this action the plaintiff appealed, when, under date of March 10, 1892, your office affirmed the judgment of the register and receiver, whereupon plaintiff again appeals, alleging the following grounds of error:

1st. In holding that the land involved was legally open to entry under the general homestead laws on August 7, 1884, when the entry of Tschirn was allowed.

2d. In holding that said entry was not fraudulent and therefore void *ab initio*.

3d. In holding that the act of Congress approved March 2, 1889 (25 Stat., 877), did not for the first time subject the land involved to the operation of the homestead law and release it from the reservation created by former laws and by executive orders.

4th. In construing said act of March 2, 1889, as a legislative confirmation of the alleged "incomplete title" of Tschirn and a defeasance of the right to make entry by Settoon in virtue of her ancient settlement and improvements.

5th. In holding that though Mrs. Settoon was in a position as prior settler to have asserted an adverse claim to the land that the record did not show she did so.

6th. And in holding that lot 2 of Sec. 7, had not prior to the entry of Tschirn been actually settled and occupied for purposes of trade and business and not for agriculture.

It appears from the record that the plaintiff originally settled upon lot 2, some time in 1823; after residing there for a number of years, she abandoned the land. Subsequently, two or three parties successively occupied it for several years, and finally, some time during the late war, she purchased the improvements of the occupant, consisting of a house and garden, and returned to the land, where she has resided up to the present time.

This tract was supposed to lie within the limits of a French grant, known as the John McDonogh and Co. claim, also within the Conway grant, and therefore it was not subject to entry.

It also appears that said lots were within the limits of the grant for the New Orleans and Pacific Railroad, under the act of Congress, March 3, 1871 (16 Stat., 573), and finally the tracts were selected with others by the State of Louisiana as swamp and overflowed lands. It is unnecessary to state further than that the grant was decided not to embrace said lots; that the railroad company relinquished all claim to the same, and that under date of December 8, 1885, a contest was had between the defendant and the State of Louisiana in relation to the swamp character of the land, wherein your office rejected the claim of the State, and under date of November 2, 1887, the judgment of your office was affirmed by this Department.

This brings the case down to the present contest.

The plaintiff contends that at the date the defendant made his entry, the land was not subject thereto, and that the entry of claimant is void.

It is true that when said entry was made, the lots were still embraced in the State selection of swamp and overflowed land, and that by Commissioner's letter, dated November 1, 1882, the local officers were directed that these lots and other lands covered by said private claim should be withheld from entry, until further notice, on account of the suits pending in the United States supreme court, as to the validity of said claim, but it should be remembered that the contest against the State selection was entirely in relation to the swamp character of the land, and did not raise any other question; therefore the decision of the Department against the State selection could not, in any manner, be deemed a judgment in favor of the validity of the homestead entry. The entry simply remained "in statu quo," the character of the land only having been determined.

It is unnecessary for the purposes of this case to examine the status of the private grant to Conway. It is sufficient to say that the Department has for years recognized the reservation of this claim, as against any other disposition of the land. In November, 1881, the Houmas suits in relation to this grant were begun and while pending before the supreme court your office order of November 1, 1882, was promulgated.

If there remained any doubt of the reservation of these lands by law and also by Commissioner's order, the act of March 2, 1889 (*supra*), passed for the purpose of restoring the same to the public domain, must have settled the question. Congress, no doubt, when this act was passed, was in possession of all the facts in relation to this grant, and there is no question that the lands were considered in a state of reservation or there would have been no necessity for the passage of the act restoring them to entry.

From a careful examination of said act of March 2, 1889 (25 Stat., 877), I find that it only refers to lands by description in townships 8 and 9, in ranges 1, 2, 3 and 4, all lying west of range 5, within which the tracts in question are located.

Why the description given in the statute only covered a part of the Conway grant and stopped at range 4, does not appear. It can not be denied, however, that the third proviso in said act may include the land in controversy, to wit:

That the provisions of this act shall be and are hereby extended to embrace all settlers upon public lands, and for the disposition of all public lands embraced in the grant to Daniel Clark, so far as decreed invalid by the supreme court of the United States and the unconfirmed Conway claim.

The land in dispute is unquestionably within the limits of the Conway claim, and notwithstanding the fact that the descriptive part of the statute stopped at the east line of range 4, and did not include lands in range 5, yet I am unable to see any reason why Congress should intend one rule or construction for lands west of said line and another for lands east of it, in the Conway claim; therefore, I am satis-

fied that the intent of Congress in said act was to embrace all the lands within said claim.

At the date Tschirn made entry of the land, it was covered by the Conway claim, and also by the State selection, as swamp and overflowed land; furthermore, your office order directing that these lands should be reserved from entry—evidently a precautionary measure—was still in force, in fact it has never been revoked, and therefore there can be no doubt that Tschirn's entry was erroneously allowed, and should not, by reason of such error, prejudice the rights of other settlers.

No rights are secured as against the government by settlement on land withdrawn from entry, but, as between two claimants for such land priority of settlement may be considered. *Pool v. Moloughney* (11 L. D., 197); *Etnier v. Zook* (ib., 452); hence, in the case under consideration, the defendant should acquire no right by virtue of his entry, but priority of settlement of the claimants may be considered.

In the act of March 2, 1889 (*supra*), it is expressly provided that it relates to—

Lands claimed by actual settlers for purposes of cultivation whose titles are incomplete within the limits of the Donaldson and Scott, Daniel Clark and Conway grant, and that after setting apart to each of said settlers, not to exceed one hundred and sixty acres, the residue of the public lands within said grant, shall continue to be as they are now, a part of the public domain.

The act of 1889, *supra*, provided for the restoration to the public domain of certain lands, in Louisiana, including the tract in question, and for the protection of *bona fide* settlers on any of said lands by giving them a preference right of entry.

In the case at bar, Mrs. Settoon and Tschirn both claim to be settlers upon the land, and, therefore, under the rule laid down in the above cited cases, the question is one of priority of settlement.

It appears from the evidence, that Mrs. Settoon was born in the French settlement in Louisiana; that she is a poor widow, about eighty-seven years old, and understands the English language very indifferently; that her home and improvements, worth about \$300, are on lot 2; that she has no other home; that soon after the passage of the act of March 2, 1889, she applied to make entry of said lot 2, and her application was rejected on account of the prior entry of the defendant.

Thus, it appears, that Mrs. Settoon exercised due diligence in trying to secure her home and improvements, and there is no question that her long residence upon the land fully establishes her prior claim to said lot; therefore, the entry of Tschirn, to the extent of lot 2, must necessarily give way to her superior right.

Although the homestead entry, in view of the then existing reservation, should not have been allowed, yet, as the reservation has now been removed and no adverse interest appears, I see no just reason why the entry, as to lot 1, may not be allowed to stand.

I find no evidence to show that this tract was used for purposes of trade prior to the initiation of the defendant's entry. The fact that a man by the name of Hougham has kept a small country store on the land for several years does not, in my opinion, prove such charge; furthermore, the evidence fails to disclose any facts showing fraud on the part of the claimants.

Your office decision is modified accordingly, and you will cancel said entry to the extent of lot 2, allowing Mrs. Settoon a preference right to make entry of the same, and as the final proof in said homestead entry appears to be satisfactory, you will proceed as is usual in such cases.

MINERAL LANDS—AMENDED REGULATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 2, 1894.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES,

SIRS: Paragraphs 109 and 110 of the "United States Mining Laws and Regulations Thereunder" approved December 10, 1891, are amended to read as follows:

109.—No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

110.—Hearings to determine the character of lands are practically of two kinds, as follows:

1. When lands are returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural, under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper non-mineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient, as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting, is *not* required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

2. When lands which are sought to be entered as agricultural are alleged by affidavit to be mineral or when sought as mineral their non-mineral character is alleged. The proceedings in this class of cases are in the nature of a contest between two or more known parties and are provided for in the rules of practice.

Very respectfully,

S. W. LAMOREUX,
Commissioner

DEPARTMENT OF THE INTERIOR,

July 2, 1894.

Approved,

HOKE SMITH,

Secretary.

RELINQUISHMENT—INSANITY.

KAY v. KAY.

An entry must be reinstated where the cancellation thereof is due to a relinquishment procured from the entryman while in a condition of insanity.

Secretary Smith to the Commissioner of the General Land Office, July 2, 1894. (J. I. H.) (J. L.)

I have considered the appeal of William Kay from your office decision of February 13, 1893, in the case of Thomas Kay *v.* William Kay, reversing the decision of the local officers, and holding for cancellation William Kay's homestead entry No. 9117, and for re-instatement Thomas Kay's homestead entry No. 8243, of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$; and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 17, T. 11 S., R. 1 E., Salt Lake City land district, Utah Territory.

On October 25, 1888, Thomas Kay made homestead entry of said land. On May 29, 1891, his relinquishment dated May 18, 1891, was filed in the local office. And on the same day William Kay made homestead entry of said land.

On January 5, 1892, Thomas Kay filed his affidavit, corroborated by three witnesses, alleging that his relinquishment aforesaid was fraudulently procured by William Kay while he, the said Thomas, was insane, and praying that a hearing be ordered; that William Kay's entry be canceled; that said relinquishment be held for naught and of no effect; and that his, Thomas Kay's, entry be re-instated.

Whereupon your office on March 24, 1892, directed the local officers to notify William Kay to show cause within sixty days why his entry should not be canceled. In response to said notice William Kay filed his affidavit, in which he denied Thomas Kay's insanity on the day he made his relinquishment, and alleged that said Thomas Kay had abandoned his homestead in the year 1890. In reply, Thomas filed his second

affidavit, corroborated by the affidavits of his wife and five other persons, repeating the allegation of his insanity at the date of his relinquishment, denying William's charge of abandonment, and alleging that William, since the date of his entry, had not complied with the provisions of the homestead laws. All of *ex parte* affidavits were more or less circumstantial.

On consideration whereof, your office, by letter "C" of May 27, 1892, directed the local officers to order a hearing to obtain additional information, to the end that your office might be able to properly determine whether Thomas Kay's relinquishment on May 18, 1891, was made with full knowledge of its real import.

The hearing was had, and on September 3, 1892, the local officers rendered their joint decision recommending that the prayer of Thomas Kay be denied, and that the homestead entry of William Kay be allowed to remain intact.

Thomas Kay appealed to your office. On February 13, 1893, your office reversed the decision of the local officers, and held William Kay's homestead entry No. 9117 for cancellation, and the homestead entry of Thomas Kay, No. 8243, for re-instatement.

William Kay has appealed to this Department.

I agree with your office in holding that the only issue now pending in this case, relates to the sanity or insanity of Thomas Kay on May 18, 1891. Testimony relating to transactions before or after that date is relevant only so far as it may tend to show his state of mind on that date.

It is a presumption of law that all men are sane, and the burden of proof is upon the person alleging insanity. Where, however, a person has been proven to be insane, the presumption is that the insanity continues, and the burden of proof shifts to the party alleging sanity. (11 Am. and Eng. Encyclopedia of Law, 159-160.)

On March 18, 1891, Thomas Kay was carried to the office of Dr. D. O. Miner, suffering with sub-acute meningitis, in a condition of imbecility bordering on idiocy; all his mental faculties were blunted. When Dr. Miner last saw him, on May 5, 1891, he had so far improved as to apparently be able to take care of himself, although at that time in asking any question, it required considerable time for him to perceive what you were speaking about. There was a dulness or blunting of his mental faculties at that time. He was seen to go into a chicken coop and catch a chicken, and pull the feathers from the living fowl and eat the feathers. Other instances of insane conduct are related by the witnesses. The proof is clear that Thomas Kay was insane during the months of March, April, May and June, 1891.

The testimony tending to prove a lucid interval on May 18, 1891, is insufficient.

Your office decision is hereby affirmed.

CONTEST—RELINQUISHMENT—CONTESTANT.

YOUNG v. MASON.

If a relinquishment is filed as the result of a contest the contestant should have the benefit thereof, even though the contest affidavit is technically insufficient to warrant a hearing.

*Secretary Smith to the Commissioner of the General Land Office, July 2,
(J. I. H.) 1894. (W. F. M.)*

On May 1, 1889, Walter Page made homestead entry of the SE. $\frac{1}{4}$ of section 26, township 12 N., range 3 W., of the Oklahoma City land district.

On January 3, 1891, George Young filed an affidavit of contest, alleging that Page had violated the law by premature entrance into the Territory.

On March 19, 1892, Page's relinquishment of his entry was filed in the local office, and on the same day Susan Mason was allowed to make homestead entry for the same land.

It appears that contestant Young's corroborating witness, on February 4, 1892, filed in the local office a further affidavit, stating "that since the corroboration of said contest affidavit aforesaid, he has become satisfied that he was mistaken in the identity of the said Walter Page, and that he did not see the said Walter Page as sworn to by him. He now desires to withdraw said corroboration, and asks same be not considered."

From your office decision finding that Young's affidavit disclosed no personal knowledge as to the facts alleged, and holding it to be technically insufficient and dismissing said contest, the matter has been brought here on appeal.

It appears to be true that from a technical point of view, the contest of Young is insufficient, yet this Department has held that the filing of a defective affidavit may become the efficient cause of a relinquishment, and in that event the contestant should have the benefit thereof; and in a case similar to the one at bar a hearing was ordered for the purpose of determining whether or not such a defective affidavit had brought about a relinquishment after the institution of the contest. *Hay v. Yager et al.*, 10 L. D. 105.

The decision of your office is, therefore, modified, and it is now directed that a hearing be ordered for the purpose of determining whether or not Page's relinquishment was the result of the contest initiated by Young.

ADY v. BOYLE.

Motion for the review of departmental decision of December 15, 1893, 17 L. D., 529, denied by Secretary Smith, July 2, 1894.

RAILROAD LANDS. ACT OF MARCH 3, 1887.**SWINEFORD ET AL. v. PIPER.**

The last proviso to section 5, act of March 3, 1887, only applies to settlers whose rights were acquired after December 1, 1882, and prior to the passage of said act.

Section 5 of said act is not repealed by the act of March 2, 1889.

That a deed of the land purchased from a railroad company is not delivered until after the passage of said act, does not defeat the right of such purchaser, or his assignee, to perfect title under section 5 thereof, if the sale by the company was in fact made prior to the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, July 2, 1894. (A. E.)

The record in this cause shows that on September 23, 1890, George F. Piper filed an application to purchase Sec. 25, Tp. 48, R. 15 W., Ashland (Wisconsin) land district, by virtue of the 5th section of the act of March 3, 1887, and gave notice of his intention to submit proof in support of his application, on November 5, 1890. This proof, though made on the day fixed, being declared premature by your office, Piper gave new notice and made new proof on March 3, 1891. On this date Curtis A. Swineford, Charles M. Bird, Charles D. Bell and Benjamin M. Paddock appeared and protested. The local office having recommended that the applicant be allowed to purchase, the protestants appealed to your office.

By decision of December 6, 1892, your office affirmed the action of the local office. From this Swineford, Paddock, Bell and Bird appealed to this Department.

The land in controversy was within the grant of May 5, 1864, to the State of Wisconsin to aid in the construction of railroads, and under that grant fell within the ten miles limit of the Chicago, St. Paul, Minneapolis and Omaha Railroad.

By the adjustment, the railroad company only received one half of the land, the other reverting to the United States. The company and the United States did not take this land in common where it came within the Wisconsin Central Railroad grant, made by the act of 1864, nor did the latter road take it in common with the Omaha Company. But it was held by this Department, that the Wisconsin Central could not go within fifteen miles of the Omaha road for any lands whatever because the lands within those limits were reserved from the Central

grant, a different condition from the ordinary lapsing of the granted limits of two roads under the same grant was presented; and it was held, under those circumstances, that the Omaha Company was only entitled to the one undivided half of the lands within said granted limits, and that the other half belonged to the government. Therefore, it being impossible to issue for the benefit of said company a patent for an undivided moiety of said lands, or patent to the state for the whole for the joint benefit of said company and the United States, it became necessary to reject the former lists, presented by the company, and to require it to specify particular tracts, which in the aggregate would amount to one half of the lands within its granted limits, so that patents conveying full title to the same might be issued therefor. Chicago, St. Paul, Minneapolis and Omaha Ry. Company, 11 L. D., 607.

Thus, this land, though within the grant, was excepted from it, and therefore comes within the 5th section of the act of March 3, 1887.

Under the construction given by this Department, the last proviso of this section only applies to settlers who have settled after December 1, 1882, and before March 3, 1887, therefore, as the protestants do not show or even allege settlement before March 3, 1887, it can not be seen wherein they have acquired any rights by the provisions of said section. Chicago, St. Paul, Minneapolis and Omaha Ry. Co. (11 L. D., 607); Union Colony *v.* Fulmele (16 L. D., 273).

It is not the right to purchase that entitles the purchaser to the remedy of this section, but the fact that he is a purchaser.

As regards the contention that the 5th section of this act was repealed by the act of March 2, 1889 [25 Stat., 854], it need only be said that the repeal of laws by implication is not favored, and, owing to the fact that the 5th section of the act of March 3, 1887, vested a remedy in those who had purchased of the railroad company in good faith, the Congress certainly had no intention of taking that remedy away before the Department could ascertain or pass upon it, as in the case under consideration. Therefore, the point is not well taken.

The record in this case shows that on February 3, 1887, Isaac Burhans purchased for the sum of \$1,600 the land in controversy from the railroad company, it having prior to that time been patented to the company by the State. The validity or invalidity of this patent does not affect the rights of the applicant, an assignee of the purchaser, and need not be considered; it is sufficient to say that there was reason for Burhans to believe that the company had good title. On making this purchase Burhans paid one half of the purchase money in cash, and the company agreed in writing to convey the land to him on receipt of the remainder of the price, which it did after the passage of the act of 1887.

The payment of Burhans of one half of the purchase price for this land was the purchase, and he secured a title at that time which he could have enforced, admitting the seisin of the company, and the fact that the evidence of his purchase was not delivered to him until after

the passage of the act does not change the date of the sale, nor take the case without the remedial features of the law. The object of the law was to confer protection upon those who had parted with good consideration under the belief that they were obtaining good title.

From Burhans the land by a series of conveyances came into the hands of Piper for valuable consideration. As the act applies to heirs and assignees, Piper comes within its provisions, if the original grantee did; therefore, in view of the foregoing, Piper is entitled to purchase the land, and your office decision in so holding is affirmed.

GEORGE A. MORRIS.

Motion for review of departmental decision of November 8, 1893, 17 L. D., 512, denied by Secretary Smith, July 2, 1894.

RAILROAD GRANT—WITHDRAWAL—CONTESTANT.

ATLANTIC, GULF AND WEST INDIA TRANSIT CO. v. LUTZ.

A homestead entry, improperly allowed of lands withdrawn for the benefit of a railroad grant, confers no right as against the grant; nor does the successful contestant of such entry secure any right against said grant.

Secretary Smith to the Commissioner of the General Land Office, July 2, 1894. (J. I. H.) (J. L. McC.)

The Atlantic, Gulf and West India Transit Company has appealed from the decision of your office, dated June 18, 1883, directing the local officers to allow Jacob C. Lutz to make homestead entry of the NE. $\frac{1}{4}$ of Sec. 19, T. 28 S., R. 19 E., Gainesville land district, Florida.

The land lies within the six-miles (granted) limits of said company's railroad; but your office holds that it was excepted from the grant because of having been embraced in the homestead entry of one Thomas S. Daniels, made March 13, 1877, which was canceled January 13, 1883, upon a contest initiated by said Lutz—said homestead entry having been in existence at the date of the acceptance and approval of the map of definite location of the railroad (January 28, 1881), and of the approval of the map (March 21, 1881).

This Department, in considering lists Nos. 1, 2, and 3 of selections made by the Atlantic, Gulf and West India Transit Company (2 L. D., 561), held that Secretary Schurz, by his decision of January 28, 1881, authorizing and directing the withdrawal of March 26, 1881, merely continued in effect the withdrawal made in 1856, and re-affirmed in 1857. This ruling was re-affirmed by Secretary Lamar in his decision of August 30, 1886 (5 L. D., 107), holding that the rights of the road were protected by the original map of definite location (filed in 1860).

Said withdrawal continued in force until August 15, 1887, when it was revoked.

Such being the facts of the case, the homestead entry of Daniels, made March 13, 1877 (*supra*), was improperly allowed; and "no rights, either legal or equitable, as against a railroad grant, are acquired by a settlement upon lands withdrawn by executive order for the benefit of such grant." (*Shire et. al. v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 10 L. D., 85.)

It requires no argument to show that a person can not acquire any right, as against a railroad company, by contesting the entry of another party who has no right because of the prior grant to the company. If he could do so, the entire grant might be defeated by a series of invalid entries followed by contests of the same.

The application to make homestead entry of the tract in controversy must therefore be denied.

The decision of your office is reversed.

MINERAL LAND—RES JUDICATA.

STINCHFIELD *v.* PIERCE.

A final decision of the Department holding a tract to be non-mineral in character is conclusive up to the period covered by the hearing; but such decision will not preclude a further consideration as to the character of the land based on subsequent exploration and development.

Secretary Smith to the Commissioner of the General Land Office, July 2, (J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 2 N., R. 14 E., Stockton, California, land district.

It appears by the record that Llewellyn Pierce made homestead entry of said tract April 3, 1888, alleging settlement April 1, 1856. Pursuant to published notice, he offered final proof at the local office October 13, 1892, when Andrew W. Stinchfield appeared and filed a protest against said proof, alleging that claimant has not lived on the land as required by law; that his residence was on adjoining land; that he has not cultivated the land as required by law, and that the land is more valuable for mining, "and gold in paying quantities has been mined therefrom."

The final proof was taken and the witnesses cross-examined. At the close of the cross-examination, claimant objected to any testimony "in regard to the mineral or non-mineral character of this land being entered into, because the question has been decided by the whole Interior Department twice," and he declined to introduce any further testimony as to the mineral character of the land.

The testimony of the protestant and several witnesses was taken, and the local officers decided "that the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of section 33" is shown as a present fact to contain auriferous gravel, and is therefore subject to entry under section 2329 of the Revised Statutes; that thirty-five acres of the land in contest are shown to be agricultural in character," and recommended that Pierce be permitted to enter the same. Both parties appealed, and your office, by letter of February 10, 1893, reversed that decision as to the mineral character of the five acres described, and sustained the agricultural entry for the entire tract. The case now comes before the Department on Stinchfield's appeal, alleging error both as to the facts and the law.

The character of the land in controversy has been once before decided by the Department in a controversy between the same parties, and it was decided against the mineral claimant. It seems that one Sewall Stinchfield made mineral entry of the tract September, 1881. Pierce filed a protest against the same, alleging residence on and cultivation of the tract, and charging that it was not mineral but agricultural land. A hearing was ordered on these charges, and testimony taken, commencing December 27, 1882, and ending January 25, 1883. As a final result of that hearing, the Department, on March 10, 1888 (148 L. and R., 411), affirmed your office judgment, holding the land to be agricultural in character, and that Pierce might establish his right to it by a full compliance with the law as to residence. It was immediately after this judgment that he made his homestead entry.

By the testimony of Andrew W. Stinchfield in the case at bar, it is shown that he purchased the property from Sewall Stinchfield in September, 1882. Hence he was the party in interest in the former proceeding, as this was prior to the first case, and he must be held to be bound by that judgment. The questions involved at that hearing were elaborately presented and thoroughly considered. It is stated that there were over nine hundred pages of testimony, and it is evident from an examination of the case that it was gone into exhaustively in its every feature.

Andrew W. Stinchfield again, in July, 1888, presented a petition, asking for another hearing of the case as to the mineral character of land, supported by a number of affidavits. This matter was duly considered below and finally reached the Department on appeal, where it was treated as a motion for rehearing, and on September 19, 1890 (206 L. and R., 338), was denied, but your office was instructed to have a special agent investigate the matter "and report to your office the result of such investigation, upon receipt of which you will take such action as may seem proper." His report is not before me, but it is stated in said letter of February 10, 1893, that "such investigation was made, resulting in a report by him (the special agent), dated February 8, 1892, in favor of the agricultural character of the land, and the good faith in the homestead claimant."

In the face of all these adverse proceedings, it is idle to talk of considering the question of the character of the land as an original proposition. It would be trifling with the doctrine of *res judicata*, that wise and beneficent rule of law which makes repose of litigated questions and creates confidence in the integrity of judicial and departmental decisions, upon which great property rights are vested, to permit parties thus to re-open, for re-adjudication, questions that have been settled under all the forms of law. Therefore, the question of the character of the land must be held to have been settled up to and including the former trial, and all testimony as to its mineral value prior to that time will be eliminated from the case at bar.

It is a matter of common knowledge that the value of the ordinary mining claim is established by development and exploitation; that its mineral worth may be, and not infrequently is, as capricious and unstable as the wind. Nature has not, as a rule, provided her treasure in large and unvarying quantities, but has distributed it sparingly, as if to test man's genius and energy in finding it. The exploration may be one day in borrasca and the next in bonanza. Hence, it being the settled policy of the government to encourage the production of the precious metals, I think that if it can be shown that by subsequent development it has been demonstrated that the land is more valuable for its minerals than for agricultural purposes, it may be done. But the testimony in such a case would have to be clear and unmistakable, such as to carry conviction beyond possible doubt.

Applying this test to the case at bar, it must be held that the protestant has signally failed to establish the mineral character of any portion of the land in controversy. In your said office decision the testimony has been fairly and sufficiently stated, and the conclusion is approved. It might be added, in addition, that the testimony shows that no discovery whatever has been made since the former hearing; that there has been no development worthy of the name, and what work has been done was wholly with the view of performing the annual assessment work required by law on tunnel sites; further, the protestant himself testified that his main object in wanting the land was for the purpose of continuing his tunnel through it, with the view of connecting it with the Buckeye tunnel, and thereby draining other ground.

Your said office decision as to the residence of Pierce on the land is also approved.

The judgment of your office is therefore affirmed.

OKLAHOMA TOWN LOTS—ADVERSE CLAIM.

THE GODDARD PECK GROCER CO. ET AL.

A certificate of right issued by the municipal authorities of a town to a lot claimant entitles him to a deed therefor, where the adverse claims presented do not fall within the jurisdiction of the Department.

Secretary Smith to the Commissioner of the General Land Office, July 2, 1894. (W. F. M.)

On September 16, September 22, and October 2, 1890, respectively, Lewis J. Best, The Goddard-Peck Grocer Company and Theodore A. Pamperin, presented their several applications to the board of town-site trustees, No. 1, assigned to Guthrie, Oklahoma, each asking for the allotment of lot No. 1, in block No. 71, in the town of Guthrie, and a deed therefor.

Pamperin's application is based upon priority of settlement and actual occupancy, that of Best on right of purchase from Pamperin, and that of The Goddard-Peck Grocer Company upon purchase from "original settlers," and continued occupancy since purchase.

A hearing was had on March 16, 1891, after which the board rendered judgment—

That lot No. 1 in block No. 71, in Guthrie, Oklahoma, with the improvements thereon, be and the same is hereby awarded and allotted to said Goddard-Peck Grocer Company, and that a deed be made and delivered accordingly.

The decision of your office, now on appeal here, reversed, or modified this judgment, and awarded the lot in controversy to Pamperin, who was not a party to the proceedings before the board, having failed to make the required deposit to cover the expenses of the hearing, and who has not subsequently appeared except by brief through counsel since the case has been pending in this Department.

The facts developed at the hearing which are necessary to an intelligent comprehension of the attitude of the parties in interest and of their respective rights in so far as they have shown any, may be stated in a few words.

On April 20, 1889, A. J. Witherell and T. A. Pamperin, the latter one of the claimants herein, both being then in Arkansas City, Kansas, entered into an agreement by the terms of which "they joined themselves jointly together for the purpose of doing a grocery business in the town of Guthrie, Indian Territory, and further for taking up lots in said city in which each will have an equal interest." Other and further stipulations of the contract have no bearing upon the controversy.

Accordingly, soon after the opening of Oklahoma to settlement they engaged in business at Guthrie, and each of the partners, in his individual name, located, occupied and claimed certain lots within the limits of the townsite, but whether in the interest and for the benefit of

the partnership, pursuant to their agreement, is not conclusively shown, Witherell, as his interest appears, asserting the affirmative of the proposition, while Pamperin, with adverse interests, contends for the negative. For the lot involved in this litigation, however, the mayor and council of Guthrie, on May 20, 1889, issued to Pamperin, in his individual name, an instrument styled by them a "warranty certificate" by which they guarantee to him possession of the lot and a deed in fee simple without further proof of settlement. The certificate also purports to be a receipt in full for all assessments levied upon the lot for the purpose of defraying the expense of survey, platting and any other charges against said lot to date.

It appears from parol testimony admitted into the record that in December, 1889, Pamperin conveyed the lot, by a deed the character of which is not clearly shown, to L. J. Best. This deed had never been recorded, and was not produced, but the evidence discloses that no consideration was ever paid, but only promised upon condition that Pamperin should secure the title from the government. In view of the fact that Pamperin had no title, and of the conditions of the transfer, Best took nothing absolutely by the deed, nor did he engage absolutely to do or pay anything. The transaction, if it had any validity at all, was a mere contract to sell, and imported an equitable title only, to which this Department can not give legal effect.

On September 23, 1889, after the dissolution of the partnership between Witherell and Pamperin, Allen J. Witherell, in behalf of the partnership, treating the lot as partnership property, conveyed it to the Goddard-Peck Grocer Company in satisfaction of a partnership debt, and it is upon this deed of conveyance that this company bases its claim.

Thus, this Department is invited to invade the exclusive domain of the local courts and adjudicate rights of property of the citizens of the Territory of Oklahoma, controlled by local laws and arising out of transactions over which the government of the United States, through its executive branch, has no jurisdiction whatsoever. It is not competent for the Department to construe the partnership agreement between Witherell and Pamperin, and give effect to its terms, during the existence thereof, nor to settle its affairs after its dissolution.

Both the Goddard-Peck Grocer Company and Best claim through Pamperin, and while he was not a party to the hearing before the board, their rights, in any event, depended ultimately upon the establishment of Pamperin's original right through occupancy. The logic of their position is the admission of his claim. The warranty certificate presented by him to the board of townsite trustees is indisputably the "paper evidence of claim" contemplated by section 2 of the act of May 14, 1890, 26 Statutes, p. 109, and the *prima facie* evidence which it imports has not been opposed by any adverse claim within the competence of this Department to take cognizance of.

The decision of your office is, therefore, affirmed.

PUBLIC LAND—ORDER OF SURVEY.

GOWDY v. GILBERT.

A final decision of the Department directing the survey of a tract as public land, precludes the subsequent consideration of a claim thereto based on riparian ownership.

*Secretary Smith to the Commissioner of the General Land Office, July 2,
(J. I. H.) 1894. (G. B. G.)*

The land involved in this case is lot 6 of Sec. 2, T. 15 N., R. 15 W., Grayling land district, Michigan. This description is based on a survey of said section, approved February 7, 1889, which was a second survey, or re-survey, of the section.

According to the original survey, approved June 28, 1839, the land in controversy was part of lots 2 and 4, as designated by the plat of such survey, said plat representing a lake as the western meander line of lot 2, and the northwestern line of lot 4.

According to the re-survey of February 7, 1889, the lines of these lots, as above referred to, fall a considerable distance south and east of the lake-shore, leaving a body of land containing 69.62 acres between said lots 2 and 4, and the shore of the lake as unsurveyed public land, which was then surveyed and is now known as lot 6, and this is the land in controversy in this suit.

It appears that the defendant herein, P. D. Gilbert, located as a homestead said lot 4, built his home at a point on said lot, as he believed, near the lake-shore, which point, under the last survey, is in lot 6.

Lot 4 was patented to Gilbert June 20, 1870, and by departmental decision of May 17, 1889, ex-parte Philomen D. Gilbert (8 L. D., 500), it was directed that the said Gilbert be allowed to make entry for lot 6 as an additional homestead entry, under the 6th section of the act of March 2, 1889, and that patent issue to him for said land on proof of compliance with the requirements of said act.

On June 18, 1889, the said Gilbert made homestead entry for said lot 6, which entry is still intact. On September 13, 1892, the plaintiff herein, A. C. Gowdy, filed in your office a protest against said entry, and requested that such entry be canceled, for the reason that it embraced a portion of the land entered by Gowdy more than twenty years ago.

Lot 2 was patented to the protestant Gowdy September 20, 1872. Said lot, under the survey approved June 28, 1839, contained 67.60 acres, and according to your office opinion,

Under the re-survey of section 2, approved February 7, 1889, the lines of the former survey of 1839, *supra*, were followed in every instance, and the boundary lines and areas of the subdivisions were in no wise changed by said subsequent survey, hence lot 2 now, as then, contained 67.60.

This statement is made with special reference to the contention of protestant that the land in controversy had been previously patented to him, or more specifically stated, that lot 2 having been patented to him, it is contended that the western line of said lot was the lake-shore, that the land in controversy lying between the western line of said lot, according to the re-survey, and the shore of the lake, is land uncovered by the receding waters of the lake, and belongs to him by virtue of riparian proprietorship.

This is a question that has passed beyond the jurisdiction of the Department, and can only now be determined by the courts. The question as to the character of this land was fully determined by the Land Department before survey, and when said survey of lot 6 was ordered, the question as to the character of the land became *res judicata*. See Case v. Church (17 L. D., 578).

Gowdy's protest is therefore dismissed, and it appearing that the entryman Gilbert is entitled to said lot 6, by reason of his occupation and improvement, the decision appealed from is concurred in, and is therefore affirmed.

COAL ENTRY—EQUITABLE ACTION.

ANTHRACITE MESA COAL CO.

A coal entry allowed on defective declaratory statement and irregular proof may be equitably confirmed, in the absence of any adverse claim, where a proper declaratory statement is subsequently filed and the requisite additional proof furnished.

*Secretary Smith to the Commissioner of the General Land Office, July
(J. I. H.) 2, 1894. (P. J. C.)*

The land involved in this appeal is the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 13 S., R. 86 W., 6 P. M., Gunnison (formerly Leadville) land district, Colorado.

It appears that coal entry No. 33, Leadville (Ute series), was made of this tract February 28, 1883, in the name of Wallace Bowman. This entry was made by one Howard F. Smith, under a power of attorney from one John H. Bowman, as attorney in fact for Wallace Bowman, appointing him—Smith—attorney in fact for Wallace Bowman. When this entry came up for consideration in your office, the attention of the local office at Gunnison was called to the irregularity by letter of June 7, 1884. They were advised that the regulations require the declaratory statement and affidavit to be made by the applicant himself, but as there was no adverse claim or conflict, it was ordered that Wallace Bowman be allowed to make his declaratory statement and affidavit and file the same *nunc pro tunc*. It was also required by said letter that proof of possession by the agent must be furnished, under paragraph 17 of the regulations of July 31, 1882 (1 L. D., 687); also that

the power of attorney from Wallace Bowman to J. H. Bowman was not in the files, and that "where an agent is recognized he must appear under "sufficient power of attorney,"" under paragraph 34 of said regulations.

Thus the matter seems to have rested until November 16, 1892, when your office advised the local office that on a re-examination of the case it was found that the following was lacking: "1. The affidavits of two witnesses and agent showing that said land is chiefly valuable for coal; and, 2, proper evidence of citizenship of said Bowman."

On March 26, 1893, your office again took up the matter, and by letter of that date to the local office said, *inter alia*:

I am now in receipt of your letter of March 7, 1893, inclosing certain evidence called for by letter "N" of November 16, 1892, and reporting that the evidence required by said letter of June 7, 1884, has not been furnished.

Inasmuch as said evidence is material, and claimant has failed to furnish the same, the entry is accordingly held for cancellation.

From this decision the Anthracite Mesa Coal Mining Company, the alleged transferee of Wallace Bowman, has appealed.

Since the appeal was taken there has been filed in this office the affidavits of Wallace Bowman, called for by your office letter of June 7, 1884, that is, a declaratory statement and the affidavit required by paragraph 32; also his affidavit of citizenship, and still another affidavit, in which he states that John H. Bowman was appointed as his attorney in fact "by a duly executed power of attorney, with full authority to substitute an attorney in fact to act for affiant." These affidavits were made in the State of New York, and are dated June 8, 1893. It is stated by counsel that the reason for delay in presenting them was owing to the inability of the transferees to ascertain his whereabouts.

It seems to me that in view of the fact that there are no adverse claims to the land, your office order of June 7, 1884, may be now carried into effect. The original power of attorney from Wallace to John H. Bowman has not been supplied, but the former swears it was duly executed. In addition to this, the presumption would be that satisfactory evidence was presented to the local office of his appointment as such attorney in fact. (Frederick Rose, 18 L. D., 110.)

In view of the provisions of Rule 100 (Rules of Practice) permitting the filing of additional evidence in *ex parte* cases these affidavits have been considered. To avoid the further delay incident to referring the question back to your office for further consideration, in the light of this evidence, it is my opinion that these affidavits may be filed *nunc pro tunc*, and the matter then referred to the Board of Equitable Adjudication for its action. It is so ordered, and your said office judgment is reversed.

RAILROAD GRANT—LANDS EXCEPTED.

HASTINGS AND DAKOTA RY. CO. v MARTIN.

Land embraced within a homestead entry at the date of the grant to this company is excepted therefrom, though said entry is canceled prior to definite location. The ruling of the supreme court in the case of *Bardon v. Northern Pacific R. R. Co.*, as to the effect of a claim at the date of the grant to that company, is equally applicable to the Hastings and Dakota grant.

*Secretary Smith to the Commissioner of the General Land Office, July 2,
(J. I. H.) 1894. (U. W. P.)*

The land involved in the appeal from the decision of your office of October 29, 1892, denying the claim of the Hastings and Dakota Railway Company thereto, is lot 1 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 115 N., R. 30 W., Marshall land district, Minnesota, and is within the primary limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to aid in the construction of said railroad.

At the date of the granting act, said land was embraced in homestead entry No. 1561, made July 12, 1864, which was cancelled November 22, 1866, because of failure to comply with legal requirements, and which had ceased to exist at the date of definite location of the road June 26, 1867.

March 4, 1881, Catherine Martin made her homestead entry of said land, and on February 9, 1886, final certificate was issued therefor. The Hastings and Dakota Railway Company claimed said land under its grant. But your office denied its claim. The railway company has appealed.

By departmental decision of November 15, 1892, in the case of *Grinnell, et al. v. Hastings and Dakota Railway Company* (15 L. D., 431), it was decided that lands embraced within a subsisting homestead entry at the date of the grant to said company, are excepted therefrom, although said entry may be cancelled prior to the definite location of the road. This decision was simply following the doctrine announced in the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535).

There is no force in the contention of the attorneys for the railroad company that the grant to it is distinguishable from the grant to the Northern Pacific Railroad Company, interpreted in *Bardon v. Northern Pacific Railroad Company, supra*.

The words in the third section of the grant to the Northern Pacific Railroad Company (13 Stat., 365), on which the question turns, are:

Whenever, prior to said time, (i. e., the definite location of the route of the road) 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 land shall be selected by said company in lieu thereof.

The language of the corresponding provision in the grant to the Hastings and Dakota Railway Company (14 Stat., 87) is:

In case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section or part thereof granted, as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead or pre-emption has attached, as aforesaid.

In the former grant, the language is "Whenever, *prior to said time*, any of said sections, etc., shall have been granted, etc."; in the latter grant, "In case it shall appear that the United States have, *when the lines* or route of said roads are definitely located, sold, etc." I am not able to discover any distinction in the meaning of the two grants. The words "have sold", "has attached", and "has been reserved by the United States", when the lines are definitely located, surely mean before the lines have been definitely located.

I am therefore of opinion that there was no error in the decision of your office appealed from, and it is affirmed.

*See arrival 4/16
J. L. McCull 7-4-94*

RAILROAD SELECTIONS—MINERAL LANDS.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1894. (J. L. H.) (J. L. McC.)

In the matter of the selection, by railroad companies, of lands in satisfaction of their grants, the following rules and regulations will be observed in determining whether the lands selected are mineral or non-mineral lands:

(1) Where the lands have been returned by the surveyor-general as mineral, a hearing may be had to determine the character of the land, under Rules 110 and 111 of Rules and Regulations issued December 10, 1891, controlling the disposal of mining claims.

(2) Where the lands selected by the company are within a mineral belt, or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit, by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employés of the company, as to their mineral or agricultural character, and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

Upon receipt of said list you will cause it to be examined, and a clear list to be prepared of all lands embraced therein that are not within a radius of six miles from any mineral entry, claim, or location, which list shall be transmitted to the Department for its approval. If any of the lands embraced in said list of selections are found upon examination to be within a radius of six miles from any mineral entry, claim, or location, you will cause a supplemental list of such lands to be prepared, and return the same to the register and receiver of the district in which they are situated, and notify the railroad company that they have been so returned. The register and receiver will at once cause notice to be published in such newspapers as shall be designated by the Commissioner of the General Land Office, containing a statement that the railroad company has applied for a patent for the lands, designating the same by townships, and has filed lists of the same in the local land office; that said lists are open to the public for inspection; that a copy of the same, by descriptive subdivisions, has been conspicuously posted in said land office for inspection by persons interested, and the public generally; and that the local land officers will receive protests, or contests, within the next sixty days, for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

At the expiration of said sixty days, the register and receiver will return to the Commissioner of the General Land Office said supplemental list, noting thereon any protests, or contests, or suggestions, as to the mineral character of any of such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list. After the same shall have been returned by the register and receiver, you will first eliminate from said supplemental list all the lands that have been protested, or contested, or claimed to be more valuable for mineral than for agricultural purposes, or concerning which any suggestion has been made as to their mineral character. The remaining lands you will certify to this Department for approval and patenting as agricultural.

In regard to lands protested or contested, or claimed to be mineral, or concerning which any suggestion has been made, or report by the register and receiver, as to their mineral character, you will order a hearing to be had by the local land officers in each case, after giving due notice to the persons furnishing such information, and to the railroad company, under the existing rules and regulations of the Department concerning hearings in cases where the land has been returned as mineral land.

The railroad company shall pay to the register and receiver the cost of advertising said lands in the manner set forth.

You are further instructed that all lists which have been heretofore prepared in accordance with any rules, regulations, or instructions of the Secretary of the Interior, where such rules have been complied

with (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department), and such mineral affidavits furnished for each subdivision of forty acres, shall be excepted from the terms of the foregoing regulations. Also, where lists of selections are now pending of lands returned by the surveyor-general as mineral, where hearings have been had in accordance with rules 110 and 111 of Rules and Regulations of December 10, 1891, above referred to, and the local officers have determined that said lands are non-mineral in character, and such determination has been approved by the General Land Office, such lands shall be submitted to the Department for approval, without further investigation, although they may be within six miles of any mineral claim or location, unless since said hearing mineral claims or locations have been made of any tract embraced in said lists, in which event you will eliminate said tract from said list, and hold the same for further investigation.

STATE SELECTIONS—MINERAL LANDS.

INSTRUCTIONS.

*Secretary Smith to the Commissioner of the General Land Office, July 9,
(J. I. H.)* 1894. *(J. L. McC.)*

I am in receipt of your communication of June 18, 1894, transmitting for examination and approval draft of a circular letter designed to put into operation the instructions of this Department relative to lists of State selections of lands within what are known or regarded as mineral belts. I return the same without approval, and direct that where lands selected by any State, under the various grants, are within what are known or regarded as mineral belts, or in proximity to lands claimed or returned as mineral, the State or its selecting agent shall be required to comply with the rules and regulations this day promulgated relative to selections of lands similarly situated, within the limits of railroad grants.

RIGHT OF WAY—TERMINI OF LINE.

HESPERIA LAND AND WATER CO.

The certificates of the president and chief engineer of an irrigation company, attached to right of way maps, should designate the termini of a pipe line along which the right of way is claimed over the public land.

*Secretary Smith to the Commissioner of the General Land Office, July 10,
(J. I. H.) 1894. (F. W. C.)*

I have considered the appeal by the Hesperia Land and Water company from your office decision of April 3, 1894, requiring said company to amend the certificates of the president and chief engineer attached.

to its maps showing the proposed location of its pipe line, along which the right of way is claimed under the provisions of the act of March 3, 1891 (26 Stat., 1095).

The chief objection to the certificates referred to, is that they fail to designate the termini of the pipe line along which the right of way is claimed over the public lands.

Your letter suggested to the company that the old maps be not amended but that new maps be filed complying with the requirements contained in said letter—as the old ones are greatly defaced—and after approval they become the final record.

It is claimed in the appeal that the maps in their present shape met all the requirements in force at the time of the filing of the same, and for this reason they should be approved.

The reason for this claim would seem to be that the maps were once returned by your office with suggestions which were complied with, but that in your first letter you failed to note the defects now made the basis of your letter of April 3, 1894, before referred to.

It would appear from the map that this pipe line crosses, part of the way, private property, and that right of way is only claimed for a portion of the pipe line indicated on the map, and as it has always been required that the termini should be set forth in the affidavit and certificate attached to the map, I must approve your action requiring the amendment in this particular.

INDIAN LANDS—EMINENT DOMAIN.

OPINION.

In the exercise of the right of eminent domain a State may condemn for public purposes, under proper procedure, lands embraced within Indian allotments.

*Assistant Attorney General Hall to the Secretary of the Interior, June 25,
1894.* (G. B. G.)

I have the honor to acknowledge the receipt, by verbal reference, of a letter from Hon. T. C. Power, United States Senator, addressed to your predecessor, Mr. Secretary Noble, transmitting a communication from the Commissioner of Indian Affairs, relative to the right of certain settlers at Stillwater, Montana, to build a bridge across the Yellowstone River, upon land duly allotted to an Indian woman of the Crow tribe.

In response to the inquiry of Senator Power, the Commissioner refers to the various treaties and agreements concluded with said tribe of Indians, and says there is no "authority of law for the building of roads, or construction of bridges across the Crow reservation in Montana, or over allotments made to the Indians of the said tribe, embracing lands formerly contained therein."

He also says:

County authorities, even with the consent of the allottee, can acquire no other right than an easement to the lands so taken and used.

Parties seeking to build a road, or construct a bridge on lands allotted to the Crow Indians, can do so only by mutual agreement, between themselves and allottees, and it is trusted that allottees will see the benefits resulting from improvements of the character indicated, and give their consent to such as are necessary and important.

In said letter, Senator Power says: "While I am a friend of the Indian and the half-breed, I do not want the allottee to be in a position to be arbitrary, and not permit highways to be built through their land, and also believe he should pay some taxes, and bear a portion of the burden of the State", and asks the question, "What would you recommend in this case?"

By said reference, I am asked for an expression of opinion on the question herein set forth.

There are two questions to consider:

First. Does such right of eminent domain exist, either in the United States government, or in the State of Montana, as warrants the taking of any part of the lands allotted to the Crow Indians in severalty, for the purposes mentioned?

Second. In which sovereignty does the right exist, the United States government, or the State?

On the first question there can be little doubt. The purposes for which the exercise of the right of eminent domain is called in question herein, are such as are universally recognized as proper matters for the invocation of sovereign power. The right to build bridges and establish highways for the public use. There appertains to every independent government the right to take private property for public uses. "It is an attribute of sovereignty", and exists independently of constitutional recognition. The question of whether the conditions precedent to the exercise of the right, have been complied with, is a proper matter for judicial inquiry, but judicial cognizance is not allowed of the expediency or necessity of appropriating any particular private property to a public use. Specially as regards Indian lands, the government's right of eminent domain in such lands, has never been questioned by the courts.

The origin of the doctrine of ultimate title and dominion in the United States, is found in the principle older than our government, that discovery gave title to the government by whose subjects, or by whose authority it was made. This gave to the discovering nation the sole right of acquiring the soil from the natives.

As said by Chief Justice Marshall, in the case of *Johnson v. McIntosh* (8 Wheat., 543, 575):

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and christianity, in exchange for unlimited independence.

While thus claiming the right of acquisition and disposition of the fee in the soil, the usufructuary right of occupancy was recognized in the natives.

The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the courts until extinguished, when the patentee took the encumbered fee. So this court, and the State courts have uniformly and often helden, *Clark v. Smith* (13 Pet., 195, 201).

The land embraced in the Territory (now the State) of Montana, is part of the Louisiana purchase. When ceded to the United States by France, this government then acquired the ultimate fee in the soil, and with it the higher right of eminent domain.

As the exercise of the right of eminent domain necessarily, in most cases, and certainly in case of the appropriation of land for a highway, operates as a deprivation of exclusive individual use of the property so appropriated, it becomes necessary to examine the right of the United States government to deprive the Indian of the right of possession and use, which has been universally conceded to belong to him.

In the recent case of *Missouri, Kansas and Texas Railway Company v. Roberts* (152 U. S., 114, 117), the policy of the government, which it is conceded is untrammelled by any rule of law, is summed up as follows:

Though the law, as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands, has always been recognized, it is to be presumed, as stated in this court in the *Buttz* case, that in its exercise, the United States will be governed by such considerations of justice as will control a christian people, in their treatment of an ignorant and dependent race, the court observing, however, that the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy."

On the second question, the authorities agree that while paramount sovereignty resides in the United States, so far as the Territories are concerned, still, when a Territory is admitted as an independent State into the Union, the general rights of eminent domain are exclusively vested in the State sovereignty.

The only exception to this rule is when the general government may consider it important to appropriate for its own purposes lands or other property, to enable it to perform its own proper functions, and in such case, it may still exercise the authority in a State, as well as within Territorial jurisdiction.

By section four, of the act of February 22, 1889 (25 Stat., 676-677), admitting Montana into the Union, it is stipulated:

That the people inhabiting said proposed State, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof and to all lands lying within said limits, owned or held by any Indians or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be, and remain subject to the disposi-

tion of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

The act of April 11, 1882 (22 Stat., 42), after providing for the allotment of lands in severalty, to Indians of the Crow tribe, provides that:

The title, to be acquired by all members of the Crow tribe of Indians, shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee, or his heirs, or by the judgment, order, or decree of any court.

The same act further provides, "That all existing provisions of May 7, 1868, shall continue in force." And the provisions of May 7, 1868 (15 Stat., 649), referred to, were the terms of a treaty entered into at that time between the United States and the Crow Indians. The stipulation therein, pertinent to this inquiry, is as follows:

And the United States now solemnly agrees that no person . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians.

These are the statutes on which is predicated the opinion of the Honorable Commissioner of Indian Affairs, herein. The error into which the Honorable Commissioner seems to have fallen, appears to be in his failure to properly discriminate between the right of public domain, and the right of eminent domain.

By the act, *supra*, admitting Montana into the Union the interest disclaimed by the State is the "right and title" to certain lands within the boundaries thereof. This was a disclaimer of the right of public domain, and the right of eminent domain being a distinct, separate and permanent right was not affected thereby.

Until the patents have been delivered to the Indians for the lands embraced in their allotments, such lands are part of the public domain of the United States; but the right of eminent domain, so far as it becomes necessary to use it in the exercise of State sovereignty, passed to the State when it was admitted into the Union, as fully and completely, with reference to these lands, as any other within its boundaries, the State having the same right of eminent domain in lands belonging to the public domain, as in land held in fee simple by its own citizens.

"The right of taking property for public use is exercised by a state, subject to no power vested in the Federal government. The proprietary right of the United States can in no respect restrict or modify the exercise of this sovereign power by a State." *West River Bridge Co. v. Dix* (47 U. S., (6 How.) 507. See also American and English Encyclopædia of Law, Vol. VI., page 512, title Eminent Domain, and cases there cited.

Waiving the question of the right of the general government to impose a condition on a State, that would operate as a limitation on its sovereignty, I conclude that no such limitation was ever intended.

It is clear that by the aforesaid treaty stipulation Congress simply intended to afford the Indians adequate protection against the rapa-

cious commercial instincts of unprincipled men, and the possible exercise of the power of the courts to further the designs of such men, to secure possession of these lands, without just compensation, and to prevent the passing over, settling upon, and residing in the territory, in the furtherance of private enterprise. This was done in the interest of the Indian, and for the promotion of his welfare, and certainly not for the purpose of preventing a State from opening up highways in the interest both of the Indians and her own citizenship.

In conclusion, it follows that the State of Montana has the right to condemn, under proper procedure, for public purposes, lands embraced in Indian allotments in said State.

Approved:

HOKÉ SMITH,

Secretary.

RAILROAD GRANT—SETTLEMENT CLAIM—TIMBER CULTURE ENTRY.

NORTHERN PACIFIC R. R. Co. v. VIOLETTE.

The occupancy and cultivation of a tract at definite location by one who subsequently makes timber culture entry thereof, do not serve to except said tract from the grant, if the entryman was not qualified to take the land under the settlement laws when the grant attached.

Secretary Smith to the Commissioner of the General Land Office, July 12, 1894. (J. I. H.) (J. L. McC.)

I have considered the case of the Northern Pacific Railroad Company *v.* Francis Violette, involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 13 N., R. 20 W., Missoula land district, Montana.

The land is within the limits of the grant to the company as shown by the map of definite location, filed July 6, 1882; also within the limits of the withdrawal upon the filing of the map of general route, which became effective February 21, 1872.

At the date of the filing of the map of general route, the tract was covered by the unexpired pre-emption claim of one John Sexton. Relative to its status at the date of definite location, as shown by the hearing had in the case, the decision of your office, dated February 14, 1893, states:

Francis Violette, the present claimant, made timber culture entry No. 1306 for the said tract, July 15, 1885. The testimony shows that Violette, a citizen of the United States, and qualified to make timber culture entry, has been in possession of the land since 1877; that he fenced the whole of it in 1879; has about thirty acres plowed, raised grain and hay thereon, and on July 6, 1882, had some trees planted and growing thereon. Violette had such a claim for the land at the date of definite location of the line of road as he could perfect, and intended to perfect, and which he has subsequently entered; and it is affirmatively shown that he was qualified to make such entry; and his claim therefore excepted the land from the operation of the grant to the railroad company.

The company has filed an appeal, alleging several errors on the part of your office, the only ones that call for notice under the circumstances, being the following:

It was error not to have ruled that a timber culture entry is not a claim "under the settlement laws," as no settlement on the land is required; and the right or claim arises only on entry.

This contention is correct; the entry of the tract under the timber culture law subsequently to the date of definite location does not *per se* serve to show that any claim had attached at that date.

Error not to have ruled that, as Violette had exhausted both his pre-emption and homestead rights at the date of definite location, he could not claim, either in fact or by intention, this land under the settlement laws.

The evidence relative to Violette's qualifications at the date of the filing of the map of definite location, is very ambiguous and obscure, as follows:

Q. How far do you live from the land in question?

A. Must be half a mile from the building.

Q. Does it join your ranch?

A. Yes, it joins my pre-emption claim?

This indicates that he had made a pre-emption filing at the date of the hearing (July 20, 1891); but it does not indicate that he had made such a filing nine years before (July 6, 1882). The examination continues:

Q. Had you exhausted your rights, either homestead or pre-emption, on July 6, 1882?

A. Yes.

Q. Did you ever make filing of any kind of this tract of land before July 6, 1882?

A. I made that filing on that forty acres of land before that time; made that timber culture on it; this was after 1882. I did not understand the question at first.

This leaves it very uncertain how much of the question or questions immediately preceding, was misunderstood by the witness. The only testimony taken as to his qualifications is that above quoted.

In 1882, the land was worth five dollars an acre, and he had put nearly, or quite four hundred dollars' worth of improvements upon it. If he was at that time qualified to take the land under either the pre-emption law or the homestead law, according to the rulings of the Department his occupancy and cultivation of the tract excepted it from the grant, even if he afterward entered it under some other law. It would be a serious loss, and a gross injustice, to him if he were to be deprived of the land solely because of his having misunderstood a question asked him during the examination. I have to direct, therefore, that you will afford him an opportunity to make a statement to your office, under oath, as to whether he was qualified to make either a pre-emption filing, or a homestead entry on the 6th of July, 1882. If he shall allege that he was so qualified, you will direct that a hearing be had, at which the facts relative to his qualifications may be determined. On receipt of the report of said hearing, your office will re-adjudge the case.

The decision of your office is modified as herein indicated.

RAILROAD GRANT—INDEMNITY SELECTIONS.

HASTINGS AND DAKOTA RY. CO. (On Review.)

The provision in the departmental circular of August 4, 1885, directing that where indemnity selections had been theretofore made, without specification of losses, the company should be required to designate the deficiencies for which such indemnity is to be applied, before further selections are allowed, is not applicable where the grant is deficient in quantity, and the danger of duplication of losses does not exist.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.)* 1894. (V. B.)

An application has been made in behalf of the Hastings and Dakota Railway Company for the modification of the departmental decision of June 19, 1894 (18 L. D., 511), by excluding therefrom the paragraph, commencing at the bottom of page 512, which deals with, what seemed to be, an attempt on the part of the company to reopen the matter of the selections of 1883, which had been rejected by departmental decision of October 23, 1891. (13 L. D., 441-447).

Strictly speaking, the matter of those selections was not then regularly before this Department. They had been rejected by its decision of October 23, 1891; no review of that decision having been asked for within the time allotted by the rule, it became final and determinative to be reopened only on application here, because of newly discovered evidence.

Instead of pursuing this regular course, counsel for the company, on the motion to reconsider the decision of your office, rejecting the selections of 1891, distinctly presented again in their brief the question of the "validity of the 1883 selections," and argued that the decision of this Department rejecting the same "was erroneous both in fact and law."

When the matter came here for consideration, a copy of the same brief was filed, and in an oral argument, counsel pressed the point that the affidavit of the late register, showing that designations of losses were presented at the district land office with the selections of 1883, and, on the advice of said register withdrawn by the company's agent, showed the selections of 1883 ought to be admitted.

Notwithstanding the irregularity of this proceeding, in courtesy to counsel, the matter was commented upon in the paragraph now asked to be eliminated from the decision.

Under the circumstances I see no reason for making the modification requested. The application is denied, and the papers are sent to you.

Since the pendency of the motion for review, a letter has been received from the Hon. Haldor E. Boen, of the House of Representatives, suggesting that, in the departmental decision of June 19, 1894, a provision of the circular of August 4, 1885 (4 L. D., 90), had been overlooked.

The provision referred to directed that where indemnity selections had been theretofore made, without specification of losses, the compa-

nies should be required to designate the deficiencies for which such indemnity is to be applied "before further selections are allowed."

Said provision was not overlooked, in the consideration of the matter then before me, as supposed by Mr. Boen, but was not deemed applicable thereto. No such selections, as are described in that clause of the circular, were then before me, but only a list of selections accompanied by a specification of losses.

Besides, in my opinion, that rule is not properly applicable in this case. The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As this grant is known to be deficient over eight hundred thousand acres, or more than double the whole quantity of land received and receivable by the company, the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate.

You will so inform Mr. Boen, whose letter is herewith sent you.

OKLAHOMA LANDS—SOLDIERS' HOMESTEAD.

ALBIN v. HICKS.

The provision in the act of March 2, 1889, opening to entry lands in Oklahoma, to the effect that rights of honorably discharged soldiers shall not be abridged, does not except such soldiers from the terms of the clause in said act prohibiting all persons from entering said territory prior to the time fixed therefor.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.) 1894. (J. L. McC.)*

Simeon S. Hicks has filed a motion for review of departmental decision of November 18, 1893 (unreported), directing the cancellation of his homestead entry for the NE. $\frac{1}{4}$ of Sec. 23, T. 13 N., R. 5 W., Oklahoma City land district, Oklahoma.

The ground of said decision was that Hicks entered the territory prior to the time the land in controversy was opened to entry (noon of April 22, 1889), and that he was therefore disqualified to make the entry in question.

The motion is, in substance, based upon the following ground: That by section 2304 and 2305, of the Revised Statutes, every private soldier or officer who served for ninety days in the United States army during the recent rebellion, and was honorably discharged, and has remained loyal to the government, shall, "on compliance with the provisions of this chapter," be entitled to enter one hundred and sixty acres of land; that the act of March 2, 1889, opening to entry the portion of Oklahoma embracing the land here in controversy, provided, "That the rights of honorably discharged union soldiers and sailors in the late civil war as defined and described in sections 2304 and 2305, Revised Statutes, shall not be abridged;" that this entryman was an honorably discharged

union soldier of the late civil war; that the clause prohibiting any person from entering upon and occupying the land—thus abridging the rights conferred by sections 2304 and 2305 of the Revised Statutes—does not apply to him.

A perusal of the law shows that the proviso that the rights of union soldiers shall not be abridged, is followed by this limitation—

And provided further, That until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same; and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

If the proviso that a soldier's rights should not be abridged had followed that above quoted, there might be some plausibility in the defendant's contention. But the sweeping proviso that no person shall be permitted to enter said lands is manifestly intended to include soldiers—just referred to in the preceding proviso—as well as other persons.

No reason appears why the departmental decision hitherto rendered should be disturbed. The motion for review is therefore dismissed, and herewith transmitted for the files of your office.

MCNAMARA v. ORR ET AL

Motion for review of departmental decision of April 5, 1894, 18 L. D., 504, denied by Secretary Smith, July 12, 1894.

CERTIORARI—PUBLIC SURVEYS—DEPOSIT SYSTEM.

ROBERT O. COLLIER.

Though an applicant for a writ of certiorari may not be entitled thereto on the ground of the wrongful denial of his appeal, yet, if it appears that he is justly entitled to relief, it may be granted under the supervisory authority of the Secretary.

A contract, under the deposit system of surveys, stipulating for the survey of "all lines necessary to complete the survey" of a township, authorizes payment, at the contract rate, for the survey of the township exterior line, where the establishment of such line is necessary to the completion of the stipulated survey, though said line can not be surveyed without coincidentally extending a meridian line.

Where several survey's are embraced in one contract, with liability therefor payable from special deposits for the different surveys, no part of any deposit should be used in paying for a survey for which it was not intended.

The retracement of lines previously surveyed is not authorized under the deposit system.

The extension of a survey which creates a liability in excess of the deposit made therefor is at the risk and expense of the deputy doing the work.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.)* 1894. *(W. M. B.)*

This is an application made by Robert O. Collier, United States deputy surveyor, for a certiorari, under Rules of Practice 83 and 84, in the matter of account rendered by said Collier, and approved by the sur-

veyor-general, for the sum of \$2,011.47, for executed surveys in T. 21 S., R. 1 E.; T. 21 S., R. 1 W.; and T. 18 S., R. 6 W., Willamette meridian, Oregon, under contract No. 572, dated April 18, 1891; the said account having been revised, adjusted, and the amount reduced by your office, for reasons which will hereafter appear.

These surveys were made under what is known as the deposit system.

This contract provided for surveys in four different townships, but the account for the three above designated only demand consideration, and require adjustment; the expense of surveys in T. 13 S., R. 6 W., (being the other township embraced in said contract) amounting to \$600, was stated in a separate account, as per report No. 55951 of the General Land Office, and full amount of said deposit shown by said report to have been exhausted in discharging liability on account of surveys in that township.

The special deposits placed to the credit of the United States Treasury, on April 14, 1885, in the First National Bank of Portland, Oregon, for surveys embraced in this account; by whom made; for what particular survey; and statement of expense of surveys in each township, will be found to be as follows:

STATEMENT NO. 1.

	Amount charged for surveys.	Deposits.	Charge in excess of deposits.	Surplus.
James Kerr, T. 21 S., R. 1 E	\$1088.81	\$990.00	\$98.81
M. Kerr, T. 21 S., R. 1 W	694.44	672.00	\$67.56
Orsel Fisher, T. 18 S., R. 6 W	318.22	288.00	30.22
Total	2011.47	1950.00	129.03	67.56

It will be observed from the above statement, that the total charge for surveys in the three above designated townships, amounts to \$2,011.47, and that the account, as rendered, shows an access of \$61.47 charged, over and above the sum total of deposits; an excess charge of \$98.81 for surveys in T. 21 S., R. 1 E.; and an excess charge of \$30.22 for surveys in T. 18 S., R. 6 W., there being a surplus or balance of \$67.56 left over from deposits made for surveys in T. 21 S., R. 1 W.

The following is a correct tabulated statement of account, after revision and final adjustment by your office:

STATEMENT NO. 2.

	Amount allowed for surveys.	Deposits.	Excess charged.	Surplus.
T. 21 S., R. 1 E	\$980.81	\$990.00	\$0.19
T. 21 S., R. 1 W	596.34	672.00	75.66
T. 18 S., R. 6 W	290.88	288.00	\$2.88
Total	1,868.03	1,950.00	2.88	\$1.85

The sums allowed for surveys in each township as designated above, amounting in the aggregate to \$1868.03, as per your office report No. 55,950, was certified to the First Comptroller of the Treasury, as being correct, and properly due the deputy surveyor, and payment recommended, which was accordingly made.

Statement No. 2 shows a balance of \$9.19 and \$75.66 left to the credit of deposits appropriated for surveys in T. 21 S., R. 1 E., and T. 21 S., R. 1 W., respectively, and an excess of \$2.88 over deposit paid out for surveys in T. 18 S., R. 6 W.

Comparing the two statements, it will be seen that the sum of \$143.44 was disallowed in the account, as originally rendered, composed of the items and charges as follows, to wit:

For extending meridian line through T. 21 S., R. 1 E., 6 miles, at \$18.....	\$108.00
For retracing 3 miles and 3 chains, standard line, in T. 18 S., R. 6 W., at \$18	
a mile	27.34
For overcharge of \$7 per mile for 1 mile, 12 chains and 5 links of connecting	
line in T. 21 S., R. 1 W.....	8.10

	143.44

The charges for the above items were disallowed on the ground, which being substantially stated, is as follows: That under the rules and regulations of "Circular instructions relative to deposits by individuals for the survey of the public lands," approved and adopted June 24, 1885, the survey of "standard lines and bases" was not warranted (*vide* par. 5, p. 4 of Circular), under the deposit system; and also for the reason that the customary rate of \$5 (instead of \$12, as charged in the account) per mile, could only be allowed for the survey of connecting lines.

Collier, contending that he was entitled to the compensation claimed in his account, as rendered, and failing in his efforts to have your office reconsider its former action, and allow the relief prayed for, appealed on November 17, 1893, from your said office decision.

The right of appeal being denied on the ground that the same was not filed within the time prescribed by Rules 81 and 86 of Practice, Collier invoked the exercise of the "directory and supervisory power of the Secretary" for relief, petitioning this Department to have the record certified thereto.

It being evident that the petitioner is entitled to relief, in the way of further compensation, on account of these surveys, it will not be necessary to pass upon the question relative to denial of the right to appeal under said Rules, it being held in the case of *ex parte* Oscar T. Roberts (8 L. D., 423) that:

Though an applicant for writ of certiorari may have failed to appeal within the time fixed by the Rules of Practice, and hence not be entitled to the writ on the ground of the wrongful denial of his appeal, yet, if it appears that he is justly entitled to relief, it may be granted under the Secretary's supervisory authority.

Again, the last paragraph of the Rules of Practice prescribe that: "None of the foregoing rules shall be construed to deprive the Secretary of the exercise of the directory and supervisory powers conferred upon him by law."

The record herein having been duly certified to this Department, the case is now before me upon its merits alone.

The surveys and deposits therefor were made under rules and regulations contained in said circular approved June 24, 1885, which were formulated under provisions of the Revised Statutes, as follows:

SEC. 2401. Where the settlers in any township . . . desire a survey made of the same, under the authority of the surveyor-general, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it may be lawful for the surveyors-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to make such survey.

SEC. 2402. The deposit . . . shall be deemed an appropriation of the sum so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service; but any excess over and above the actual cost of the surveys, comprising all expenses incident thereto, for which they were severally deposited, shall be repaid to the depositors respectively.

By reference to the account rendered, from which tabulated statement No. 1 is made up, it will be seen that the cost (\$108) of surveying six miles of the Willamette meridian was charged against the deposit of James Kerr, which made the total cost of surveys in T. 21 S., R. 1 E., \$98.81 in excess of said Kerr's deposit.

The surveyor-general, in his letter of September 28, 1892, making further report upon these surveys, *inter alia*, states:

The deposit made for the extension of the Willamette meridian through T. 21 S., was made by Mr. M. Kerr, and was made in connection with T. 21 S., range 1 west and not with nor in connection with 1 east. (Reference is here made to said certificates, 1190 to 1195, inclusive).

Thus it appears that error was made in the statement of the account, and that the cost of survey in T. 21 S., R. 1 E. had thereby exceeded the amount of deposit made therefor, and that the expense of surveying such line should be taxed against the deposit of M. Kerr; but your office, it seems, did not consider this point raised by the surveyor-general, but adhered to its former decision, notwithstanding the fact that the deputy surveyor, in conformity with special instructions, properly approved by the General Land Office, had extended said meridian through T. 21 S., and that the work was done in good faith.

This contract stipulated for the survey of "all lines necessary to complete the survey" of the townships designated in the contract. Some partial surveys had already been made in the western portion of T. 21 S., R. 1 W., but none in the eastern portion thereof, and none whatever in R. 1 E. in said township. If the said meridian had not

been extended by authority contained in, and directed by, special instructions, still it would have been absolutely necessary to survey the eastern exterior (boundary line) of T. 21 S., R. 1 W., in order that a line be located, and permanently established, upon which to close the subdivisional lines of survey in said township, without which the surveys therein could not have been completed, as stipulated in contract. The meridian line could not be extended through this township without coincidentally surveying the eastern exterior of said township and range, and conversely, said township exterior could not be surveyed without coincidentally surveying said meridian. In extending the meridian, the deputy was, by special instructions, directed to mark and establish quarter section corners along the course of said line. Such is, and has been, for a long time the practice in running and establishing township exteriors, and I hold that Collier would be entitled to \$90 additional for the survey of said township exterior, arising from the survey of six miles of said line, at contract rate of \$15 per mile, provided, there was left a sufficient balance from M. Kerr's deposit of \$672, to pay the same, as M. Kerr's deposit was made specifically for the survey of that identical line, no matter by what name it might be designated, and any balance belonging to his said deposit should be applied solely to that end.

Although the surveys in the three designated townships were embraced in one contract, yet they are as separate, especially so far as the use of the deposits for payment of liability thereunder is concerned, as though they were made under three different contracts, and under such circumstances, whenever any surplus or balance is left from any deposit (after the contracting deputy has received what is legitimately due him) it should be returned to the depositor, as prescribed by law. This is required by plain provision of section 2402, *supra*.

In any case where several surveys are embraced in one contract, with liability therefor payable from deposit specially appropriated for each particular survey, it is not proper for any portion of such deposit to be used in payment of the expense of a survey for which it is not intended, and where such has been paid out through mistake, or otherwise, it should be returned to the Treasury, to be placed to the credit of the appropriation to which it properly belongs.

I hold that Collier, after refunding to the Treasury the amount of \$2.88, received for surveys in T. 18 S., R. 6 W., in excess of the deposit appropriated therefor, is entitled to have paid to him \$75.66 (being balance left on hand of the deposit of M. Kerr), for and on account of the survey of the east township exterior line of T. 21 S., R. 1 W., which said amount, upon performance of condition above stated, you will certify to the disbursing officer of the Treasury, as being properly due him (Collier), with request that the same be paid. No larger amount can be paid on account of that survey, for want of funds to meet the demand, the deposit having been exhausted^x by the above allowance.

The government has no interest in, or control over, such special deposits, further than to receive, hold, and pay out the same for the purpose designated as the law directs. The special purpose for which M. Kerr made appropriation, has been accomplished, and the surveys completed by the deputy, and duly accepted by your office, and the debt to Collier should be discharged, to the extent of any balance left for payment of legitimate claims under that contract.

No allowance can be made for the retracement of the three miles and three chains of standard line, made in connection with surveys in T. 18 S., R. 6 W., for the reason, *first*, that under rules and regulations of the circular of June 24, 1885 (par. 6, p. 4), "retracements, or the resurvey of lines previously surveyed, will not be deemed authorized under the deposit system;" and *second*, for the further good and sufficient reason that there are no funds in the Treasury for paying the same, deputy Collier having already drawn therefrom the entire amount of the deposit appropriated for surveys in that particular township.

By clear intendment of section 2401, *supra*, no larger amount can be allowed, or paid for any survey made under the deposit system, than the appropriation made therefor, and the extension of a survey which creates a liability in excess of the deposit, will be made at the risk and expense of the deputy doing the work.

FLEMING v. THOMPSON.

Motion for review of departmental decision of December 19, 1893, 17 L. D., 561, denied by Secretary Smith, July 12, 1894.

APPLICATION TO ENTER—ADVERSE CLAIM.

LAWSON H. LEMMONS.

An application for public land should be rejected if defective when presented; and the right of the applicant, in such case, to thereafter perfect his application can not be recognized in the presence of an intervening adverse claim.

Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.) 1894. (A. E.)

The record of this cause shows that on May 4, 1892, Daniel D. Williams filed a soldier's declaratory statement for the SE. $\frac{1}{4}$, Sec. 28, Tp. 8 N., R. 15 W., Oklahoma, Oklahoma Territory, which was suspended to allow him to furnish proof of service in the United States army during the war. On May 31, 1892, Lawson H. Lemmons made homestead entry for the same land. On June 6, 1892, the suspension of the declaratory statement of Williams was removed by his filing the additional papers, and placed of record. On June 24, 1892, Williams was allowed to transmute his declaratory statement into a homestead.

On October 27, 1892, your office considering these facts reported by the local office decided that:

Williams' application to file homestead declaratory statement was presented May 24, 1892, and was not rejected by you; it must therefore be considered a pending application at date of Lemmons' entry, and any right acquired by said entryman was subject to the right of Williams under his prior application.

Williams having furnished evidence satisfactory to you of his — to file under section 2304, Rev. Stats., you allowed him to do so, and he carried his filing into entry within the prescribed time, his rights relate back to the date of his presentation of his application to file. You will therefore notify Lemmons that his homestead entry No. 4519 is hereby held for cancellation for conflict with homestead entry No. 4741 of Williams as based on his homestead declaratory statement. Notify Lemmons of this action and of his right of appeal.

On May 12, 1893, the local office transmitted to your office an appeal from the above decision, and in that letter reported that on November 15, 1892, Lemmons filed a contest against the entry of Williams, alleging prior settlement; that the case was set for a hearing on April 13, 1893, at which time the charge of prior settlement was dismissed. On April 14, 1893, Lemmons filed a motion to set aside the action of the register in dismissing plaintiff's charge of prior settlement, and asking that new notice issue on your office letter of October 27, 1892. This motion was sustained, service accepted of the letter, and an appeal from the same filed by Lemmons. This appeal is now before the Department.

The application of Williams being defective when filed, should have been rejected by the local office, and the entry of Lemmons intervening defeated any right which Williams might otherwise have acquired by perfecting his defective application. See Johnson Barker (1 L. D., 164); Instructions (3 L. D., 120); Goyne *v.* Mahoney (2 L. D., 576). Therefore, Williams should not have been allowed to perfect his application and consummate his entry in the face of an adverse intervening claim.

Your office decision is reversed, and you will cancel the entry of Williams and allow that of Lemmons to remain of record.

TIMBER CULTURE ENTRY—COMMUTATION—CONTEST.

EVERSON *v.* WILSON.

The privilege of commuting a timber culture entry, accorded by section 1, act of March 3, 1891, does not defeat the right of a contestant to proceed with a pending contest.

Secretary Smith to the Commissioner of the General Land Office, July 12, 1894. (P. J. C.)

The land involved in this appeal is the SW. $\frac{1}{4}$ of Sec. 24, T. 130 N., R. 56 W., Fargo, North Dakota, land district.

The record shows that Mary D. Wilson made timber culture entry of said tract December 2, 1882, and on April 12, 1892, Claus Everson

filed affidavit of contest, alleging failure to comply with the requirements of the law as to planting, cultivating and protecting the trees. Service was had by publication, and the testimony taken before the local office, commencing August 4, and ending October 26, 1892.

On May 24, 1892, the claimant made application to make commutation proof (under act of March 3, 1891, 26 Stat., 1095), and July 12 was set for the day. The proof was submitted on that day, but it was rejected for the reason that the contest was pending. Claimant appealed, and your office affirmed their decision, whereupon she prosecutes this appeal, assigning error of law.

The claimant claims the right to make commutation proof under section 1 of said act, which contains the following proviso:

Provided, That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws, and who is an actual and *bona fide* resident of the State or Territory in which said land is located, may be entitled to make final proof thereof, and acquire title to the same, by the payment of \$1.25 per acre for said tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior.

It is contended by appellant's counsel that this act confirms all timber culture entries when it can be shown that the land has been cultivated for four years in good faith regardless of the present condition; that it "sweeps away any and all adverse rights which may have attached by virtue of previous laws or by rulings of the department."

This position is not tenable. Congress, in my judgment, did not contemplate the confirmation of this class of entries at all. It simply gave entrymen the privilege, upon showing that they had made a *bona fide* effort to comply with the timber culture law for a period of four years, and who were actual residents of the State or Territory where the land is located, upon making proof thereof, to acquire title by the payment of the government price. It is akin to the commutation allowed under the homestead laws. It means a compliance with the requirements of the statute in regard to cultivation, with an honest intent to produce trees, and where for climatic, or other reasons beyond the control of the entryman, he or she has failed to obtain the desired result, Congress permitted him to secure the land upon which labor and money had been expended. The matter of producing trees on the prairies of the west was purely a matter of experiment at best. To encourage it, Congress passed the timber culture law. That it has not been a pronounced success is a matter of common knowledge. To reward those who, in good faith, had made the effort, the act under consideration was passed, but it was certainly not intended by Congress that all inquiry should be cut off for the ascertainment of the *bona fides* of the entryman.

In the case at bar there was a contest pending, charging substantially want of good faith in the claimant. This was filed under existing

law and the rules of the Department, and the contestant is entitled to be heard and the merits of his case decided.

Your judgment is therefore affirmed.

The testimony taken at the hearing is before me, but inasmuch as neither your or the local office passed upon the same, it is returned, with instructions to retransmit it to the local officers for their action.

OKLAHOMA TOWNSITE—SCHOOL FUND.

F. A. DINKLER.

The proceeds of a purchase of land for townsite purposes under section 22, act of May 2, 1890, will not be paid to the alleged municipal authorities of a town in the absence of satisfactory proof of the legal incorporation thereof.

Secretary Smith to F. A. Dinkler, Hennessey, Oklahoma Territory, July 12, 1894. (G. B. G.)

I am in receipt of your application, as treasurer of the townsite of Hennessey, Oklahoma Territory, for the payment of \$750.00, paid to the Secretary of the Interior by Canada H. Thompson and Jacob N. Shade, \$375.00 each, for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24, T. 19 R. 7 W., and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 19 R. 7 W., respectively, as the townsite of Hennessey, under the provisions of section 22, of the act of Congress approved May 2, 1890, (26 Stat., 81).

Said section provides, among other things, that the sums paid in the purchase of public lands for townsite purposes, " Shall be paid over to the proper authorities of the municipalities, when organized, to be used by them for school purposes only.

In ex parte A. L. Cockrum (15 L. D., 335), the Department has laid down the following, as the necessary evidence of the organization of a municipality, to authorize the Secretary of the Interior to " pay over" money under said act:

First. A duly certified copy, under seal, of the order of the board of county commissioners, declaring that the specified territory shall, with the assent of the qualified voters be an incorporated town, also the notice for a meeting of the electors, as required by paragraph 5 of Article I, Chapter 16, of the Statutes of Oklahoma.

Second. A like certified copy of the statement of the inspectors, filed with the board of county commissioners, also a like certified copy of the order of said board, declaring that the town has been incorporated, as provided by paragraph 9, of said Article I.

Third. A like certified copy of the statement of the inspectors, filed with the county clerk, declaring who were elected to the office of trustees, clerk, marshal, assessor, treasurer, and justice of the peace, as provided by paragraph 16, of said Article I.

Fourth. A like certified copy of the town clerk, of the proceedings of the board of trustees, electing one of their number president, also, a copy of the qualifications to act, by each of the officers mentioned, as provided by paragraph 19, of said Article I.

Fifth. A certified copy, by the town clerk, of the proceedings of the board of

trustees, designating some officer of the municipality to make application for, and to receive the money to be paid by the Secretary of the Interior.

Sixth. A proper application for the money, by said designated officer.

These requirements are based on chapter 15, Article I, of the Oklahoma Statutes, providing for the "Incorporation of Towns" in the Territory of Oklahoma.

The proof accompanying the application under consideration, does not meet these requirements. There is no evidence of notice for a meeting of the electors, as required by law, and no certified copy of the order of the board of county commissioners, declaring that the town has been incorporated, as provided by the Oklahoma Statutes.

There is no evidence that an election was held, as provided by section 9, of said Article I, of Chapter 15.

It appears affirmatively that the board of county commissioners of Kingfisher county, Oklahoma Territory, on a petition signed by a majority of the taxable inhabitants of the proposed town—

being satisfied that inhabitants to the number of seventy-five, or more, are actual residents of the territory described in the petition," (ordered) "That the inhabitants residing within the limits or boundaries of the exterior lines of said-described tracts are hereby declared to be an incorporated village, and from thenceforth, they shall be a body politic and corporate, under the name and style of the village of Hennessey,

In this connection, however, my attention is called to the fact that the order of incorporation was made June 12, 1890, and the territorial legislature convened on August 27, 1890. That under section 11, of the organic act of said territory, the law of Nebraska, with reference to cities of the second class, and villages, was applicable to towns organized in said territory, before the adjournment of the territorial legislature.

I find that under section 11, of said organic act, the provisions of Chapter 14, of the compiled Laws of the State of Nebraska, in force November 1, 1889, were "extended to, and put in force in the Territory of Oklahoma, until after the adjournment of the first session of the legislative assembly of said territory."

Section forty, Article one, of said Chapter, is in part as follows:

Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this State, or that shall hereafter become organized, pursuant to the provisions of this act, shall be a village, and shall have the rights, powers, and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision:

It thus appears that the laws of Nebraska provided only for the incorporation of towns having a population of two hundred or more.

It not appearing that the Town of Hennessey was eligible for incorporation, under the laws of Nebraska, and there being no legal incorporation of the town, under the laws of Oklahoma, your application is denied.

On satisfactory evidence that said town had, at the time of its incorporation, the required population, under the Nebraska law, or that it has since been legally incorporated as a municipality, under the laws of the Territory of Oklahoma, the money will be paid over.

FORFEITED RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

JAMES SIMONTON.

A devisee is not entitled to purchase forfeited railroad lands under section 3, act of September 29, 1890, if he is in possession, under a purchase in his own right, of the full amount of lands allowed to any one person under said act. The provisions of said forfeiture act do not authorize an executor to exercise the right of purchase.

Secretary Smith to the Commissioner of the General Land Office, July 12, 1894. (I. D.)

James Simonton, executor of Peter Christensen, appeals from your office decision, denying his right to purchase the land as such executor.

The land involved is the N. $\frac{1}{2}$, Sec. 7, T. 5 N., R. 33 E., W. M., La Grande land district, Oregon, and is part of the lands covered by the Northern Pacific Railroad land grant, and the act of September 29, 1890, forfeiting unearned lands.

Peter Christensen settled this land November 25, 1886, with intention to purchase from the Northern Pacific Railroad company, and remained in occupancy until his death in February, 1891.

Christensen, by will, devised "all the the landed estate . . . owned by us" to Lewis F. Anderson, and appointed James Simonton his executor.

The right to purchase the land therefore seems to vest first in Anderson, as devisee, if he were otherwise qualified to assert the right.

The record shows, however, that Anderson himself was a purchaser of three hundred and twenty acres in the same section, under section 3, of said act of September 29, 1890, and was at the time of the accrual of his possible right as devisee of Christensen, in possession under his own purchase of the full amount of land allowed to any one person under said act.

He was further disqualified, because he was not in possession of the Christensen land. There is no provision of law authorizing the executor to exercise the right to purchase the land.

Your office decision is therefore affirmed, and cash entry No. 4361, will be canceled, in the absence of any heirs of said Christensen, deceased, who may be found qualified to purchase the land.

HOMESTEAD ENTRY—AMENDMENT.

F. B. KESLING.

An entry may be so amended as to include land originally selected by the entryman, and improved, but not embraced within his entry for the reason that it was not then surveyed, and he believed that he would be entitled to make an additional entry thereof when surveyed.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.)* 1894. *(F. W. C.)*

I have considered the appeal by F. B. Kesling from your office decision of February 28, 1892, denying his application to amend homestead entry No. 474, made August 8, 1892, for lot No. 2, Sec. 6, T. 30 N., R. 20 W., Missoula land district, Montana, so as to include the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, T. 31 N., R. 20 W.

It appears from affidavits filed in support of his application to amend, that Kesling selected both tracts and made improvements thereon, but made entry for lot 2 only, because the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of Sec. 31, was then unsurveyed.

It further appears that he was advised that, under the act of March 2, 1889 (25 Stat., 854), he would be permitted to make an additional entry for the other land as soon as surveyed, and for this reason he made entry as before stated.

He seems to have acted in entire good faith in the matter and the local officers recommended the allowance of the amendment.

The right to grant an amendment lies within the discretion of the officers charged with the disposition of the public lands, and as it has been repeatedly held that an entry may be amended so as to take the lands intended to be entered, where the mistake is satisfactorily explained, I am of the opinion that the amendment in question should be allowed as applied for.

Your office decision is therefore reversed.

OKLAHOMA TOWNSITE—PUBLIC RESERVATION.

ADAMS v. CITY OF GUTHRIE.

In the survey of a townsite under section 22, act of May 2, 1890, reservations for public purposes are limited to twenty acres in the aggregate.

*Secretary Smith to the Commissioner of the General Land Office, July 13,
(J. I. H.)* 1894. *(W. F. M.)*

This controversy arises out of an application of the municipal authorities of the city of Guthrie, Oklahoma, for a deed to a certain reservation for public purposes, known and designated as Highland Park,

upwards of fifty acres in area, and situated in Capitol Hill townsite, now an addition to and a part of Guthrie.

The decision of your office, now here on appeal, contains an exhaustive statement of the facts that in any manner bear on the controversy, much of which will be omitted here as unnecessary to be re-stated, and finds, by way of conclusion, that the reservation of 10.62 acres designated as Capitol Park and of 2.07 acres for school purposes in the plat of Capitol Hill townsite so far exhausts the right of reservation conferred by the 22nd section of the act of May 2, 1890, 26 Statutes, p. 81, as to limit the further exercise of the right to 7.31 acres, and thereupon, the following direction is given the trustees:

You will proceed to modify said plat so that the area of the reservation styled 'Highland Park' shall not exceed 7.31 acres. You will divide the excess into lots and blocks, with the proper streets and alleys, and award such lots to parties who were lawful occupants thereof at the date of the entry of the townsite of Capitol Hill, December 14, 1891, if any such there be, proceeding under the regulations of June 18, 1890, 10 L. D., 666. If there are no occupants, as specified, the lots will be listed as undisposed of, and come under the 4th section of the act of May 14, 1890.

The act of May 2, 1890, entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," 26 Statutes, p. 81, in its 22nd section, provides—

That hereafter all surveys for townsites in said Territory shall contain reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres, and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities.

The first and original survey of Capitol Hill was made in 1889, and the plat thereof was sworn to as correct by the city engineer on June 6, 1889, and was certified by the mayor and clerk of the provisional government of that municipality. It appears, therefore, that Capitol Hill was an organized town almost a year before the approval of the act under the authority of which it is now sought to limit its reservations for public purposes.

The city of Guthrie succeeded to the provisional government of Capitol Hill on August 14, 1890, and it appears that another survey was made under the direction of the board of Townsite Trustees, No. 6, the plat of which was certified by the members of the board, and sworn to by the civil engineer in charge of the survey, on February 17, 1892.

This latter survey does not appear from the certificates on the plat to have been a mere approval by the trustees of another already made by the inhabitants of Capitol Hill, as authorized by the act of May 14, 1890, section 1, 26 Statutes, p. 109, and, therefore, is controlled by the act of May 2, 1890, *supra*, as to reservations for public purposes.

The decision of your office is, therefore, affirmed.

RULES 2, AND 9, OF PRACTICE AMENDED.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., July 14, 1894.

Rules 2 and 9 of the Rules of Practice, approved August 13, 1885, are hereby amended to read as follows, respectively, viz:

RULE 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest. When the contest is against the heirs of a deceased entryman, the affidavit shall state the names of all the heirs. If the heirs are non-resident or unknown, the affidavit shall set forth the fact, and be corroborated with respect thereto by the affidavit of one or more persons.

* * * * *

RULE 9.—Personal service shall be made in all cases when possible, if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served. When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir. If the heirs of the entryman are non-resident or unknown, notice may be served upon them by publication as hereinafter provided. If the person to be personally served is an infant under fourteen years of age, or a person who has been legally adjudged of unsound mind, service of notice shall be made by delivering a copy of the notice to the statutory guardian or committee of such infant, or person of unsound mind, if there be one; if there be none, then by delivering a copy of the notice to the person having the infant or person of unsound mind in charge.

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

RAILROAD LANDS—ORDER OF RESTORATION.**INSTRUCTIONS.**

Secretary Smith to the Commissioner of the General Land Office, July 18,
(J. I. H.) 1894. (F. W. C.)

With your office letter of April 28, 1894, were submitted for my approval instructions to govern the restoration of certain lands within the conflicting limits of the grants for the branch line of the Southern Pacific Railroad Company, act of March 3, 1871 (16 Stat., 573), and the Atlantic Pacific Railroad Company, act of July 27, 1866 (14 Stat., 292).

The lands within the overlapping limits just mentioned, were ordered restored by departmental letter of October 23, 1888 (6 L. D., 816). A motion was filed for the review of said decision directing the restoration, and the same was ordered suspended to await the decision of the

court in the cases then pending, involving the question of the respective rights of said companies within the conflicting limits referred to.

The cases referred to were those of the United States *v.* Southern Pacific Railroad Company, and United States *v.* Colton Marble and Lime Company, both of which were decided by the United States supreme court on March 24, 1893, and will be found in 146 U. S., pages 570 and 615, respectively.

Following the rendition of these decisions you were again directed to carry into effect the order of restoration, but by letter of November 8, 1893, the order for restoration was again suspended as to the land involved in suit known as "case 184," now pending in the United States circuit court.

The instructions submitted for my approval are limited to the restoration of those lands involved in the cases recently decided by the supreme court and above referred to. These instructions provide for a notice by publication, for a period of ninety days, during which time those persons claiming the right of purchase under the provisions of the act of March 3, 1887 (24 Stat., 556), are required to come forward and publish notice of their intention as required by circular of February 13, 1889 (8 L. D., 348).

Applications heretofore presented for these lands are rejected in the notice of restoration, but direction is given the local officers to specifically advise such persons of the contemplated restoration, to the end that they may take steps to protect their interest, whatever they may have, upon the restoration of the land.

Seeing no objection to the course suggested in the matter of the restoration of these lands, I have approved the instructions, which are herewith returned.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 18, 1894.

REGISTER AND RECEIVER,

Los Angeles, California.

SIRS: On October 23, 1888 (6 L. D., 816), the Honorable Secretary of the Interior directed the restoration to entry of the unpatented lands within the overlapping limits of the grants for the branch line of the Southern Pacific Railroad Company, by act of March 3, 1871 (16 Stat., 573), and the forfeited portion of the grant to the Atlantic and Pacific Company by act of July 27, 1866 (14 Stat., 292). A motion for review was filed, and after consideration by the Department, the restoration was suspended, to await the decision by the courts in cases then pending of the questions involved.

On March 24, 1893, the United States supreme court rendered its decision of said questions in favor of the government, in cases (involving some five thousand acres of land) of United States *v.* Southern Pacific Railroad Company (146 U. S., 570) and United States *v.* Colton Marble and Lime Company and United States *v.* Southern Pacific Company (146 U. S., 615), and the Secretary again directed that the necessary steps be taken to restore the lands to settlement and entry. Subsequently,

however, on November 8, 1893, the order for the restoration was revoked, for the reason that further suits were pending, involving the questions aforesaid, and that new questions had been presented by the company's answer.

As decrees have been entered, pursuant to the mandate of the court in the cases decided on March 24, 1893, aforesaid, declaring the United States the absolute owner in fee simple, there is no reason for further withholding the lands involved therein from settlement and entry. Therefore, in order to carry their restoration into effect, you will cause to be published for a period of thirty days, in some newspaper of general circulation, in your district, and in the vicinity of the lands, a notice that said lands, a particular description of which will be published with the notice, are restored to the public domain, and will be subject to entry on a day to be fixed to the notice, which will be ninety (90) days from the date of the first publication; and that all persons claiming the right of purchase under the fifth section of the act of March 3, 1887 (24 Stat., 556), must come forward during the ninety days of the publication and give notice of their claims by publishing their notice of intention to make proof and payment in accordance with the requirements of the circular of February 13, 1889 (8 L. D., 348), upon a day which shall be subsequent to that fixed for the restoration.

To the end that complications, which might arise from the former practice of suspending applications for these lands, may be avoided, and the rightful claimants be enabled to acquire title with as little delay as possible, I have to direct that in the notice of restoration there be inserted a notice to all prior applicants, that their applications confer no rights upon them, and that upon the day set by you for the restoration, the lands will be opened to entry and disposal without regard to such applications, which shall be held by the notice to be rejected.

That all such applicants may, however, have opportunity to present new applications upon the expiration of the ninety days notice, you will at once notify, specially, all parties shown by your record to have pending applications for these lands of the rejection thereof, of the date of the restoration, and of the necessity of presenting new applications for the protection of their rights.

Any entries of the lands which may have been allowed will be permitted to stand, and if no superior adverse claims to the lands covered by them are presented, they may be perfected. In all cases of conflicting claims, you will proceed in accordance with the rules of practice in similar cases. No more specific instructions can be given, as it is believed that numerous questions will arise, in the disposal of the lands, and many cases will involve questions peculiar to themselves, which will necessitate a decision in each upon its merits.

You will promptly forward a copy of the newspaper containing the notice for the information of this office.

The receiver, as disbursing officer, will pay the cost of the publication, and forward a copy of the notice, with proof of publication, as his voucher for the disbursement.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,

Secretary of the Interior.

ABANDONED MILITARY RESERVATION—SETTLEMENT.

MATHER ET AL. v. HACKLEY'S HEIRS (On Review).

The act of July 5, 1884, providing for the disposition of abandoned military reservations, is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

The disposition of a military reservation in Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, is governed by the provisions of the act of August 18, 1856, and under said act the Commissioner of the General Land Office was authorized to dispose of such lands either at public sale, or under the homestead and pre-emption laws.

Where a military post or cantonment is established, by order of the Secretary of War, upon the public domain, whether for temporary or permanent occupation by the military, the lands included therein are not subject to entry until properly restored to the public domain.

A settlement on lands in Florida in violation of the provisions of the act of March 3, 1807, prohibiting such appropriation of said lands, confers no right; and where the lands embraced in such settlement are appropriated by military authority for purposes of a cantonment, and the settler ejected therefrom prior to the enactment of April 22, 1826, granting pre-emption rights to settlers in Florida, the provisions of said act are not applicable.

Filings and entries allowed immediately after the reception of the plat of survey at the local office, and prior to the regulations of October 2, 1885, are not invalid for the want of the previous notice of the filing of said plat required by said regulations.

A tract of public land subject to disposition under section 2455 R. S., as an "isolated tract," is open to settlement until the Commissioner takes action under said law; and, an entry allowed of such land, prior to any action on the part of the Commissioner, precludes the subsequent exercise of his authority under said section.

Settlement rights acquired on land prior to an order withdrawing the same from entry are held in abeyance during the existence of such order, but may be exercised when it is vacated.

A settler who seeks to acquire title to land lying in different sections by virtue of his settlement thereon, must show acts of settlement extending to the tracts in each section.

*Secretary Smith to the Commissioner of the General Land Office, July 24,
(J. I. H.) 1894. (E. W.)*

The various parties at interest, to wit, Daniel Mather, the city of Tampa, the heirs of Louis Bell, deceased, W. B. Henderson, Lizzie W. Carew, Julius Caesar, Frank Jones, E. B. Chamberlin, and Martha Lewis, *alias* Martha Stillings, and the Hackley heirs, have, by their attorneys, filed motions for review of departmental decision in the case of Mather *et al.* v. the Hackley heirs (15 L. D., 487).

Louis Bell filed declaratory statement on March 30, 1883, and died on the reservation in November, 1885.

Daniel Mather offered to file declaratory statement April 14, 1883. Frank Jones applied to file declaratory statement on April 5, 1883. Edward S. Carew made homestead entry on March 22, 1883, covering the whole of the reservation; Mrs. Carew, his widow, subsequently

limited her claim to lots 9 and 10, Sec. 24, T. 29 S., R. 18 E., amounting to 35.70 acres.

Julius Caesar applied to file declaratory statement on the 23d of April, 1883.

Enoch B. Chamberlin made homestead application on April 22, 1884.

Andrew Stillings, husband of Martha Stillings, applied to file declaratory statement on April 25, 1883.

W. B. Henderson applied on the 27th day of November, 1883, to locate lot No. 8, and lot No. 9, Sec. 24, T. 29 S., R. 18 E., containing 36.87 acres, in satisfaction of Wm. Gerard's special certificate No. 2, sub-division No. 11, issued under the act of Congress approved on the 10th of February, 1855, for the relief of the heirs of Joseph Gerard.

The claim of the Hackley heirs is based upon the provisions of the act of April 22, 1826 (4 Stat., 154), as will be hereinafter explained.

A number of these motions for review were filed too late, but, in the exercise of that supervisory power vested in the Secretary of the Interior, all of the cases will be considered upon their merits.

The decision under review deals with the legal status of the Fort Brooke military reservation of Florida, which, during its existence, embraced the land in controversy.

Said lands are therein held subject to disposition in accordance with the provisions of the act of July 5, 1884 (23 Stat., 103), the first section of which provides as follows:—

That whenever in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

It will be noticed that by the terms of the act itself, as viewed in the light of the ordinary rules of construction, it is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

The President therein is empowered to place under the control of the Secretary of the Interior, such lands as "have become, or shall become useless for military purposes."

But the land formerly embodied in the Fort Brooke military reservation had been on January 4, 1883, relinquished and transferred by the Secretary of War to the Interior Department and thus restored to the public domain before the passage of said act; therefore, there can be no reason why the President should consider their value for military purposes, in the sense contemplated by said act.

The scheme contemplated by the statute was the restoration of useless reservations. At that time the land in controversy did not belong to any reservation. I am of the opinion, therefore, that the act of 1884 has no application in the disposition of the lands belonging to said reservation.

The first section of the act of April 22, 1826, *supra*, upon the provisions of which the Hackley heirs base their claim, provides:

That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect, as are directed by the act, entitled "An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois territory," passed February fifth, one thousand eight hundred and thirteen: *Provided*, That no person shall be entitled to the provisions of this section, who claims any tract of land in said territory, by virtue of a confirmation of the commissioners, or by virtue of any act of Congress.

It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1823, and that said Hackley never relinquished his claim to said land, and that he made settlement in good faith, so far as the record discloses, and for the purpose of securing a home, which claim, his heirs contend, is superior to any that were made subsequent to the abandonment of said reservation.

It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy, was occupied by United States troops in cantonment, and was so used until December 1830, when it was formally reserved by executive order in which its limits were fixed at sixteen miles square. Subsequent to this said lands were in a state of reservation the greater portion of the time, until January 4, 1833, when they were relinquished and finally restored to the public domain.

R. J. Hackley was ejected from the land by the military in 1824.

At that time the provisions of the act of March 3, 1807 (2 Stat., 445), were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3 Stat., 654). The first section of the act of March 3, 1807, *supra*, provided:

That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any state to the United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees, or otherwise, until thereto duly authorized by law; such offender or offenders, shall forfeit all his or their right, title, and claim if any he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he, or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed; or attempt to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated or cause to be designated, by marking trees or otherwise.

When R. J. Hackley was ejected from said land by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement.

The heirs of Hackley, however, relying upon the provisions of the above quoted act of 1826, contend that the cantonment which existed from 1824 to 1830, was not such a reservation as will defeat the pre-emption rights of said heirs, under the act of 1826. His position is, that when the act of 1826 confirmed in all settlers upon those lands prior to January 1, 1825, the right to purchase the lands whereon they resided, etc., no more occupancy by the military, nor even constructive reservation of an inferior order or dignity, could defeat the operation of such an act of Congress.

In support of his position, counsel cites the case of *Johnson v. The United States*, 2d Court of Claims, 391. Johnson's claim was based upon what was known as the "Oregon Donation act," and, as required by that act, he had settled upon and occupied the land in controversy for four years continuously, with nothing left to be done to secure patent but to make proof of the same, when the tract was forcibly taken and occupied by troops of the United States, "without the knowledge of the President, the Secretary of War, or any high officer of the government." In that case the court held that such an occupation was not a reservation within the meaning of the Oregon Donation act, and could not effect the rights of the plaintiff.

In the case at bar, however, the facts are very different.

The tract now known as the Fort Brooke military reservation was occupied under the direction of the Secretary of War, two years before the passage of the act upon which the claim of the Hackley heirs is predicated.

In further support of his views, counsel recites the history of Camp Stambaugh in Wyoming Territory.

It appears that in 1870, the Secretary of War established said military post, which was laid off as a reservation and included all the territory within one mile of the flagstaff erected at the post. In 1881, the Secretary of War notified the Secretary of the Interior that said post, being no longer needed for military purposes, had been discontinued. In said communication he expressed the opinion that, inasmuch as there had been no formal reservation of the lands included therein by the President, the same might be restored to the public domain, as other lands, without the consent of Congress.

The Secretary of the Interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment, and the subsequent notification on the part of the Secretary of War.

I am unable to see wherein the correspondence above referred to sustains the contention of counsel, for while it may be true that a military post, established by the Secretary of War, may be restored to the public domain with less formality than if it had been reserved by a formal

order of the President, still, the Secretary of War had authority to establish cantonment Brooke, and by virtue of such establishment the lands upon which it was located, were not subject to entry so long as unrelinquished.

Where a military post or cantonment is established upon the public domain, whether the same be for temporary purposes, or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain.

If the Secretary of War has the authority to establish a military post, it follows that during the time that the lands included therein are occupied for military purposes, they are not subject to be disposed of under the pre-emption laws. In the case of *Wilcox v. Jackson* (13 Pet., 498), it is held as follows:

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was in legal effect, a reservation made by order of the President, within the terms of the act of Congress.

It is further held in said case as follows:

But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale, could be construed to embrace it or to operate upon it, although no reservation were made of it.

The counsel for the Hackley heirs further contend that the cantonment did not cover the whole of the one hundred and sixty acres to which Hackley's claim attached, and that the appropriation by the military did not, therefore, extinguish his claim to that portion which lay outside of the limits of the cantonment.

Counsel insists that inasmuch as the buildings erected for the accommodation of Cantonment Brooke were located upon what is now known as lot 9, of said tract, the said encampment was therefore limited to the spot upon which said buildings were erected.

This is untenable, for the reason that it was necessary for the convenience of the military to appropriate a considerable area of the public domain for wood, water and other purposes, and the fact that Hackley was ejected from his entire claim was itself an appropriation thereof.

In accordance with the views thereinbefore expressed, therefore, the claim of the Hackley heirs is denied.

The provisions of the act just mentioned have no application in adjusting any claim made to the land in controversy, for the reason that said lands had been segregated and occupied by troops in cantonment, for two years, at the date of its passage.

It seems to me that the proper disposition of said lands is governed by the provisions contained in the act of August 18, 1856 (11 Stat., 87), which provide that all lands heretofore reserved for military purposes in the State of Florida, etc., "shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

For the purposes of the present inquiry, it is not necessary to go into the details of the history of the Fort Brooke military reservation until the time of its final restoration to the public domain in January, 1883.

On March 22, 1883, the local officers at Gainesville, Florida, received an approved diagram of the subdivision into seven lots of the land formerly embraced in said reservation. On April 2, thereafter, said officers were directed to allow no entries upon any land within said reservation. In the interval which elapsed between the 22d of March, and the 2d of April, 1883, said lands were open to entry unless it was incumbent upon the Commissioner to place the lands upon the market in the manner provided in the act of 1846, which contains the following provision in the fifth section thereof: (Section 2455 R. S.)

It shall and 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: Provided, That 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 direction of the Commissioner aforesaid. (9 Stat., 51.)

It will be observed that the foregoing provision is discretionary with the Commissioner, inasmuch as it is a matter left to his judgment. Beside, it was the practice of the Department prior to October, 1885, to recognize the validity of homestead and pre-emption claims made immediately upon the filing of township plats; and in cases, also where lands have been restored to the public domain by acts of forfeiture, homestead and pre-emption claims have been allowed to take effect immediately after the passage of such acts.

On the 2d of October, 1885, Commissioner Sparks, with the approval of Secretary Lamar, issued instructions to registers and receivers (4 L. D., 202), which provide as follows:

Hereafter when approved plat of the survey of any township is transmitted to you by the surveyor-general, you will not regard such plat as officially received at and filed in your office, until the following regulations have been complied with:

First, You will forthwith post a notice in a conspicuous place in your office, specifying the township that had been surveyed and stating that the plat of survey will be filed in your office on a day to be fixed by you and named in the notice, which shall be not less than thirty days from the date of such notice, and that on and after such day you will be prepared to receive applications for the entry of lands in such township, etc.

It seems that the foregoing instructions were issued for the reason that prior to said date it had been the practice of the Department

to recognize the validity of filings and entries immediately after the plat of survey, made by the surveyor-general, was received at the local office. If, before that time, the reception of the plat of survey sent by the surveyor-general to the local officers was regarded as a sufficient reason for the acceptance of filings and entries, much more would the reception of a plat of survey sent to the local office by the Commissioner of the General Land office be regarded as such.

In the case at bar, the plat of survey sent by the Commissioner of the General Land Office was received at the local office on the 22d day of March, 1883.

It may be that the land included within the Fort Brooke military reservation is an isolated and disconnected tract within the meaning of the act of 1846, but when such a tract belongs to the public domain, it is nevertheless, open to settlement under the public land laws at all times before the Commissioner proceeds with the disposition of the same, under the provisions of said act. If, therefore, a qualified entryman applies to make homestead entry upon such a tract, while it belongs to the public domain and before any steps have been taken by the Commissioner to dispose of the same under the authority given him by said act, his application should be allowed. After such an entry has been allowed and such a tract has been in that manner segregated, the Commissioner has no authority to dispose of it in any other manner.

The discretionary power vested in the Commissioner by said act of 1846, must be exercised before the segregation of the land. After an entry has been allowed, the rights of the entryman become vested and the provisions of the above mentioned act must be construed in harmony with them.

In Vol. 2, L. D., 606, Secretary Teller, in treating of the question relating to the Fort Brooke military reservation, comes to the conclusion that the entry and filings made thereon, after the 22d of March, 1883, were premature. It is held in said case that—

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.

Section 2364 of the Revised Statutes reads as follows:

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.

It will be observed that the above recited act is limited in its terms to reservations "brought into market."

The act of 1856, provides that military reservations in Florida, after being placed under the control of the General Land Office, are "to be disposed of and sold in the same manner and under the same regulations as other public lands in the United States."

Now, "public lands in the United States" are disposed of in various ways. On July 2, 1864, the date of the passage of the act embodied

in section 2364, public lands were disposed of under the homestead and pre-emption laws, and, when the Commissioner so directed, certain lands were brought into market and sold to the highest bidder.

Said section being limited by its own terms to the manner of disposition last mentioned, has no application except in those cases where the Commissioner in the exercise of his discretion under the law, had brought lands into the market to be sold at public auction. This construction is obvious unless it be held that the act of 1856, contemplates that no military reservation in Florida shall be disposed of in any other way than by public sale. I am of the opinion that the principle of construction employed in the decision above mentioned, is untenable.

Under the authority vested in the Commissioner of the General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into market and disposed of the same at public auction; the lands included in the Fort Brooke military reservation; but he was not compelled to do so and up to this time has made no effort to have the same disposed of in that manner. It was legitimate, also, to dispose of said reservation under the homestead and pre-emption laws, and when the same was restored to the public domain, as hereinbefore mentioned, it was subject to entry under said laws. Section 2364 of the Revised Statutes, has no application to the disposition of the same unless the Commissioner of the General Land Office, in the exercise of his discretion, has seen proper to bring said reservation into market.

The Fort Brooke military reservation, at one time, included all the lands within sixteen miles square, and in 1883 it had been reduced by former relinquishment to less than one hundred and fifty acres. Almost the whole of said original reservation has been disposed of under the homestead and pre-emption laws. The fact that the land in controversy has become very valuable is no reason for the introduction of a different rule from that which has been uniformly observed by the Department in the disposition of other reservations prior to the act of 1884.

I am of the opinion, therefore, that the lands in controversy were open to entry from March 22 to April 2d, 1883, the day on which the local officers were instructed to allow no entries on the same.

The claims of all the other parties at interest are based upon applications made on and subsequent to the 22d day of March, 1883. The homestead entry of E. S. Carew, the husband of the claimant Mrs. L. W. Carew, was the first application made after the lands were restored to the public domain, and unless there was some sufficient legal reason for the rejection, should have been allowed.

In the departmental decision complained of it is held as follows:

The finding of the local officers and your office, that the entry of Carew and the settlement of Mather were not made in good faith, is supported by the evidence, and their claims were properly rejected.

I have searched the record with a view of ascertaining, if possible, the disclosures therein that go to impeach the good faith of E. S. Carew, and I have failed to find any admissible or competent evidence that justifies the conclusion reached in said decision.

The rejection of the claim of Mrs. L. W. Carew seems to have been predicated upon the testimony of J. T. Lesley, who appeared as witness in behalf of the city of Tampa.

Lesley testified that Senator Call notified him that he, the Senator, had instructed E. S. Carew to make pre-emption or homestead upon the reservation, and had instructed one Carlisle to make cash entry on the same, in order to secure it for the people of Tampa. He also informed witness that he had instructed Dr. Carew to draw upon him, Call, for the money. This Carew did. Witness paid the draft drawn by Carew upon Senator Call. A few days afterward Carew informed witness that he had received a telegram from Senator Call to make homestead entry upon said reservation and to draw upon him, Call, for the money. Carew told witness that he would turn over the homestead or pre-emption to the people of Tampa or would continue the same, or prove it up. Witness explained to Carew why it was that he was requested to make the homestead, which was to forestall speculation until Congress could pass an act donating it to the city of Tampa. Witness and others thought best to have the reservation homesteaded and to let the town have what it wanted. Witness explained to Carew, who was interested in the scheme, what amount witness thought the city of Tampa would be satisfied with. Witness, after consultation with parties interested and members of the town council, thought it best that, if Dr. Carew would agree to carry out, in good faith, such an arrangement and divide up the reservation as per agreement, he, Carew, should continue on the place. Witness told Dr. Carew that, and Carew acquiesced in the arrangement.

Carew, witness and others, intended at the end of six months, to commute this land, put it in under the commutation act, and divide it out among the parties interested as per agreement. Witness afterwards called upon Carew to have an interview about the matter, and, to his astonishment, Carew refused to do anything.

Carew then said he was the only person who had any rights and that he intended to retain them. Witness answered that while Carew might defeat the town of Tampa and the "balance of us" from getting this land, or any part of it, witness thought "we would be able to do the same with him," having no disposition to do anything of the kind but simply asking that the agreement thus made be carried out in good faith.

Carew refused to do so. Carew remained in the house secured for him up to the time of his death; his widow has lived in the same house ever since. Witness had no controversy or correspondence with Carew on or before the 22d day of March, 1883, relative to the reservation or

homestead thereon. According to the agreement, witness had with Carew, the reservation was to be divided into six parts: Carew to have one; the town of Tampa one; W. B. Henderson one; S. M. Sparkman one; J. A. Henderson one; and witness one. Tampa was to make its selection and the balance to be divided equally among the other five. Parties interested were to pay all the expenses and Dr. Carew was to comply with the homestead law in regard to residence and cultivation.

After the failure to secure the land in 1883 there was a scrip entry made upon it by W. B. Henderson, and by him the same proposition was made to the city of Tampa. Witness owned an interest in this scrip after that time; witness's son now owns said interest.

Carew died in 1886.

It will be observed that at the time of the trial Carew had been dead several years, and that the witness was an interested party in the transaction in regard to which he testified.

In the statute of Florida, Chap. 101, Sec. 24, it is provided as follows:

No person offered as a witness in any court or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceedings, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction, or communication between such witness and the person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, or committee of such insane person or lunatic; etc.

Besides it will be observed that the witness testified that he and Carew were parties to a scheme which involved perjury on the part of Dr. Carew and subornation of perjury on the part of the witness himself. When Dr. Carew made his homestead entry he was compelled to swear that the same was done *not* for the benefit of any other *person, persons, or corporation*. He was also compelled to swear that he was "not acting as agent for any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered or any part thereof," etc.

The scheme testified to by the witness was utterly inconsistent with the affidavit which had to accompany the homestead application of Carew, and the moral culpability implied on the part of a witness who, according to his own showing, testified in a revengeful spirit, because the other party to such a contract refused to carry out the same, is sufficient to discredit his testimony in the absence of any other legal reason.

In my opinion the testimony of J. T. Lesley, in so far as it goes to impeach the good faith of E. S. Carew, is inadmissible from a legal standpoint, and harmless because of its other infirmities. There being no other obstacle in the way of the claim of Mrs. Carew, I am of the opinion that it should be allowed.

The legislature of Florida in the year 1889 merged the towns of Tampa and North Tampa into one corporation and extended the limits of the city so as to include the reduced military reservation, and upon this legislative enactment the city of Tampa bases its claim to said reservation to be used as a public park and for other purposes.

The testimony failing to show that any considerable portion of the same was used and occupied for trade and business, the said claim was properly rejected in the opinion under review.

To avoid confusion I note that by the diagram approved by your office and transmitted to the local office in 1883, Fort Brooke was divided into seven lots, numbered 8, 9, 10, 12, 13, 14 and 16. According to the public survey, lots 8, 9, and 10, fall within Sec. 24, T. 29 S., R. 18 E.; lots numbered 12, 13, and 14, fall in Sec. 19, T. 29 S., R. 19 E., and lot numbered 16 falls within Sec. 18, T. 29 S., R. 19 E., Gainesville, Florida.

On the 22d day of March, 1883, the day on which the lands included in the Fort Brooke reservation were opened to entry, Louis Bell was residing upon that subdivision known as lot No. 8, Sec. 24, T. 29 S., R. 18 E., intending to make the same his permanent home. He was qualified and sought to assert his settlement rights by an application to file prior to the order in which the local officers were directed to allow no entries upon said lands. The claim of the heirs of Bell might properly be rejected upon the technical ground that the land in controversy was, at that time, included in the homestead entry of Carew, but inasmuch as said homestead claim was subsequently limited so as to exclude the lot or subdivision upon which Bell resides, and inasmuch as there is no other claimant to said legal subdivision who has a superior right to Bell, and for the further reason that his good faith calls for the exercise of the supervisory power of the Department, the same will be upheld, but limited to said subdivision.

The telegram sent from your office on the 2d of April, 1883, to the local officers directing them to allow no entries upon lands within said reservation, was doubtless made upon the idea that said lands could not be disposed of otherwise than by being brought into market and sold at public auction.

There being now no reason why said order should remain longer in force, especially in view of the fact that the claims of Carew and Bell, both of which were of record or offered prior to the date of said order, include the most valuable lands in the reservation aforesaid, the same is hereby revoked.

The claims of Julius Caesar to lot No. 13, and of Martha Stillings, wife and heir of Andrew Stillings, deceased, to lot No. 12, of Sec. 19, T. 29 S., R. 19 E., and that of Frank Jones to lot No. 16, Sec. 18, T. 29 S., R. 19 E., are in the same condition as that of Louis Bell, with the exception that said claims were asserted subsequent to the date of the

order from your office directing that no entries be allowed upon the lands of said reservation.

The settlement rights of Caesar, Stillings, and Jones had attached prior to the date of said order, and were simply held in abeyance by it. You will, therefore, direct that their claims be allowed to the lots or subdivisions upon which they respectively resided, should there be no intervening reason in either case for a different disposition of said lots.

The claim of W. B. Henderson to locate Gerard scrip on lots Nos. 8 and 9, Sec. 24, T. 29 S., R. 18 E., must be denied on account of its conflict with the prior rights of Louis Bell and Mrs. Carew.

The declaratory statement of Daniel Mather was properly rejected in the light of the record which discloses the fact that he never contemplated making his permanent home upon any land inside the Fort Brooke reservation, and that he abandoned his claim in 1885.

The remaining lot in said reservation, to wit, lot No. 14, Sec. 19, T. 29 S., R. 19 E., was settled upon by E. B. Chamberlin on the 7th of July, 1883, and upon that settlement he bases his claim.

The order emanating from your office directing the local officers to allow no entries, was no bar to initiating a settlement claim, and said order having been herein revoked, his claim will be allowed to said lot, should there be no other legal obstacle in the way of his perfecting the same.

It will be observed that I have recognized the settlement rights of Bell and others, in this case, and the question might arise that since the settlement of Bell, for instance, was made prior to the homestead entry of Carew, and his rights thereunder were asserted by him within the time prescribed by law, that his claim would be superior to that of Carew, whose settlement began from his entry.

A settler is defined to be—

A person 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 an announcement of such intention, and from which the public generally may have notice of his claim. (2 L. D., 628.)

In the light of this definition, the record discloses no act on the part of Mr. Bell, or the other claimants, which connects him or any of them, "with the particular tract claimed," outside of the lots or subdivisions upon which they respectively reside, until after the same was covered by Carew's entry.

I recognize the rulings of the Department that where an entryman is claiming a quarter-section of land and has made settlement upon one forty-acre tract of the quarter-section which he claims, that his settlement rights will be construed to cover the whole of the technical subdivision.

This rule, however, is limited by the condition that it must appear that the entryman intended to claim the particular technical subdivision which embodies the tract upon which he has made settlement.

If it should appear, for instance, that a person has made a settlement upon one quarter of some particular section of public land, and intends to claim a portion also of some other section, then the rule above referred to does not apply.

In order to avail himself of such a claim his acts of settlement must cover the whole tract.

Now the Fort Brooke military reservation includes portions of three separate sections of public land. A claimant, therefore, who seeks to acquire title to the whole of said reservation, must show such acts of settlement as extend to the entire tract.

But it may be suggested that the legal subdivision upon which Bell resides, according to general public survey, is the same as that upon which Carew resides, and that under a proper construction of the rule hereinbefore discussed, the settlement rights of Bell should be held to extend at least to cover the lots upon which Carew resides.

The reply is that Mr. Bell has never limited his claim to any technical quarter-section of land, and the rule applies to such claimants only.

The decision under review, for the reasons hereinbefore mentioned, is set aside and you will direct that the lands formerly included within the Fort Brooke military reservation be disposed of in accordance with this opinion.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

TRUMAN WHEELER.

A soldiers' homestead declaratory statement filed by an authorized agent of the soldier, and abandoned, exhausts the homestead right of the soldier.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.) 1894. (F. W. C.)*

I have considered the appeal by Truman Wheeler from your office decision of March 13, 1893, denying his application to make homestead entry for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, T. 129 N., R. 52 W., Watertown land district, South Dakota, for the reason that he had exercised his homestead right under soldiers' declaratory statement filed April 19, 1892, for the SE. $\frac{1}{4}$, Sec. 7, T. 129 N., R. 51 W., Fargo land district, North Dakota.

The points raised by the appeal are sufficiently stated: first, that the filing of the soldiers' declaratory statement does not exhaust the homestead right; and, second, claimant should not be held bound for the filing of the declaratory statement under the facts and circumstances attending the filing of the same.

The lands involved are a portion of the Sisseton and Wahpeton Indian reservation which was opened to entry on April 15, 1892. Wheeler was at this time residing in the State of Minnesota, and being

desirous of entering a tract of these lands he authorized one J. H. Movious to make a filing for him of good agricultural land.

It appears from an affidavit by Movious that he, after examination, selected the NE. $\frac{1}{4}$, Sec. 2, T. 129 N., R. 53 W., as the tract to be filed for in Wheeler's name, but that due to delay in the forwarding of the papers empowering him to make said filing, which papers did not reach him until April 17, 1892, and being Sunday he was obliged to wait until the next day before filing the same; that when he reached the local office he found that a filing had been made for the land intended to be filed for in Wheeler's name, and he thereupon selected for Wheeler, without examination, the said SE. $\frac{1}{4}$ of Sec. 7, T. 129 N., R. 51 W., for which he made soldiers' declaratory statement, as before stated.

It appears from the affidavit of Wheeler, duly corroborated, that the last mentioned tract is unfit for cultivation, and that after examining said tract he selected the tract embraced in the application under consideration, upon which he has since built a house and otherwise improved the land.

It has been uniformly held since the circular of December 15, 1882 (1 L. D., 648), that a soldier will be held to have exhausted his homestead right upon the filing and abandonment of a homestead declaratory statement.

The sole question for consideration is, therefore, whether Wheeler is bound by the action of Movious in making the filing for the said SE. $\frac{1}{4}$ of Sec. 7, T. 129 N., R. 51 W.

It is admitted that Wheeler authorized Movious to make filing in his name, and that the selection of the tract was left to Movious; acting under this authority he made the filing, as before described, and, while he does not appear to have made a good selection, yet as Wheeler left the selection of the land to Movious, he is bound by his action.

The fact that Wheeler has, since applying for the land first described, made improvements thereon, can in no wise alter his status. Being bound by the filing made by Movious, his rights under the homestead law were thereby exhausted, and I must therefore affirm your office decision denying his application in question.

TIMBER CULTURE ENTRY—COMMUTATION—FINAL PROOF.

COON v. BARRETT.

Final proof taken without publication of notice can not be accepted in the commutation of a timber culture entry under section 1, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, July 12, (J. I. H.) 1894. (J. L.)

I have considered the appeal of George N. Barrett from your office decision of May 16, 1893, in the above entitled case, affirming the decision of the local officers and rejecting Barrett's final proof under

his timber-culture entry No. 1601, for lot 15, of Sec. 3, T. 17 S., R. 1 E., Los Angeles land district, California, containing 44.45 acres.

On December 29, 1886, Barrett made timber-culture entry of said land. On or about November 14, 1891, he filed in the local office an application to make final proof, which is not to be found in the files before me. The register advised him—

No publication was required, as his entry was made prior to September 12, 1887; and that he could go before the United States Commissioner at San Diego at any time most convenient to that officer and himself, with two of the witnesses named in the application, and make said proof, using this letter as his authority therefor.

This was erroneous. See Circular of Instructions of April 27, 1891 (12 L. D., 405); Commissioner's letter of April 29, 1892, and Secretary's letter of June 2, 1893 (16 L. D., 482).

On December 23, 1891, Barrett with two witnesses went before the deputy clerk of the superior court of San Diego County, California, and made, signed and swore to three irregular and imperfect papers intended to be offered as final proof. On or about July 14, 1892, Barrett filed in the local office notice of his intention to commute and make final proof in support of his claim under the act of March 3, 1891 (26 Stat., 1095), and that said proof would be made before United States court commissioner M. L. Ward, at San Diego, California, on August 30, 1892. Said notice was duly published in a newspaper. On that day James Coon filed his protest against Barrett's final proof, alleging:

1. That said Barrett has not complied with the law as per the Revised Statutes of the United States.
2. That the said entry has been made for speculation and not in good faith; and
3. That the entryman has failed to plow, plant and cultivate each year the requisite number of forest trees to comply with the said statute.

No witnesses being present on August 30, 1892, Barrett filed with the Commissioner the "original proof taken before the clerk without notice of publication, on December 29, 1891," as aforesaid, and by consent of parties a continuance was granted until October 18, 1892. On October 17, 1892, Barrett made his non-mineral affidavit before M. L. Ward, U. S. commissioner. And on October 22, 1892, said papers were filed as Barrett's commutation final proof, and were promptly rejected by the local officers.

Barrett appealed, and on March 16, 1893, your office affirmed the decision of the local officers. Barrett has appealed to this Department.

On August 30, 1892, the day fixed by publication, Barrett produced no witnesses, and offered as final proof only the papers sworn to before the clerk on December 23, 1891. On October 18, 1892, the day to which the hearing was adjourned, he offered nothing else except his non-mineral affidavit. He rested his case upon that showing. There was no need for further appearance or further evidence by the protestant. The papers offered as final proof were irregular and insufficient in form and in substance, and were properly rejected.

Your office decision is hereby affirmed.

SWAMP LANDS—PERIODICAL OVERFLOW.

STATE OF OREGON ET AL v. MOTHERSHEAD.

Lands subject to periodical overflow, but useful for cultivation upon the recession of the water, are not swamp lands, within the meaning of the swamp land grant.

*Secretary Smith to the Commissioner of the General Land Office, July 12,
(J. I. H.) 1894. (F. W. C.)*

I have considered the appeal by the State of Oregon and Henry Miller, its transferee, from your office decision of November 14, 1892, rejecting the claim made to the NW. $\frac{1}{4}$ of Sec. 17, T. 24 S., R. 31 E., Burns land district, Oregon, as swamp land.

On September 13, 1883, the State selected this tract, with other lands, on account of the swamp land grant which was extended to Oregon by the act of March 12, 1860.

This case arose upon an application by Stonewall J. Mothershead to file pre-emption declaratory statement for the land, presented June 22, 1887, and recorded as declaratory statement No. 2746.

Under circular letter "K", of December 13, 1886, (5 L. D., 279), notice of said adverse claim was given the governor, who, on July 13, 1887, filed a protest, but requested that a hearing be not ordered in the matter until after the land had been examined and reported upon by an agent from your office, in conjunction with one on behalf of the State.

In accordance with said request, a special agent of your office, together with an agent of the State, after due examination, reported, under oath, classifying this tract as swamp land.

Hearing was afterwards ordered, and February 16, 1891, was fixed for day of trial, and after continuance, the case was heard April 23, 1891.

Upon the testimony adduced, the local officers found that this tract was not swamp land on March 12, 1860, and upon appeal, your office decision sustained that of the local office.

An appeal brings the case before this Department.

This township was surveyed in 1875, and the field notes upon the section lines show the land to be level, soil first rate, good grass, and liable to overflow.

The testimony shows that a stream runs diagonally across the south-western part of this quarter section, which is designated in the testimony as the west fork of the Silvies River.

It is shown that this land has been at times overflowed, generally during spring freshets. The present condition of the land is generally dry and good crops of hay cannot be harvested without irrigation.

The condition of the land on March 12, 1860, is the matter for determination.

Was the land on that date so "wet" as to be rendered thereby unfit for cultivation?

Lands subject to periodical overflow, but useful for cultivation upon the recession of the waters, are not swamp lands, within the meaning of the swamp land grant.

None of the witnesses produced on either side, have any knowledge as to the character of these lands in 1860.

Those produced by the State claim to have a knowledge of the land antedating those offered by the pre-emption claimant, but their testimony is of little or no value in determining the actual character of the land in 1860.

Under the circular of December 13, 1886, *supra*, the burden of proof is upon the State to establish the character of the land on March 12, 1860. The present character of this land is admitted not to be "swamp land", and crops cannot be successfully raised without irrigation.

There is no evidence to show that this land has been reclaimed by artificial means, but on the contrary, the claimant in part accounts for the former overflows, by showing that the river had been dammed, and that since the dams have been removed, the overflows have been less frequent.

I must hold, from a careful consideration of the testimony, that the State has failed to show that this tract was "swamp" land on March 12, 1860, within the meaning of said act, and therefore affirm your decision, and direct that its selection be cancelled.

EVIDENCE—POWER OF ATTORNEY—CHIPPEWA SCRIP.

HARTMAN v. WARREN ET AL.

A deposition, under the laws of Minnesota, taken for the reason that the witness cannot be produced at the trial, is not admissible in evidence, where said witness is present at the hearing, though he may then refuse to testify.

A power of attorney, executed and delivered, that does not contain the name of the appointee, is with an implied authority to complete the instrument, and make it effectual, by filling in the blank, where it is apparent that such was the intention of the party executing the power.

The right to select eighty acres of land accorded to the mixed bloods of the Chippewas of Lake Superior by the seventh clause of article 2, of the treaty of September 30, 1854, is not dependent upon actual residence, at the date of said treaty, among or contiguous to said Chippewas; nor do the provisions of said treaty prohibit the sale, prior to patent, of land located by power of attorney under such right of selection.

*Secretary Smith to the Commissioner of the General Land Office, July 20,
(J. I. H.)* 1894. *(C. W. P.)*

On the 21st of May, 1892, the Department directed a hearing in the case of Emil Hartman v. James H. Warren et al., then entitled Hyde

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et al. v. Warren et al. (14 L. D., 576), (affirmed on review, in 15 L. D., 415), in these words:

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virtue of his pre-emption claim for said NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ as against the government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The land involved in this controversy is lot 7, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, T. 63 N., R. 11 W., Duluth land district, Minnesota.

On March 19, 1889, Hartman filed his affidavit of contest, which is as follows:

1st. Said pretended location was not made by said James H. Warren, to whom said certificate of scrip was issued.

2d. Said pretended location was not made for the benefit, or in the interest of said James H. Warren, for whose benefit, and in whose interest, said certificate was issued.

3d. Said James H. Warren was not entitled by law to make a location of said land.

4th. That prior to the time of said attempted location, said James H. Warren, for a valuable consideration to him paid, had parted with said certificate of scrip, and that in order to effectuate the bargain and sale by him made, and to evade the express prohibition of the law, and aid and permit his vendees to accomplish by circumlocution and subterfuge, a fraud and imposition upon the officers of the law, had signed and acknowledged certain powers of attorney, one, to locate the land, and the other, to sell the same after its location, which your petitioner verily believes to have been illegal and void, in that they, at the time of the said pretended execution and delivery, were not complete, and as subsequently used by said vendees before the public officers of the United States to wit: No attorney (naming him) was inserted in either of said letters of attorney, and no certain or definite description of land was described in either of them, all of which such acts were in violation of the act of Congress aforesaid, and in contravention of the rules and regulations of the Department.

5th. That for some time prior to the pretended location, as your petitioner is informed and believes, said certificate and powers of attorney were in the open market for sale at Duluth, Minn., by C. d'Autremont, Jr., a resident of Duluth, and the business associate or partner of the said J. H. Sharp, the pretended attorney in fact of said James H. Warren, and that said J. H. Sharp well knew at the time of his pretended location, that his alleged principal had no interest in the said certificate of scrip, and was to get no interest whatever in the lands which he attempted to locate in said scrippee's name with said scrip.

6th. Your petitioner has been informed that James H. Warren was some years ago (about the time of the location, as aforesaid) Secretary of the Home Missionary Society, residing in San Francisco, California; that he was, under the 7th clause of the 2d Article of the treaty of September 30, 1854, entitled to 80 acres of land; but your petitioner alleges that there was no warrant of law for any location, as attempted to be made in his name in the Duluth land office, October 15, 1885. That the certificate of identity, or so-called scrip, which was issued to him by the Commissioner of Indian Affairs, upon its face expressly declared that any assignment, sale, pledge or mortgage of the same, would not be recognized as valid by the United States, nor any right accruing under it. This was violated and disregarded, as said scrip was located in the interest, and for the benefit, of Fred F. Huntress, Samuel

C. Brown, John Paulson, Kristian Kortguard, and not in any sense for the benefit of said Warren, either present or prospective.

7th. For the reason that said selection has not received the sanction of the President of the United States.

8th. For the reason that the right of any person entitled under the 7th clause of the 2d Article of the treaty of September 30, 1854, to take land, is purely a *personal* right, and was not asserted by him in person, or by any person duly authorized for his, said Warren's own personal use and benefit.

9th. For the reason that said James H. Warren was not the only party interested in the said location.

A hearing was had, and much testimony taken. The register and receiver decided against the contestant, and recommended a dismissal of the contest and the patenting of the Warren location. The contestant appealed. Your office confirmed the judgment of the local officers. The contestant now appeals to the Department.

I will briefly go over the facts of the case. It has been the subject of two appeals to the Department, and has been twice argued orally.

It now comes before the Department after all the facts have been brought out in the testimony, and fully elucidated by the arguments of counsel.

September 30, 1854, (10 Stat., 1109) a treaty was made by the United States, through commissioners, with the Chippewa Indians of Lake Superior and the Mississippi, and that nation ceded to the United States their title and interest in and to, their lands lying east of a certain boundary therein described.

Many reservations were made in favor of certain bands, and individual Chippewas, and by the seventh clause of the second Article, it is provided that:

Each head of a family, or single person, over twenty one years of age at the present time, of mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to 80 acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

January 20, 1875, the Commissioner of Indian Affairs, Mr. Smith, reported to the Secretary of the Interior that he had received a communication, addressed to Hon. T. W. Ferry, from Rev. J. H. Warren, dated at San Francisco, December 18, 1874, relative to his claim to enter eighty acres of land, as a mixed-blood Chippewa of Lake Superior, under the seventh clause of the second Article of the treaty of September 30, 1854, with certified proof, or declaration, filed by Senator Ferry, with the Commissioner of the General Land Office, and by him referred to the Indian Office. The Commissioner recommended that, as there was no Indian Agent nearer than Round Valley, before whom Warren could make proof, as required by departmental order of March 19, 1872, and as he was personally known to Senator Ferry and himself as being a mixed blood Chippewa of Lake Superior, and entitled to the benefits of the treaty of 1854, the departmental order should be so far modified in his case as to permit the substitution of the certifi-

cate of the Commissioner of Indian Affairs, for the action required, to be taken before the local Indian Agent, which should entitle him to locate land under the treaty, and enter by proper description the tract he may desire; and that the General Land Office be instructed to notify the registers of the proper land offices, of the action in the case.

January 21, 1875, the Secretary of the Interior, Mr. Delano, approved this recommendation, and directed the Commissioner of Indian Affairs to advise the Commissioner of the General Land Office of his action, and to request him to notify the registers of the proper land offices accordingly.

January 22, 1875, the Commissioner of Indian Affairs certified that Warren was personally known to him, and that he was satisfied that he was one of the persons entitled to locate land under the treaty with the Chippewa Indians. He also stated that it was authorized by the Secretary of the Interior, in a letter to the office of Indian Affairs, dated January 21, 1875, to be deposited with the registers of the land offices within whose districts the land is situated, to which the beneficiary under the treaty is entitled, in lieu of the action required by departmental decision of March 19, 1872, to be taken before the local Indian Agent.

And in a letter to Senator Ferry, dated on the same day, he informs him that he therewith returns the certified proof or declaration of Warren, with his certificate endorsed thereon, which he says was authorized by the Secretary in his letter of the 21st instant, (of which he encloses a copy) to be substituted in this case for the action required by the departmental order of March 19, 1872, to be taken before the Indian Agent.

February 9, 1875, the Commissioner of the General Land Office, Mr. Burdette, addressed a letter to the registers and receivers of the land offices at Duluth, St. Cloud, Toxlon Falls, Alexandria and Detroit, Minnesota, instructing them, should the certificate of the Commissioner of Indian Affairs in this case, be presented to either of them for the purpose of making a selection, to allow the entry to be made, proceeding in the matter as provided for in cases where the certificate of the Indian Agent, for which it is to be substituted, shall be presented.

So the matter rested, until some time in the year 1884, when the certificate of the Commissioner of Indian Affairs, endorsed on the affidavit of Warren, above referred to, together with the letter of the Secretary of the Interior, referred to by the Commissioner of Indian Affairs, in his letter to Senator Ferry of January 22, 1875, which is also annexed to the papers, and a blank power of attorney from Warren, to locate land under the treaty with the Chippewas, and a power of attorney to sell, also without the name of the appointee, and without a description of the land to be sold, both signed and acknowledged on the 23d of August, 1833, came into the hands of Mr. Charles d'Autremont, Jr., of Duluth.

Mr. d'Autremont testified that they were sent to him by a Mr. Bruce of Chippewa Falls, or Eau Claire, Wisconsin, to use, to dispose of, or to enter the land and sell it, and account to him. He did not distinctly remember which. Mr. d'Autremont was not able to dispose of the so-called scrip for some time. He told people he had some scrip, that would enter eighty acres of land, or so. But he finally, in the early part of 1885, or the close of 1884, came to some agreement, through a Mr. J. H. Sharp, who was, or had been, his partner in the land business, to dispose of the scrip, or the land located under it. The testimony is very indistinct upon that point.

The powers of attorney being deficient, Mr. d'Autremont procured new powers of attorney from Mr. Warren, through the Mr. Bruce who had deposited the papers with him. The new powers of attorney were executed by Mr. Warren before a notary public, in San Francisco, California, on the 20th of January, 1885.

Here a question is raised as to whether the powers of attorney contained the name of Joseph H. Sharp, as attorney to execute the powers, at the time of their acknowledgment by Mr. Warren. Mr. d'Autremont's recollection is very indistinct on the subject. He says, "At this length of time I could not state positively as to that." "It might have had Mr. Sharp's name in, when it was sent on to him (Mr. Warren.)" "I didn't write Mr. Sharp's name in", but "he (Sharp) might at my direction have done so."

Mr. Warren, in his deposition, taken for the contestant, under a commission to California, who swore that he then had no interest in the controversy, states that it is his distinct impression that the power of attorney executed by him in January, 1885, had Mr. Sharp's name in it, when he executed it. Further on in his deposition, he says, "I do assert that the second powers of attorney were fully filled up as to the name of J. H. Sharp, the appointee."

I do not consider the deposition of Mr. Sharp, *in perpetuum rei memoriam*, offered at the hearing, for it is clearly inadmissible.

Mr. Sharp was present at the hearing, but refused to testify, on the ground that he "had no other information in this case except what was obtained professionally while acting professionally for my (his) client". Afterwards he said, "I will correct the statement by saying, professionally as an attorney."

The grounds on which a deposition *in perpetuum* may be taken in the State of Minnesota, are set forth in the Statutes of that State, in the 16th section of chapter 73, as follows:

When a witness whose testimony is wanted in any civil cause pending in this State, lives more than thirty miles from the place of trial, or is about to go out of the State and not return in time for trial, or is so sick, infirm, or aged as to make it probable he will not be able to attend at the trial.

It is obvious that this deposition was taken under a state of facts which no longer existed at the time of the trial before the register and receiver, for the witness was then present, attending the trial.

But section 27 provides that:

No deposition shall be used if it appears that the reason for taking it no longer exists; provided, that if the party producing a deposition in such case shows any sufficient cause for using such deposition, it may be admitted.

Does the deposition fall under this proviso? The proviso would seem to refer to the causes mentioned in the 16th section. For it can hardly be, that a deposition taken under that section which so carefully specifies the circumstances under which such deposition may be taken, can be used under circumstances other than some of the circumstances enumerated, though not the reason given for taking it.

But if it be conceded that this is not a correct interpretation of the law, is it a sufficient reason for receiving the deposition, that the witness, although present in court, refused to be sworn?

It is impossible to admit the proposition that the fact that a witness refuses to testify, is a sufficient legal cause to receive a deposition which was taken solely for the reason that it was within the range of probability that he could not be produced at the trial.

Then is it a sufficient cause to admit the deposition of the witness, that he stated at the trial that his only information on the subject of the case resulted from communications made to him professionally as the attorney of Warren? This ground for receiving the deposition is as unsound as the other. For the objection to receiving his testimony at the hearing, on the ground of privilege, applies as strongly to his deposition, which was objected to on that ground by Mr. Hanks, as attorney for Mr. Warren.

Then a copy of the record of the notary public before whom Mr. Warren acknowledged the powers of attorney, of January, 1885, was offered in evidence to prove that Sharp's name was not in them at the time of their acknowledgment.

By the laws of California, (2 Hittell's Code, paragraph 11,920) entries in official books are made *prima facie* evidence of the facts therein stated. By paragraph 794 (1 Hittell) notaries public are required to keep a record of the parties to, date and character of every instrument acknowledged or proved before them. This record, if admitted, would seem to throw doubt upon the correctness of Mr. Warren's recollection on the subject.

But even if Mr. Warren is mistaken, and the powers of attorney did not contain the name of the appointee, when Mr. Warren sent them to Mr. d'Autremont, through Mr. Bruce, it was with an implied authority to complete the instruments by filling in the blanks, and so make them effectual. *Smith v. Crooker* (5 Mass., 539); *Ex parte Kirwin* (8 Cowen, 118); *Vliet v. Camp* (13 Wis., 198); *State v. Young* (23 Minn., 551); *Drewry v. Foster* (2 Wall., 24); *Allen v. Withrow* (110 U. S., 119).

Mr. d'Autremont testified that he delivered the scrip to Mr. Sharp "to enter a piece of land with." When asked if he gave it to Mr. Sharp to enter land with in his own behalf, he replied "In my own behalf—

no—I never owned the scrip." When asked whether he had any interest in the scrip, he replied "I had an interest to get my pay for the trouble I had been put to about the matter, and I also would have to account to Mr. Bruce, the man who left it with me; he would hold me personally responsible."

He further testified that he gave the scrip to Mr. Sharp, and as he understood, Sharp entered a piece of land with it, and deeded the land under the power sell, and gave him (d'Autremont) a check from the man to whom he deeded the land for this, and another piece of land at the same time; that he sent the purchase money, after deducting his commission for his trouble, which he thinks was \$40 or \$50, to Mr. Bruce.

Mr. Warren testified that he received the money. He says he received it through his brother, to whom he originally sent the scrip, to locate it and sell the land; that he "did not receive anything until the land was sold, according to my (his) knowledge and belief."

The records of the land office at Duluth show that, on the 15th of October, 1885, James H. Warren, by Joseph H. Sharp, his attorney in fact, located the land in controversy. On the following day, namely, October 16, 1885, Sharp, as attorney in fact for Warren and wife, executed and acknowledged a quit claim deed of the land to Kristian Kortguard.

Kristian Kortguard was examined on the part of the contestant, and testified that he resides at Minneapolis, and is a banker; that the land in question was purchased by F. F. Huntress, S. Leavitt and himself, under an agreement between them, which is in evidence. That he had nothing to do with the transaction personally; that it was conducted by Fred. F. Huntress; that he knew nothing about the entry or location of the land; that he never bought or held any scrip or certificate of location in the name of Warren, or any other person.

Huntress and Leavitt were examined in behalf of the defendants, but it is not necessary to recite their testimony. It confirms the testimony of Mr. Kortguard. Mr. Huntress swears that Sharp located the land for Warren, and then deeded it to him. Further on, he says the deed was to Mr. Kortguard.

This is a sufficient narrative of the facts, and raises two questions which it is necessary to decide, under the affidavit of contest.

1. Was Warren entitled to the eighty acres of land, under the treaty, as the head of a family, or single person, over twenty-one years of age at the date of the treaty of mixed blood, belonging to the Chippewas of Lake Superior?

2. Did the location of the land under the power of attorney from Warren to Sharp, give Warren such an ownership of the land as entitled him to sell it to Kortguard and his associates?

It appears that February 23, 1856, Mr. Hendricks, then Commissioner of the General Land Office, in a communication to the Secretary of the

Interior, Mr. McClelland, after stating that there is no provision in the treaty under consideration, for the issuing of scrip or land certificate, and, in his judgment, no law for it, expressed the belief that the plan of issuing them, if adopted, would be fraught with many evils in opening the door to speculation and irregularities. In his opinion, the treaty contemplated ownership and possession by the Indians personally, and was designed to guard against any transfer of their right before the issuing of the patent. March 3, 1856, Secretary McClelland transmitted Mr. Hendrick's letter to the Commissioner of Indian Affairs, with this endorsement thereon: "Sec'y remarks, 'Let mem's be given In's as proposed, but with clause expressly and decidedly vs. any transfer, mortgage, &c. Patent to be given to the Indians, not in any wise to inure to the benefit of any one but the Ind. and his heirs.'" (Half Breed Scrip, Chippewas of Lake Superior, p. 38).

March 12, 1856, the Commissioner of Indian Affairs, in a letter to the Secretary, recommended the issuance of scrip as the most practicable method of disposing of the half breed claims, and enclosed a form of certificate, which was approved by the Secretary. July 10, 1856, Secretary McClelland, in reply to a letter from the Commissioner of Indian Affairs, dated July 8, 1856, stating that the construction placed upon the treaty by the Indian Office was, that its provisions can only be extended to such mixed bloods of the Chippewas of Lake Superior, as resided among, or contiguous to, the various bands of those Indians, as distinguished from the Chippewas of Michigan, and the Chippewas of the Mississippi, and asking his opinion as to the construction to be given to the treaty, as far as it related to the lands to be selected by the mixed bloods belonging to the tribe, stated that the Department should be as liberal in carrying into effect the stipulations of said Article, as the terms of the treaty will admit; that the Indian Bureau understood what was intended, and that intention should be carried out without regard to mere technicalities. (H. B. S. C. of L. S., p. 40).

September 3, 1857, Hon. H. H. Rice, in a letter to the Indian Office, presented the applications of Elizabeth and Theodore Borup and Sophia Champlin, claiming as mixed bloods of the Chippewas of Lake Superior, which were not granted. March 19, 1863, Senator Rice again addressed a letter to the Commissioner of Indian Affairs, requesting a reconsideration of their claims. Whereupon, the Commissioner, Mr. Dole, on the 25th of March, 1863, wrote to the then Secretary, Mr. Usher, submitting Mr. Rice's letter to his consideration, and stating that from the evidence, there can be no doubt that the claimants are mixed-blood Chippewas of Lake Superior; that their claims had been rejected on the ground that the treaty—

Only extended to such mixed bloods of the Chippewas of Lake Superior, as resided among, or contiguous to, the various bands of those Indians, as distinguished from the Chippewas of Michigan and Mississippi; whereas it appears that the claimants in question reside neither among nor contiguous to the Chippewas of Lake Superior;

That it was doubtful if that allegation was sustained by the proof; but granting that it was, it was, in his opinion, a forced construction of the treaty, to require that mixed bloods should reside "among or contiguous to" the Indians, in order to be entitled to the benefits of its provisions; that as to the question of residence, there was, as he conceived, no ambiguity in the language of the treaty; nor was there any expression requiring a resort to collateral evidence in order to ascertain its meaning. Secretary Usher, on the 18th of May, 1863, returned the papers, approving the claims of Elizabeth and Theodore Borup, but rejecting that of Sophia Champlin, because she appeared to be under twenty-one years of age. (H. B. S. C. of L. S., pp. 41-42).

This decision of the Department overruled the practice of the Indian Office, and scrip was thenceforth issued to persons of mixed bloods, without regard to their residence, the only requirement being satisfactory evidence that the claimants were mixed bloods belonging to the Chippewas of Lake Superior, twenty-one years of age or heads of families, at the date of the treaty. (H. B. S. C. of L. S., p. 7).

March 19, 1872, Secretary Delano, in a letter to the Commissioner of Indian Affairs, condemned the rule of evidence adopted by the Indian Office, under the decision of Secretary Usher, remarking that it had led to frauds, irregularities and illegalities, and directed that it be reversed, adding these words:

Believing, as I do, that no one is entitled to the benefits of the 7th clause, unless he "belonged" to the Chippewas of Lake Superior, *at the date of the treaty*. The words of said 7th clause are, "belonging to the Chippewas of Lake Superior," and in order to receive the benefits thereof, the party entitled must have been in the condition therein specified, at the date of the treaty.

There is not a tittle of evidence to contradict the sworn statement of Mr. Warren of December 18, 1874, that he was a person of mixed blood, belonging to the Chippewas of Lake Superior, and at the date of the treaty of lawful age, and the head of a family. In his deposition, he swears that he was born in 1819, at the mouth of the Montreal River, Northwest Territory, south shore of Lake Superior; that in 1850, he went to California in the employment of the American Home Missionary Society, as its missionary, and has been there ever since; that when he was six years old his father died, and he was placed by his uncle, who was his guardian, at school at Mackinaw, Michigan; that at the age of sixteen, he went to La Pointe, Lake Superior, the old homestead. His mother having married again, he was afterwards sent by his uncle to school at Clarkson in New York, where he staid about two years; that he then returned to La Pointe. He next went to live with a relative in Dubuque, Iowa; he then went to Knox University, Illinois. While at college he visited his mother at La Pointe; after that he went to the city of New York to complete his classical and theological studies, and in 1850, went to California. That he had been a minister of the gospel from that time to the time of his deposition—43

years; that he was married in 1850; that his father was an American, and his mother, French and Chippewa. His residence in California was such as was incident to his religious work as a missionary and minister, and in that sense, temporary; that prior to the 30th of September, 1856, he had never been naturalized. When asked if he went to California prior to September 30, 1854, and if so, if he ever subsequently returned to Minnesota to reside with the Chippewa Indians of Lake Superior, and if so, how long he remained with them, and if he established a home with his family, or boarded there, or stopped with friends, he replied in words which strongly appeal to the heart, as well as the reason:

I have already given the date of my coming to California. In 1877, prompted by affection and duty, I went to La Pointe, Lake Superior, to visit my aged mother, and such relatives as were then alive. Have never had any plans as to whether my absence should be temporary or permanent. I certainly never entertained any thought of severing my tribal relations, *whether absent or not*. On the contrary, my connection with the old Chief Buffalo, whom I visited at La Pointe, took on the nature of family pride, not to be given up by voluntary severance from the tribe.

But it is argued that, as the evidence does not show actual residence, either among or contiguous to the Chippewas of Lake Superior, at the date of the treaty, Mr. Warren is not entitled to the benefit of the treaty.

The review of the action of the Department shows that in 1856, it was adopted by the Indian Office, with the approval of the Secretary of the Interior, as a rule of evidence in respect to persons entitled to land under the treaty, that they must have resided among, or contiguous to the Chippewas of Lake Superior, at the date of the treaty. This rule of evidence remained in force until the year 1863, when it was reconsidered by the Commissioner of Indian Affairs, and with the approval of Secretary Usher, was abrogated. The effect of the later practice having been to encourage, or permit extensive frauds and irregularities, Secretary Delano, in 1872, reversed the practice, and directed the Commissioner to return to the former practice.

As a rule of evidence, it was doubtless of great importance for the prevention of fraud and imposition, but it is impossible to construe the treaty itself to require actual residence among, or contiguous to, the Chippewas of Lake Superior, as an indispensable condition for the privilege granted to the mixed bloods of the Chippewas of Lake Superior. It would be rather an interpolation into, than a construction of, the treaty.

The opinion of Attorney-General Cushing (7 Ops. of Att'y's Gen'l, 746) is thought to countenance this construction of the treaty, but a careful reading of his opinion will not lead to that conclusion.

The question under discussion was, whether a person of mixed blood, of the Chippewas of Lake Superior, retaining tribal relations, can enjoy at the same time a right of pre-emption, as a citizen of the United

States. Does Mr. Cushing say a word about residence among, or contiguous to, the tribe? Not one. On page 750, he says:

In fine no person of the *race* of Indians is a citizen of the United States, by right of birth. It is an incapacity of his race.

But may not that natural incapacity cease? May not the members of a family of Indians, by continual crossing of blood cease to be Indians? Undoubtedly.

On page 752, he says:

Many persons of this class, (mixed bloods) it is not to be doubted, are of most respectable character, and mentally and morally capable to be citizens of the United States. But citizenship does not depend on that alone. Such persons are capable to become citizens; the question will remain in each case, whether they have become so in fact. Suppose a half breed, who is to this day, to all intents and purposes, Indian,—the chief, for instance, of some tribe,—and therefore clearly not a citizen of the United States. That was the condition of John Ross, in the case referred to in Tennessee. It may be—we concede for argument's sake that it is—competent for him to become a citizen, or at any rate a voter, as in Wisconsin, *by ceasing to be a member of the tribe*. Be it so. Let him cease then, to continue, of his own volition and election, an Indian. If by some act of recognized legality, he has manifested his desire to be considered a citizen, then it will have to be considered whether such act is effective; whether, for instance, it was performed in good faith, as in the case of alleged change of domicil; whether it is not contradicted by the party's having, in the meantime, retained his tribal relations; whether, in a word, if of admitted capacity to become a citizen of the United States, he has in fact become such, by throwing off the *status* of Indian.

On page 755, he says:

I think the language of the 7th clause of the 2d Article of the treaty with the Chippewas, before me, legally describes persons not citizens of the United States, but though half blood, yet still Indians. I think the persons so described, in asking and receiving the benefit of the clause, declare themselves to have been at that time not citizens, but Indians.

They might be competent to become citizens. This assignment of eighty acres of land to each of them in severalty, and segregated from the common property of the tribe, may be construed as implying that they intended thereafter to quit the tribe, with its community of rights, and become citizens. But it contemplates and supposes, and their acts pronounce, that they had not yet passed the line between the aboriginal and the civilized, or citizen *status*.

I therefore conclude that Mr. Warren was entitled to locate eighty acres of land under the treaty.

2. If he was entitled to enter the land, it is plain that having located it, by his attorney in fact, there is nothing in the treaty to prohibit the sale of the land located before patent.

The language of the treaty is, "which shall be secured to them by patent in the usual form", i. e. in absolute ownership without restraint of the power of alienation.

In the treaty with the Pottawatomie Indians in 1832, there were reservations to individual Indians, which should be selected under the direction of the President, after the land should have been surveyed, and the boundaries should correspond with the public surveys. Before this was done, and, of course, before receiving a patent, the Chief Pet-chi-co, one of the reservees, conveyed the land to which he was entitled

under the treaty, by warranty deed. It was held by the supreme court (*Doe, et al. v. Wilson* 23 How., 457) that the title of Pet-chi-co was property, and alienable, unless the treaty prohibited its sale, which was held not to be the case. This ruling was affirmed in *Crews, et al. v. Burcham, et al.* (1 Black, 352). Mr. Justice Nelson, delivering the opinion of the court, said:

It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reserves, or in case he had parted with his interest in favor of his grantees. And the obligation is not less imperative and binding, because entered into by the government. The equitable right, therefore, to the lands in the grantees of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.

Subsequently, in *Elwood v. Flannigan* (104 U. S., 562), the supreme court again affirmed the decision in *Doe, et al. v. Wilson*, and *Crews v. Burcham, supra*.

In *Dole v. Wilson* (20 Minn., 356)—a case entitled to great consideration in the case at bar—it is said that the treaty under consideration not only contains no prohibition of a conveyance of the lands to be located, but expressly provides that they are to be secured to the half breeds by patent in the usual form, i. e., “in the form in which patents are made to an ordinary purchaser of public lands, without restraint upon the power of alienation”: and it was held that the delivery of the possession of Chippewa scrip, together with an agreement to convey such lands as might be selected and entered by the half breed, either in person or by attorney, to such party or parties as should locate said scrip, his, or their heirs or assigns, on demand after the location thereof, furnished a valid and sufficient consideration to support a promise to pay the money for which the action was brought.

In *Myers v. Croft* (13 Wall., 291) it was held that the 12th section of the act of Congress of September 4, 1841, which contains the provision that: “all assignments and transfers of the rights hereby secured, prior to the issuing of the patent, shall be null and void”, did not disable the pre-emptor to sell the land after his entry, but before patent was granted; that the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was, in good faith, the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject.

How much stronger is the case, under the Chippewa treaty, where there is no inhibition of the assignment or transfer of the privilege conferred by the treaty.

I am therefore of opinion that the decision of your office, affirming the action of the register and receiver in dismissing Hartman's contest, should be affirmed.

It appears that Thomas W. Hyde appeared at the hearing before the local officers, and sought to introduce testimony to establish a pre-emption claim to a part of the land in controversy, to wit, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 30. The register and receiver declined to receive the testimony offered, or to admit Hyde as a party to the hearing, which was affirmed by the decision of your office under consideration. Hyde appeals to the Department.

There must necessarily be somewhere a termination of all controversies. If there ever was a case before the Department to which the doctrine of *res judicata* is applicable, it is the case of Mr. Hyde. He has had no less than four hearings before the Department, on appeal or on review, and he now presents himself for the fifth time with a persistence which is worthy of admiration.

In *Hyde v. Warren*, on review, (15 L. D., 415), it is said:

The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of *Hyde et al. v. Eaton, et al.*, decided February 18, 1889, (not reported) and again on motion for review, on January 28, 1891, (13 L. D., 157.) It was there found that this settlement was not made in good faith, for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under that settlement, that is, his claim as a whole was held to be invalid, after a full investigation and opportunity to Hyde to be heard in defence thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person not a party to the former proceedings, presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department, holding it invalid.

There was therefore no error in the decision of your office, in holding that the matter was *res judicata*.

The judgment of your office is approved and affirmed.

MONITOR LODGE.

Motion for review of departmental decision of April 5, 1894, 18 L. D., 358, denied by Secretary Smith, July 20, 1894.

ABANDONED MILITARY RESERVATION—PALATKA SCRIP.

STATE OF FLORIDA (On Review).

The act of July 5, 1884, providing for the disposal of abandoned military reservations, is limited in its application to such reservations as were in existence at the date of its passage, or such as should be thereafter created.

A special swamp indemnity certificate, locatable upon "vacant and unappropriated public lands," may be located upon lands of such character lying within the corporate limits of a city, if in fact such land is not claimed by said city, and can not be under the public land laws.

*Secretary Smith to the Commissioner of the General Land Office, July 20,
(J. I. H.) 1894. (E. W.)*

The State of Florida, by its attorneys, presents a motion for review of departmental decision of September 23, 1893 (17 L. D., 355).

The State of Florida undertook to make selection of lot 3, square 28, and lot 3, square 1, in the city of St. Augustine, being part of section 17, township 7 south, range 30 east, Gainesville, Florida, under special certificate issued to said State, as indemnity for swamp and overflowed lands, under the provisions of the act of June 9, 1880 (21 Stat., 171).

The right of the State of Florida to make said selection is denied in the decision complained of upon the ground that said scrip is not locatable upon lands within the corporate limits of a city, and said ruling is assigned as error in the motion for review.

The lands in controversy having formerly been included within the limits of a military reservation, were restored to the public domain in 1883. Counsel for the State of Florida contend that the same should not be disposed of in accordance with the provisions of the act of July 5, 1884 (23 Stat., 103), the first section of which is as follows:

That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

The plain and manifest purpose of the act as disclosed by its provisions was to empower the President to cause certain lands that are useless for military purposes to be placed under the control of the Secretary of the Interior.

But the lands involved in this case had already been adjudged useless for military purposes, by competent authority, and as such had been placed under the control of the Secretary of the Interior. They belonged to the public domain at the passage of said act in the same sense as if they had never been included within the limits of a military reservation. Said act is manifestly limited in its application to such military reservations as were in existence at the date of its passage or such as should be thereafter created, and it is so held.

The said indemnity certificate known as Palatka scrip is locatable upon any of the vacant and unappropriated public lands of the United States in Florida.

Prior to the date of the decision under review, the Department had not adjudicated any case involving the right of the State of Florida to locate

Palatka scrip within the limits of an incorporate town, but it had made several rulings in cases involving Porterfield and Valentine scrip which are very similar in terms to those of the Palatka scrip.

Valentine scrip is locatable upon unoccupied and unappropriated public land of the United States, not mineral (17 Stat., 649).

Porterfield scrip is locatable on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location, where the minimum price does not exceed \$1.25 per acre (12 Stat., 836). The rulings of the Department upon the question presented in the motion for review have not been uniform, as will be seen by a comparison of the various cases in which said question has arisen.

In the case of *Valentine v. the City of Chicago*, it was held as follows:

Looking to the equitable intention of the lawmakers, I am of the opinion that it was intended that this scrip should be located upon any unoccupied and unappropriated public lands, not mineral, which were in a state of nature, and I do not think that Congress intended that Mr. Valentine, or his assigns, should be allowed to locate said scrip in the business center of one of our great cities, and thus absorb its street, parks, and public improvements. (6 C. L. O., 22.)

In the case of the Townsite of Seattle *v. Valentine et al.* (6 C. L. O., 136), it was held as follows:

Your decision rejecting the application of Thomas B. Valentine to enter certain tracts within the corporate limits of the city with Valentine scrip is affirmed on authority of my decision of the 28th ultimo, in the case of *Thomas B. Valentine v. the City of Chicago*.

The same ruling was followed in the case of *James H. May* (3 L. D., 200), in which it was held that Valentine scrip may not be located upon land occupied and within the corporate limits of a city.

On the 22d of March, 1864, the Department made a ruling in the case of *Byron Reed*, recorded in Letter Book-Lands No. 8, page 92. Byron Reed located two warrants of Porterfield scrip upon lands—

Situate within the incorporate limits of the town of Omaha, although no part of it was actually occupied by the town, and it did not therefore form a portion of the three hundred and twenty acres which could be lawfully entered by the corporate authorities at the minimum price, etc.

In this case it is held that:

The original holders of these warrants or their assignees, could lawfully locate them upon unoffered lands, if not held at a price exceeding \$1.25 per acre.

Again, in the case of *Lewis et al. v. Townsite of Seattle et al.* (1 L. D., 497), Lewis and Hill made application to locate Porterfield scrip on certain lots within the limits of the incorporated town of Seattle. In this case it is held as follows:

I will endeavor to show that the land in question, excepting that covered by Bywater's claim, was not "otherwise appropriated at the time of such location" or attempted location, of said Porterfield warrants, as contemplated by the statute in question. The status of these lands was the same on January 8, 1880, as it was

hereinbefore shown to have been at the date of Bywater's application to file for a portion of said lands, that is, public land within the limits of an incorporated town to which there was no legal claim.

Now with reference to what land may be located with Porterfield warrants, I find departmental decision, dated March 22, 1864, in the case of Byron Reed, wherein it was strenuously urged in argument that said warrants could be located only upon land subject to private entry, but it is therein held that they could be located upon unoffered lands, and that Reed's location of said scrip within the incorporated limits of the town of Omaha was valid.

In the case of *Bovard v. Bunn*, it was also held that a mere *de facto* appropriation does not run against the government nor preclude the location of said scrip, notwithstanding the equities of an adverse claimant. In other words, that this scrip may be located upon any of the public lands, offered or unoffered, not otherwise legally appropriated at the time of such location.

I, therefore, concur in your opinion that the said scrip may be located upon offered or unoffered land, upon land within the limits of an incorporated town, and that no mere *de facto* appropriation can defeat or preclude the location of the same.

The discrepancy in the decisions from which extracts have been made above, with the exception of the case of the Townsite of Seattle *v. Valentine et al.*, is more apparent than real, for it will be observed that the Valentine scrip was rejected, mainly for the reason that the lands upon which it was sought to be located, were occupied for municipal purposes.

The case of Townsite of Seattle *v. Valentine et al.*, made in 1879, is so far modified or overruled in the case of *Lewis et al. v. Townsite of Seattle et al.*, decided in 1881, as to destroy the binding force of the former upon the Department now.

The rule of construction adopted in the case of *Valentine v. City of Chicago*, "looking to the equitable intention of the lawmakers," has not been observed by the Department so far as to supersede the plain and manifest provisions of a statute. Where there is a want of ambiguity in an act, it should be presumed that the intention of Congress is set forth in the ordinary meaning of its provisions, and it should be accordingly applied.

It seems to me that the foregoing decisions may be reconciled by the application of the fundamental rules of construction adhered to by the courts of the country.

In the case of *Thornley v. United States* (113 U. S., 310), the court says:

Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction.

Again, it is held in the case of *French v. Spencer* (21 How., 228):

That where the legislature makes a plain provision, without making any exception, the courts can make none.

Again, in the case of *Yturbide v. United States* (22 How., 290), it is held that:

If there be no saving clause in the statute, the court cannot add one on equitable grounds.

In the case of *Hadden v. Barney* (5 Wall., 107), it is held that:

What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

Now by the application of the rules of construction above set forth to the various cases involving the location of Valentine and Porterfield scrip—with the exception of the case of *Townsite of Seattle v. Valentine et al.*, which has been overruled in the case of *Lewis et al. v. Townsite of Seattle et al.*, as hereinbefore shown—they may be harmoniously reconciled.

The cases in which the Valentine scrip has been rejected may be upheld on principle because the cases really turned upon the fact that the lands upon which it was sought to be located were occupied and appropriated for townsite purposes, and were not free from existing claims.

In the decision under review, it is held that “It is, however, unnecessary to invoke the ruling of the Department in the case of *Mather* in support of your decision, for the reason that the words ‘public lands’ are habitually used in our legislation to describe such as are subject to sale or other disposal, under general laws,’ and do not necessarily embrace all unoccupied and unappropriated public lands,” etc.—citing *Newhall v. Sanger* (92 U. S., 761,) and *Bardon v. Northern Pacific R. R. Co.* (145 U. S., 538.)

In the decisions of the supreme court referred to, “public lands” are defined to be such “as are subject to sale or other disposal under general laws.” The application of this definition to the case at bar is invoked by assuming that “these lands being within the corporate limits of the city of St. Augustine, were not subject to disposal under general laws.”

But this assumption is untenable. The lands in controversy “are subject to sale or other disposal under general laws.” There is no other way to dispose of such lands. If the Commissioner of the General Land Office should order them into market as isolated and disconnected tracts, such a proceeding would be a disposition under general laws. The language of the supreme court must be interpreted in the light of the subject-matter under consideration.

In the case of *Newhall v. Sanger*, the court was seeking to determine the ownership of a quarter section of land in California. The appellee was claiming under the Western Pacific Railroad Company, which held a patent under its grant of 1862. The appellant derived title by mesne conveyance from one Ransom Dayton, the holder of a patent of later date, which recites that the land was within the exterior limits of a Mexican grant called Moquelamos, and claimed that a patent had been, by mistake, issued to the company.

The court sustained the title of the appellant for the obvious reason that lands within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time of withdrawal ordered by the Secretary of the Interior did not pass by the grant to the company. The court held, substantially, that the United States, in its grant to the Western Pacific Railroad Company, undertook to convey only such lands whereto its title was complete. The definition of public lands above quoted was in this connection used by the court as a standard or measure of title, by which to determine what lands are embraced in such a grant as that under consideration. Congress had granted certain public lands, that is, land "subject to sale or other disposal under general laws," but Moquelamos, the Mexican grant, on account of its legal status at the time when the rights of the railroad company attached, not being subject to such disposal, was held to be excepted from the grant.

This ruling gives no support to the proposition that lands within the limits of an incorporated town are not included in the definition of public lands given by the supreme court.

Besides, the phrase "public lands" as used in the act of May 14, 1880 (21 Stat., 140), has been interpreted in the case of *Falconer v. Hunt et al.* (6 L. D., 512), as follows:

What is evidently meant by the phrase "public lands" as used in this statute is public in the sense that no other party had any claim to them.

The interpretation thus given to the phrase "public lands" is, it seems to me, in perfect harmony with the definition thereof given by the supreme court, and the same phrase as it occurs in the act under which the State of Florida is claiming in the case at bar, is equally susceptible of either interpretation.

The quantity of land which may be entered by the corporate authorities of a town is regulated according to the number of its inhabitants, and while so much thereof as may be lawfully entered is not subject to disposal otherwise than for townsite purposes, still all lands in excess of so much as may be lawfully entered are public lands and subject to sale or other disposal under general laws.

The lands in controversy are not claimed by the city of St. Augustine, and, so far as the record discloses, they can not be so claimed. It is not necessary therefore to enter into any technical niceties as to the meaning of the words "vacant" and "unoccupied."

At the time when the State of Florida sought to locate its scrip upon the lands in controversy, it was free from existing claims, and was public lands, "vacant and unappropriated," and I know of no legal reason why the same is not subject to disposal in satisfaction of said scrip.

The State of Florida is seeking to locate its scrip upon "vacant and unappropriated public lands of the United States in Florida," and the two lots mentioned in the record fall within that description.

The plain and manifest terms of the act upon which the Palatka scrip is based, should not be arbitrarily limited because said lots are, by accidental environments, enhanced in value.

The motion is sustained, and the decision complained of is hereby set aside. The application is allowed.

GRANT v. McDONNELL.

Motion for review of departmental decision of April 5, 1894, 18 L. D., 373, denied by Secretary Smith, July 20, 1894.

PRE-EMPTION—FINAL PROOF—MILITARY SERVICE.

BRADLEY v. WAIT.

The provisions of section 2268 R. S., extending the period for the submission of pre-emption final proof in cases where the settler is called away from his settlement by military service, is not applicable to a claim initiated by an enlisted officer while on leave of absence from his company.

Secretary Smith to the Commissioner of the General Land Office,
(J. I. H.) *July 20, 1894.* *(F. W. C.)*

I have considered the appeal by Thomas H. Bradley from your office decision of April 9, 1892, dismissing his protest against the final proof tendered by Francis M. Wait, upon his homestead entry No. 8274, made July 14, 1886, covering the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 13, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 30 N., R. 6 W., Seattle land district, Washington, and holding for cancellation his (Bradley's) pre-emption filing covering the same tract.

On March 14, 1884, Thos. H. Bradley, then a captain in the 21st U. S. Infantry, on leave of absence, filed pre-emption declaratory statement for the land in question, alleging settlement on the 4th of the same month.

On June 27, 1884, he was ordered to his command in Wyoming, where he was stationed at the time of this trial, although he appears to have been since retired.

While on leave he caused a small shanty to be built upon the land, and with others in his employ, cleared and opened trails on the land in question.

He has never resided upon the land since his visit in 1884, but claims the protection of section 2268, Revised Statutes, which provides that :

Where a pre-emptor has taken the initiatory steps required by law in regard to actual settlement, and is called away from such settlement by being engaged in the military or naval service of the United States, and by reason of such absence is

unable to appear at the district land office to make before the register or receiver the affidavit, proof, and payment, respectively, required by the preceding provisions of this chapter, the time for filing such affidavit and making final proof and entry or location shall be extended six months after the expiration of his term of service, upon satisfactory proof by affidavit, or the testimony of witnesses, that such pre-emptor is so in the service, being filed with the register of the land office for the district in which his settlement is made.

During his absence Wait made homestead entry as before described upon which he has resided and made valuable improvements. His compliance with law is not questioned; the only matter raised by the protest by Bradley is whether he (Bradley) is entitled to claim the benefits of said section 2268, Revised Statutes.

Said section is taken from the act of Congress approved March 21, 1864 (13 Stat., 35), and is clearly not applicable to the condition of facts here presented.

It was passed at a time when the armies of the United States were engaged in the war of the rebellion. Calls had been made by the President of the United States for volunteers, and in answer to the same many had left their claims under the settlement laws, who unless protected, would be liable to forfeit their claims while actively engaged in defense of their government. The act contemplated that the initiatory steps had been taken before being called into actual service of the United States.

It was never contemplated that an enlisted officer while on leave of absence from his company might initiate a pre-emption claim, and thereby hold in reservation the tract claimed until his death or discharge from the service.

Further discussion of the case is unnecessary. Your office decision is affirmed and Bradley's filing will be canceled.

RUSSELL v. HAGGIN.

Motion for review of departmental decision of April 16, 1894, 18 L. D., 420, denied by Secretary Smith, July 20, 1894.

DESERT ENTRY—PRICE OF LAND.

ROBERT J. GARDINIER.

The provisions of the amendatory act of March 3, 1891, fixing the price of all desert land at one dollar and twenty five cents per acre, are applicable to a desert entry of land within railroad limits, made prior to said act, but not perfected, as required by law, until thereafter.

Secretary Smith to the Commissioner of the General Land Office,
July 24, 1894. (J. I. H.)

On the 11th of March, 1889, Robert J. Gardinier filed in the local office a declaration, under oath, that he intended to reclaim the N. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 24, T. 14 N., R. 75 W., Cheyenne land district,

Wyoming, under the provisions of the desert land law of March 3, 1877, (19 Stat., 377).

On the 9th of April, 1892, the local officers rejected the final proof submitted by Gardinier, the reason therefor being stated as follows: "Because the testimony of claimant and witnesses was not taken at the same time, and sufficient money was not forwarded in payment for the land."

On August 22, 1892, your office rendered a decision in the case, upon an appeal taken by Gardinier from the decision of the local officers, and held that their objection to the proof, on account of its not all being taken at the same time, was without merit, but that they were justified in rejecting the proof because the party failed to tender sufficient money. Upon the latter ground their judgment was affirmed, subject to appeal.

The case is brought to the Department upon an appeal from said decision, in which the grounds of error are specified as follows:

First. There was error in said decision in holding that the price of the land involved in said claim should be fixed at \$2.50 per acre, instead of \$1.25 per acre.

Second. Said decision is contrary to law and the regulations of the General Land Office, and the Department of the Interior.

The land involved is within the granted limits to the Union Pacific Railroad Company, which road was constructed within the time prescribed by law.

It was held that persons who had initiated entries for such lands, prior to March 3, 1891, should pay \$2.50 per acre therefor.

The 7th section of the desert-land law, as amended by the 2d section of the act approved March 3, 1891 (25 Stat., 1095-6-7), provides as follows:

That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre of said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act.

This section of the act was construed by Secretary Noble to authorize desert-land entries, without regard to the situation of the land with relation to the limits of railroad grants, at one dollar and a quarter per acre. (14 L. D., 74.)

This section operates upon entries then existing, as well as upon subsequent entries of desert-land. It contains the following language: "But no person or association of persons shall hold by assignment or otherwise prior to the issue of patent more than three hundred and

twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act." The words, "but this *section*," do not, in my opinion, relate to the provisions of the entire section, but do relate simply to the quantity of lands which one person could thereafter enter, and the word "section," in the act above quoted should be construed to mean "provision." It would then read: "But this *provision* shall not apply to entries made prior to the passage of this act."

This is manifest, in my judgment, from the fact that the act of 1891 is similar to the act of 1877—of which the act of 1891 was amendatory—in reference to the price to be paid for desert-lands, and it amends the act of 1877 as to the quantity of land that could be entered by any one person or association of persons. Evidently the words above quoted, taken from the act of 1891, were intended by Congress to limit the operation of the act to entries *thereafter* to be made, as to the quantity of land, and saved all entries *theretofore* made, as to the quantity of land; but it was not intended to limit the benefits as to price to such entries as might be made subsequently to the date of the passage of the act.

The declaration in this case was made March 11, 1889; and before reclamation was completed as required by the statute, the act of 1891 was passed, which, as construed by Secretary Noble, fixed the price at one dollar and a quarter per acre, regardless of the location. Construing the act as I do, as to the price the entryman should be required to pay for desert-land, I am of the opinion that this entryman should be allowed to purchase at one dollar and a quarter per acre. Having paid fifty cents per acre at the time of making his entry, he will be credited with that amount in making his final payment; and upon paying an additional sum of seventy-five cents per acre, he will be allowed to perfect his entry, and final certificate will issue, if his final proof shows compliance with the law under which the entry was made.

The decision appealed from is reversed, in so far as it affirmed the decision of the local officers.

HOMESTEAD—MARRIED WOMAN.

NIX v. SIMON.

A married woman, whose husband from disease and infirmity is permanently incapacitated to support the family, is qualified to make a homestead entry as the "head of a family."

*Secretary Smith to the Commissioner of the General Land Office, July 24,
(J. I. H.) 1894. (C. W. P.)*

I have considered the case of Edward V. Nix against Mary J. Simon, on appeal of the former from your office decision of January 5, 1893, allowing Mary J. Simon's application to make homestead entry of the

SE. $\frac{1}{4}$ of Sec. 27, T. 13 N., R. 1 W., Oklahoma land district, Oklahoma Territory.

It appears from the record that on May 24, 1892, Mary J. Simon filed her application to enter said tract, stating in her affidavit that she established her residence on the tract in question on May 8, 1889, her family at that time consisting of herself and a minor child; that she has continued to reside thereon ever since; that on December 11, 1890, she married Lewis Simon; that her said husband is totally disabled by age, disease and infirmity, from doing any mental or physical labor; that his physical condition is, and has been, continuously since August 1, 1891, such as to require medical treatment and the care and attention of a nurse, by reason whereof he is unable, and does not pretend or attempt to exercise the privileges or rights of the head of the family, but that all those rights and duties are exercised by her. Her affidavit is corroborated by J. B. Rolator, M. D., who alleges that he attended Simon during the winter of 1891 and 1892, and that from his age and diseased condition he was wholly disabled from any kind of manual labor, or from doing any work or business to earn a living for himself or a family, and that from said conditions it is wholly improbable and, he believes, impossible that he will ever be able so to do.

The local officers rejected her application because she was a married woman, and not qualified, and she appealed to your office, which reversed the judgment of the local officers.

Edward V. Nix, who had, on June 6, 1892, filed application to enter the tract in question, alleging settlement May 27, 1892, appealed from the decision of your office.

The only question for consideration is, may a married woman, the mother of a child then living, whose husband is totally helpless through what his physician believes to be an incurable malady, and who, as well as the child, is dependent upon her for support, make a homestead entry?

In the case of Eben Bugbee (2 L. D., 102), it was held that the wife of an insane man, as head of a family, her husband being in a state of "civil death", is entitled to make a homestead entry.

It is the established ruling of the Department that a deserted wife is entitled, as the head of a family, to make a homestead entry. Pawley *v.* Mackey (15 L. D., 596); Scott *v.* Pinney (13 L. D., 621); Wilber *v.* Goode (10 L. D., 527); Kamanski *v.* Riggs (9 L. D., 186).

In Teresa Landry (13 L. D., 539), it was held that a wife whose husband was afflicted with an incurable malady, which rendered him helpless and unfit for the performance of the duties of the head of the family, was entitled to make pre-emption entry, as the "head of a family."

In the case at bar, it is not denied that Mrs. Simon is in the category of a wife, whose husband is helpless from what is believed to be an incurable malady, and whose family is wholly dependent upon her

for support; but it is asserted that she is disqualified by reason of being a married woman, and consequently not in law the "head of a family." But the criterion in such cases is not whether she is a married woman, but whether her husband is permanently disabled from the support of his family, and the family dependent upon her for support.

The evidence shows that Mrs. Simon comes within the rule, and the judgment of your office is affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.**NORTHERN PACIFIC R. R. CO. v. DAVIS.**

The provisions of section 6 of the act of July 2, 1864, providing for a statutory withdrawal on the filing of a map of general route, and extending the pre-emption and homestead laws to all other lands on the line of said road when surveyed, excepting those granted, constitutes a prohibition against the making of any other withdrawal; and, an indemnity withdrawal made by direction of the Commissioner of the General Land Office, in violation of such prohibition, is without effect as against the acquisition of settlement rights.

Secretary Smith to the Commissioner of the General Land Office, July 25, 1894. (V. B.)

The NE. $\frac{1}{4}$ of Sec. 3, T. 131 N., R. 63 W., in the Fargo, Dakota, land district, is outside of the forty miles or granted limits, but within the fifty miles or indemnity limits of the grant, made by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific Railroad. The map of definite location of the road opposite to this land, was filed on May 26, 1873, and on June 11, 1873, the Commissioner of the General Land Office ordered the odd-numbered sections within the indemnity limits to be withdrawn for the benefit of the railroad company from sale or entry, under the general land laws. The township containing said section was subsequently surveyed, and the approved plats thereof filed in the district office, December 19, 1882. On January 6, 1883, Jennie L. Davis filed pre-emption declaratory statement for the described tract, alleging settlement on October 1, 1881, and in March, 1883, the company selected the same as indemnity land. Subsequently, Mrs. Davis made application to the register and receiver for an order giving public notice of her intention to make final proof and entry under her declaratory statement, which application was denied, because of said order of withdrawal, for the benefit of the railroad company, prior to her settlement, and also because of the selection of the tract by the company, as indemnity land. On appeal by Davis your office reversed the action of the local office, awarded the better right to Mrs. Davis, and authorized her to make final proof and entry of the land in controversy. On appeal by the company, the last judgment was affirmed here; and a motion for review and reversal of the departmental decision is now before me for consideration.

It does not appear that the tract in question was within the limits of the statutory withdrawal provided for by section 6 of the granting act, as defined in the case of Buttz against said company (119 U. S., 55, 72); and as it did not fall within the primary limits of the road upon the definite location, it follows that on January 8, 1883, it was public land subject to the settlement, alleged to have been made by Mrs. Davis, and that, therefore, when the approved plat of survey was filed, it became subject to entry under the general land laws, unless the order of withdrawal of June 11, 1873, by the Commissioner of the General Land Office was legally sufficient to prevent such settlement and entry.

The decision now sought to be reversed is based upon the ruling of the Department in the case of the same company against Guilford Miller (7 L. D., 100, 120), where it was held that the granting act to the company "not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it." Therefore, the motion for review herein is in effect an effort to secure a reversal of the ruling in the Guilford Miller case, in that respect; and the question of the authority of the Commissioner to order said withdrawal is the only point involved, and is the only one which will be discussed, for if the land was properly subject to the settlement and filing of Mrs. Davis, the company can gain no rights by its subsequent selection of the same as indemnity land.

The point at issue has been argued ably and elaborately both orally and on brief, and has received at my hands patient and deliberate consideration: the result of which is that I am very clear in my judgment that the motion for review must be denied.

The practice of issuing executive orders for the withdrawal of public lands from sale or other disposal because they were, or might be needed for public purposes or to effectuate grants, has undoubtedly existed for many years and grown with its use. But the origin of this asserted power on the part of the executive is involved in obscurity. In view of the provision in Article 4 of the Constitution, conferring upon Congress the exclusive "Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," it would seem that there ought to be some legislation, which, either by expression or clear implication, confers upon the executive so important a power as that of withholding public lands from the operation of laws, relating to their disposal, whenever, in the discretion of the executive, it is thought proper to do so—a disposal, be it remembered, expressly reserved by the Constitution to the Congress itself. But in my researches I have not been able to find such legislation.

So great is the power claimed, so far reaching and dangerous may be the results of its exercise, that if the matter were submitted to me as an original proposition, I do not think that I would be warranted in ordering such a withdrawal, in the absence of legislation and entirely upon a supposed power inherent in the Secretary of the Interior.

I am supported in these views by those of Mr. Secretary Lamar, as expressed in the case of the Atlantic and Pacific Railroad Company (6 L. D., 84), where was being considered the propriety of revoking the indemnity withdrawals heretofore made for that and other railroad companies. On page 87 of that decision, the Secretary said:

Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise.

More especially would I feel that such action was unwarranted, if, in any given case, Congress, the sole constitutional repository of such power, had already exercised it, even to a limited extent. But, if, in addition to that action by the Congress, there appeared to be a prohibition against further withdrawals, it would be a flagrant disobedience to the law if the executive failed to obey its mandate.

I think these observations are clearly applicable to the grant to the Northern Pacific Railroad Company.

An examination of the act of Congress making this grant fails to show, either by expression or implication, any direction to the executive authorities to make a withdrawal thereunder, as may be found in some other acts making land grants in aid of the construction of railroads.

But in section 6 of the Northern Pacific act Congress itself clearly and unequivocally makes what may be termed a withdrawal, which, by force of the statute, becomes self-acting when the prescribed conditions arise.

By that section it is provided that after the general route of the road shall be "fixed," "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 by this act."

Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands, within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive. Therefore an attempt, by the officers of the Land Department, to supplement that action by additional action of their own in that respect must be because they presume that Congress has not taken sufficient and proper steps in the premises—a setting up of their own judgment against that of Congress.

In the Guilford Miller case, on page 113, Mr. Secretary Vilas has well and forcibly sustained this view of the law, as follows:

In this case, the legislature undertook to direct with explicitness the condition and extent of the preliminary withdrawal. The legislative will having been expressed with definiteness, it must be taken to have been exhaustively expressed, and that direction implies that no other withdrawal should be made. The force of the act of Congress is as much negative as affirmative, and equally obligatory in both aspects. Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company,

without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. The effect of the statute of 1864, when it became operative by the filing and acceptance of a map fixing the general route, was not to be interrupted by any official of the government. No provision was made that its mandate, that the odd sections should "not be liable to sale, or entry, or pre-emption, except by the said company," should be terminated as to the particular lands to which it became applicable, at the will of a Department officer, and applied to other and entirely different lands. The duration of that withdrawal was, as the supreme court has said in the case referred to, "until the definite location is made."

These views alone would be sufficient, in my judgment, to sustain the conclusion reached in this case, but I am not left to stand upon them only, for Congress in the same section has gone further. Not content with ordering a withdrawal, that body expressly declared a prohibition against the making of any other withdrawal, when it said, in the next clause of the same sentence, that the provisions of the pre-emption and homestead laws "shall be, and hereby are, extended to all other lands on the line of the said road when surveyed, excepting those hereby granted to said company."

Here is an enactment in which the most comprehensive language is used. Having withdrawn the granted sections, "all other" lands within the grant, along the line of the road, are being legislated for.

It would seem therefore to follow logically, when it was commanded that the pre-emption and homestead laws be extended to "all other lands," it was all those lands within the limits of the grant which had not been otherwise disposed of by the act.

The "other" lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for "all" other lands surely can not mean only a portion of the other lands. *Qui omne dicit, nihil excludit* is a maxim well recognized in the construction of statutes and is applicable here.

This aspect of the case is presented and fully discussed by Mr. Secretary Vilas in the Guilford Miller case, and concurring in his reasoning, it is not necessary that there should be further elaboration of the argument.

The views which I have herein expressed were entertained also by Mr. Secretary Lamar, and are clearly and tersely stated by him in his opinion, before quoted from, in the case of the Atlantic and Pacific Railroad, in 6 L. D., p. 87. The grant to that company was made July 27, 1866, and the sixth section thereof is in the same words as those of the grant to the Northern Pacific. Said Secretary Lamar in the opinion cited:

It would seem that the very words of the act, "the odd-numbered 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," of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But

when the provision following this, in the very same sentence is considered—"but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "an act to secure homesteads to actual settlers upon the public domain," approved May 20, 1862, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company"—it is difficult to resist the conclusion that Congress intended that "all other lands excepting those hereby granted to said company" shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn.

Reading the law of the case as above stated, and concurring in the views of my predecessors, in that respect, the motion for review herein is denied.

SURVEY—AMENDED PLAT—NOTICE—SETTLEMENT.**DOBIE v. JAMESON.**

An entry should not be allowed of land included within an amendment to a plat of survey until due notice of the filing of said amended plat has been given, even though the amendment is made without additional work in the field.

An entry allowed in violation of this rule will not give the entryman any advantage as against an adverse claimant who alleges priority of settlement.

A settler may purchase and use the improvements of a prior occupant of the land, but acquires no rights as a settler except by his own acts of settlement.

Acts of settlement upon unsurveyed land must be of such a character, and so open and notorious, that the public generally, may have notice of the settlers claim.

Acts of settlement can not be done by an agent or employee but must be performed by the individual himself.

*Secretary Smith to the Commissioner of the General Land Office, July 20,
(J. I. H.) 1894. (P. J. C.)*

The land involved in this appeal is the SW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 9 W., W. M., Vancouver land district, Washington.

The record shows that William Jameson made homestead entry of said tract June 20, 1890, under the act of March 2, 1889, (24 Stat., 854). On November 22, 1890, Thomas Dobie filed an affidavit of contest, alleging that said land was settled on by one Beck, about November 1, 1889, who constructed a house thereon, and did some clearing; that about April 28, 1890, the contestant purchased the improvements, and at the same time established his residence on the S. $\frac{1}{2}$ of said SW. $\frac{1}{4}$, and has resided there continuously, and made some further improvements; that he was a *bona fide* settler on said land at the time of the entry, and intended to make homestead entry thereof as soon as the same was subject to entry; that claimant has never resided or established his residence on the tract; that the entry was made in bad faith and for speculation; that contestant exercised diligence to secure an entry, and only learned "within the last few days of the entry of claimant."

That pursuant to the Hon. Commissioner's letter "E", of May 16th, the Hon. Surveyor-General transmitted to said office a plat of the survey of said land, which was

received and filed on the 29th day of May, 1890, and no notice of the receipt of said plat was published, or notice that said land was subject to entry, and that contestant only knew thereof long after claimant filed, and that the Hon. Register and Receiver refused to permit or receive a filing upon said land until so instructed by said letter aforesaid, and contestant never had notice or an opportunity of knowing that said land was subject to entry, and claimant, with intent to cheat and defraud contestant, and defeat his just claim and right to said land, filed upon said land, and misled contestant in the premises.

Service was had on the claimant by publication, and the hearing before the local officers. As a result, they recommended the cancellation of Jameson's entry, and that plaintiff be given the preference right of entry. On appeal, your office, by letter of December 1, 1890, reversed their action, whereupon Dobie prosecutes this appeal, assigning as error that your said office decision is against the law and the evidence.

Informal inquiry in your office discloses the fact that the survey of a part of the township in which this land is situated, was approved January 31, 1870. It did not, however, include section 9. The south and west lines of said section were run, and corners established, marking the north-west corner of section 15, and the north-east corner of section 16; also the north-west corner of section 16, the north-east corner of section 17, and the south-east corner of section 8; also the northwest corner of section 8, and the south-east corner of section 5. Thus three corners of what is now section 9, were established, to wit: the south-east, the south-west and the north-west.

It is stated in the opinions of your office, and the local office, and conceded by counsel on both sides, that Jameson tendered his homestead application for the SW. $\frac{1}{4}$ of said section 9, November 21, 1889, which was rejected because the land was unsurveyed, whereupon he appealed. It seems that the claimant, who is himself a surveyor, and has had much to do with the surveys of the public lands, enquired at the office of the surveyor-general of Washington, after his appeal, about the survey of this section, and was informed by the clerk that he considered this section surveyed, "as much as it ever would be." It seems he came east on a business trip, and called at your office, and finding that his appeal had not been sent up, he wrote the local office concerning it, and the case reached your office December 22, 1889, and on May 16, 1890, your office sent the following letter to the surveyor-general:

Upon the receipt hereof, you will please amend the original plat of township 14 north, range 9 west, Willamette Meridian, by protracting thereon the south-west quarter of section 9. Three corners of said quarter-section having been marked in the field, and under the general rule, the quarter-section may be shown upon the plat.

Forward authenticated diagrams, showing the amendment to this office, and to the proper local land office.

The amended plat was sent by the surveyor-general to the local office May 26, 1890, and your office, by letter of June 7, 1890, returned Jameson's application to make homestead entry, to the local office, "for your (the local office's) further action." On June 20, following, his entry was

placed of record. It is conceded that no notice of the receipt of the amended plat, or notice that the said land was subject to entry, was given by publication.

It is contended by counsel for Dobie that the allowance for Jameson's entry was, under these circumstances, erroneous, inasmuch as the notice required to be given by the circular of instructions of October 21, 1885, (4 L. D., 202), was not given. These instructions specifically state how publicity shall be given, by posting notices, and otherwise, that the plat of survey will be filed on a day to be named, "which shall not be less than thirty days from the date of such notice", and until this is done, the plat will not be regarded as officially received, and it is only after such notice has been given, that entry can be made of the lands included in the survey.

On the other hand, it is insisted that as this was simply an amendment to a survey, without work in the field, made by protracting the lines in the office, it does not come within the rule; and the entry should be allowed to stand.

Admitting, for the sake of argument, that this section could thus be considered as legally surveyed for the purposes of entry, yet I think proper publicity should have been given of the fact, as required by the rule. The only object in giving this notice is to give all settlers an equal opportunity to protect their settlement rights; to give all an equal chance in the presentation of their claims. While settlers on unsurveyed land acquire no rights thereto, as against the government, yet, as between themselves, the question as to who has the prior right, will be inquired into in controversies between them.

It is fair to assume that Jameson, who is evidently skilled in all matters pertaining to surveys of the public land, procured the survey of this section; and within thirty days after the amended plat was filed he made his entry. I think this was clearly erroneous, and he should not be allowed any advantage by reason thereof, and that this case should be decided solely on the question of prior settlement, disregarding, for the purposes of this controversy, his entry.

It is contended by counsel for Jameson, that if his entry be considered erroneous on this ground, then the thirty days' notice must be given before an entry can be allowed. This is not tenable as to the land in controversy, because the very object of giving the notice has been attained; that is, so far as the parties to this controversy are concerned. It is shown, incidentally, that there were settlers on the balance, at least, some on other parts, of the section, but if there are any controversies as between them, they are not now before me, and it is only necessary to say that they will be decided on their own merits when presented.

This question of notice to the settlers after survey, as presented in the case at bar, is clearly distinguishable from that decided in *Laubenthaler v. Taylor* (18 L. D., 214). In that case, Taylor's entry was not

made until eight months after the plat had been filed, and there was no charge or showing made that the local office had not given the required notice.

It is shown by the testimony in this case that one Beck had built on the S. $\frac{1}{2}$ of said quarter-section, the land claimed by Dobie, a house sixteen by twenty feet. The construction was begun in December, 1889, and finished in the latter part of April, 1890. Dobie purchased these improvements, and settled upon the land May 1, 1890. There had also been some clearing done by Beck, and Dobie did some more after his settlement. He lived on the land continuously from that time. There is no attempt made by defendant to dispute the fact of Dobie's settlement and residence. It is a well settled rule that a settler on the public land cannot claim any rights, as such, by reason of the acts of his predecessor on the land. He has the right to purchase and use the improvements as his own, but his rights as a settler date from his own settlement on the land.

Jameson testifies that he first went upon the land on October 14, 1889; "and looking around for a site, I selected this claim." On this visit he was accompanied by one Meyer. At this time, Jameson says he was there two or three hours; he says he was on three of the forties of the quarter, and "did a little slashing, sufficient to satisfy myself that I claimed the land as my residence for the future." He used a small hand-axe for slashing, and says he did it alone, Meyer not being present; that it was twenty or thirty feet square, and it took him fifteen or twenty minutes to do it. The point at which this was done was north of the south line of the NW. $\frac{1}{4}$ of said SW. $\frac{1}{4}$. (The testimony shows that the S. $\frac{1}{2}$ of said quarter-section fronts on an arm of Shoal-water Bay; that it rises from the tide lands to an altitude sufficient to give a good view of the Bay, to about the east and west centre line dividing said SW. $\frac{1}{4}$, when the ground recedes, thus making this line the crest of the hill). The point where this slashing was done was therefore over the hill from the Bay, and by contestant's witnesses, it is said that the Bay cannot be seen from that point. Jameson says the steps taken to make actual settlement, were to hire some men some time after this visit, to "build a house, and make the necessary improvements to establish my claim." He was again on there about an hour November 7, 1889, "and made another examination of the land." In the construction of this house he employed Friend, Meyer, Ingle, and one Michael Daly, who is shown to have been in his employ for several years, assisted them. The house was twelve by fourteen feet, of split lumber, with a window covered with muslin, and a door, which was finished about January 1, 1890. The same men, during this time, also built a house for Daly.

It appears that "on his return from the east", Jameson ascertained from Friend the sort of a house he had built, when he concluded it was not suitable for his family, and directed Friend "to select a more eligi-

ble site", and sent him over again to build another house. The new house was also built of split lumber, near the site of the first, and on the N. $\frac{1}{2}$ of said quarter-section. It was begun about February 23, 1890, but it is not definitely shown when it was completed. It was built by Daly and Friend, of lumber that they had sawed and split themselves; it was fourteen by twenty feet, with a kitchen ten by fourteen feet, containing four rooms in all.

Jameson says he was there again in April, and stayed all night. On July 16, his family moved in the house, and he was then there two or three days; was there again in August one day; in September two days; and in December two nights and one day. These visits comprise his entire presence on the land.

It will thus be seen that Jameson's presence on the land prior to May 1, the date of Dobie's settlement, were his visits in October, November and April. It is not shown that he did anything on any of these occasions, that could be construed as a *bona fide* settlement. He did not make it his home, or do anything personally to indicate that he had any intention of so doing; none of his effects, or those of his family, were on the land until July 16.

The acts of settlement upon unsurveyed land must be of such a character, and so open and notorious, that the public generally, may have notice of the settler's claim. *Little v. Durant* (3 L. D., 74); *McWeeney v. Greene* (9 L. D., 38).

These acts cannot be done by an agent or employee, but must be performed by the individual himself. *Byer v. Burrill* (6 L. D., 521); *Powers v. Ady* (11 L. D., 175).

Your judgment is therefore reversed, and Jameson's entry, to the extent of the conflict with Dobie's claim, will be cancelled; Jameson's entry to stand, if he so desires, for the remainder of said SW. $\frac{1}{4}$, subject to a full compliance with the requirements of the law.

PRACTICE—NOTICE OF APPEAL.

NORTHERN PACIFIC R. R. CO. v. OLSON.

A copy of the appeal and argument thereon mailed to the register of the local office is not notice of such appeal to the adverse party if not served on him by said officer.

*Secretary Smith to the Commissioner of the General Land Office, July 20,
(J. I. H.)* 1894. *(F. W. C.)*

With your office letter of March 19, 1889, was forwarded the record in the case of the Northern Pacific Railroad Company *v. Peter Olson*, involving the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 9, T. 18 N., R. 8 W., Seattle, Washington, on appeal by the company from your

office decision of October 9, 1888, sustaining the action of the local officers in rejecting its attempted selection of this land, the list including which was filed April 28, 1885.

This land is embraced in the homestead entry of Peter Olson, made March 22, 1886, and on behalf of Olson a motion has been filed to dismiss the appeal by the company for the reason that no service of the same was ever made upon him, as required by the rules of practice.

In support of his motion Olson alleges that he was informed by the local officers that the railroad company had no claim to this land; that in accordance with published notice he made proof in 1891, against the acceptance of which the company filed no protest, and the same was regularly accepted and final certificate issued; that the first he learned of any adverse claim by the company was in answer to a letter addressed to your office last February, making inquiry as to why patent did not issue upon his entry, when he was informed that the land was involved in a case pending before this Department upon appeal by the company, as before set forth.

An examination of said appeal shows that accompanying the appeal is an affidavit by the resident counsel for the company, to the effect that on November 16, 1888, he mailed a registered letter addressed to the register of the United States land office, Seattle, Washington, enclosing a copy of the appeal and argument in this case.

It is plain that this is not sufficient notice, for if the company chose to make the register its agent, and he failed to make the service as required, the company is bound thereby.

As the appeal was never served upon Olson, the same must be, and is hereby, accordingly dismissed.

HOMESTEAD APPLICANT—SECTION 2289 R. S.

CHILDS *v.* AYERST ET AL.

One who is in possession of a quarter section of land under a timber culture entry is not the "proprietor" of said tract and disqualified thereby as a homestead applicant under section 2289 R. S., as amended by the act of March 3, 1891; nor is the ownership of stock, issued by a corporation whose capital is invested in lands, a disqualification under said statute.

*Secretary Smith to the Commissioner of the General Land Office, July 21,
(J. I. H.)* 1894. *(P. J. C.)*

The land involved in this appeal is the SE. $\frac{1}{4}$ of Sec. 30, T. 153 R. 47, Crookston, Minnesota, land district.

The history of this tract, so far as material to this controversy, is that in May, 1879, one John H. Friese filed a pre-emption declaratory statement for it, and in March, 1880, transmuted the same to homestead entry. In November, 1880, one Fred. Reynolds contested the same, and

on an ex parte hearing, the Friese entry was cancelled in August, 1881. In September following, Reynolds made homestead entry, and commuted it to cash entry in May, 1882. It being shown to your office that Friese had been killed by Indians in July, 1880, and that his heir, Senholz, made claim to it, Reynold's entry was suspended, and a hearing was ordered, which finally ripened into a departmental decision, cancelling Reynold's entry, on the ground of his disqualification to make entry, and Friese's entry was re-instated for the benefit of his heirs. (*Senholz v. Reynolds*, 6 L. D., 241).

It appears that your office, on July 2, 1888, and July 8, 1890, instructed the local officers to give notice, under the circular of December 20, 1873, (1 C. L. O., 13), to the entryman to submit proof within thirty days, and show cause why the entry should not be cancelled, and on August 29, 1890, they reported that the notice had been given, and no action taken in the premises.

It also appears that on May 20, 1890, one Thomas T. Brown, by letter addressed to your office, inquired as to the status of the land. On July 10 following, he was informed of its status, and that in the event of cancellation it would be subject to entry, and advised to initiate a contest against it, "and if successful, thereby secure a preference right of entry." On July 20, 1890, he informed your office that he had filed his contest; also an application to file on the land. By letter of May 12, 1891, your office cancelled said entry, and directed the local office to notify Brown that he would be allowed thirty days to renew his application to enter the tract, and should he fail to do so, "you will then note the cancellation of said entry as of date hereof, and allow the tract to be entered by the first legal applicant therefor." It is stated in said letter that the application of one Fritz Mellah to contest said entry, which had been rejected by the local office, was forwarded March 6, 1891, "but in view of the pending action, no further steps will be taken thereon."

It appears from the report of the register of May 26, 1891, that on December 16, 1890, Ellsworth D. Childs "appeared and filed a power of attorney from Mr. Brown, authorizing the said Childs to withdraw the application of Brown, filed July 15, 1890, which Childs did", and on March 6, 1891, he "filed an application for an entry of said land." On May 25, 1891, Childs again offered his homestead application, "which was rejected for the reason that under letter "H", of May 12, 1891, one Thomas T. Brown is allowed thirty days in which to renew his application for an entry on said tract." (None of the papers in reference to Childs' applications are in the files). He appealed from this rejection. Brown renewed his application to enter, June 10, 1891, and it was rejected because of his withdrawal of his former application, by Childs under the power of attorney. He appealed.

It seems that one Johannes Cornelius filed his timber culture application for the land December 16, 1890. Also on June 22, 1891, one

Andrew L. Anderson made application to make homestead entry; also on December 1, 1891, George Ayerst presented his homestead application. These applications were rejected, and all transmitted to your office.

By letter of July 23, 1891, your office ordered a hearing, "for the purpose of determining the question of superiority of right to enter the tract in dispute, as between Brown and Childs." At the hearing, the other parties intervened. Brown withdrew his application, and filed a paper stating that he had sold to Childs all his right, title and interest to the land. The hearing was then proceeded with as to the other parties. Ayerst, in his affidavit for intervention, alleged that Childs was not qualified to make entry, for the reason that he is the owner of more than three hundred and twenty acres of land in the State of Minnesota, and that he—Childs—is seeking the land for speculative purposes.

As a result of the hearing, the local officers held that Childs was qualified, and recommended that his entry be allowed. The other parties appealed, and your office, by letter of October 12, 1892, affirmed their action. Ayerst alone prosecutes this appeal, the principal assignment of error being that your office erred in not finding that Childs was the owner of more than one hundred and sixty acres of land at the time he made his application to enter.

The government has nothing to do with the trades and trafficking between the original parties to this action in regard to this land, and will take no notice of them in deciding who, under the land laws, is entitled to make the entry.

Brown being out of the case, it is not necessary to discuss his original status, further than to say that whatever right he had to make entry of the land, he abandoned, and thus left it open to the first qualified applicant. Childs gained nothing by his application of March 6, 1891, because the land was then segregated by Fries's entry, then under investigation by this Department. But by his application of May 25, 1891, he became the first applicant, and unless disqualified, as alleged, is entitled to have his entry placed of record.

The testimony shows that at the date of Childs' application, he had a timber culture entry of one hundred and sixty acres in said land district, and that he commuted the same to cash entry June 8, 1891; also that the firm of which he is a member—consisting of himself and one James Hill—and in which they are equal partners, own "one block of land three hundred by four hundred feet."

Section 2289, Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), provides that:

Every person who is head of a family, etc. . . . shall be entitled to enter one-quarter section, or a less quantity, but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any rights under the homestead law.

The status of Childs must be determined as of the date of his application, at which time he had made and still held the timber culture claim, and his interest in the block.

The question therefore to be determined is whether an entryman who has possession of a quarter section under a timber culture entry, is the proprietor of one hundred and sixty acres of land, as contemplated by the act, conceding, for the purposes of this discussion, that his ownership in the block, added to one hundred and sixty acres, would disqualify him, under the statutes, from exercising the homestead right.

The word "proprietor" is synonymous with "owner", in its legal signification, and is defined to be one "who has dominion of a thing real or personal, corporeal or incorporeal, which he has the right to enjoy, and to do with as he pleases, even to spoil or destroy it, as far as the law permits. The right of the owner is more extended than of him who has only the use of the thing. The owner of an estate may, therefore, change the face of it. He may commit what would be considered waste if done by another." (2 Bou. Law Dic., 11th Ed., 276).

While the entry under the timber culture law segregates the land from the public domain to the extent of protecting it from subsequent entries, yet it cannot be said that the entryman is the owner or proprietor of the land. He has at best but an equitable title to the land, the government holding the naked legal fee in trust for him, subject to his compliance with the requirements of the law, and until forfeited by failure to perform the conditions; his equitable right in the land will prevail, not only against individuals, but against the government. (Opinion of Attorney-General, 1 L. D., 30). But he has not that dominion over it which gives him the right of alienation, an essential right to proprietorship. It is unnecessary to further discuss the subject, because I do not think any one can seriously contend that Childs was the proprietor of the land included in his timber culture entry, in the sense contemplated by the statutes.

It is also insisted by counsel that Childs is disqualified by reason of the fact that he is largely interested in an incorporated company, known as the E. D. Childs Co., which owns a great amount of real estate in that vicinity, consisting of between 5,000 and 6,000 acres of land, and a large number of lots in the town of Carman. It is not necessary to go into the details of the incorporation of this company, and the transfer to it of the real estate owned by Childs and James Hill, all of which transpired prior to the date of his application to enter the land in question.

The fact that Childs owns stock in this corporation is not a disqualification under the statute. It cannot be said that he owns the land; his interest in the company is represented by the stock he owns, which is only personal property. In Schouler's Personal Property (Vol. 1, 620), in discussing this proposition, it is said:

In fact, as to every joint-stock corporation, the shares in a shareholder's hands entitle him to a proportionate part in the capital, which is regarded as so much

money; and his right is a money right, so far as himself is concerned, even though that capital, with reference to the fictitious personage known as the corporation, be invested in real estate, or in goods and chattels, or what is commonly the case, in both together, for the purposes of the corporate business. For this reason the lands of a corporation may be taxed as real estate, while the stock is personal property; and according to the modern doctrine, while a corporation may own a great deal of real, and a great deal of personal property, the interest of each individual shareholder is "a share of the net produce of both, when brought into one fund." Shares in corporation stock being regarded therefore as personal property, they are to be classed with incorporeal personal property, or, as it is sometimes said, they are of the nature of *chooses in action*; for the certificate of stock is merely corporeal evidence of the incorporeal right, and a muniment of title, as in the case of bills and notes.

Your office judgment is therefore affirmed.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT.**CENTRAL PACIFIC R. R. Co. v. BECK.**

Under the terms of the grant to this company the withdrawal made upon the map of general route precludes the subsequent acquisition of settlement rights adverse to the company; and a settlement so made, even though it existed at definite location, would not serve to except the land settled upon from the operation of the grant.

*Secretary Smith to the Commissioner of the General Land Office, July 24,
(J. I. H.)* 1894. *(F. W. C.)*

I have considered the appeal by the Central Pacific Railroad Company from your office decision of November 19, 1892, holding that the SE. $\frac{1}{4}$ of Sec. 7, T. 2 S., R. 2 W., M. D. M., San Francisco land district, California, did not pass under the grant made to aid in the construction of said railroad, and that the same was erroneously patented on account thereof, for the recovery of which a suit is recommended under the provisions of the act of March 3, 1887 (24 Stat., 556).

This land is within the limits of the grant for said company made by the act of July 1, 1862 (12 Stat., 489), and of July 2, 1864 (13 Stat., 356). By the seventh section of the act of 1862, it is provided:

That within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed, and set off, as fast as may be necessary for the purposes herein named.

At the time of the passage of the amendatory act of 1864, the general route of the road had not been designated, and, therefore, the fifth section of that act says—

That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completing of that part of the railroads, required by the terms of said act (of 1862), of each company, be, and the same is hereby, extended one year from the time in said act designated.

The map showing the general route of said road between Sacramento and San Jose was filed on December 8, 1864, and withdrawal was ordered by your office letter of December 23, 1864, which was received at the local office January 31, 1865. The land in question fell within the limits of said withdrawal and was included in a patent issued to the company on account of its grant, dated March 24, 1889.

Karl Beck applied to enter this land, his application being accompanied by the affidavits of several persons who allege that the land was occupied and improved by parties claiming the same under the settlement laws, both at the date of the withdrawal in 1865 and at the time of the definite location of the road, January, 21, 1870.

Your office denied said application for the reason that the land had been patented on account of the grant to said company, and, upon appeal, said decision was modified by departmental decision of June 9, 1891 (L. and R. Press Copybook 220, page 240), and you were directed to order a hearing in order to determine whether the land had been erroneously patented on account of said grant.

It is upon the record made at said hearing that the case is again before this Department, the decision of the local officers and your office being adverse to the company and recommending a suit for the recovery of title to said land.

Since the case has been forwarded to this Department on appeal, a motion has been made for a rehearing on the part of the company, on the ground that certain witnesses who testified in favor of Beck, have, in another case now pending before your office undecided, admitted that they were mistaken in their testimony given in this case in fixing the location of the house of one Weaver, whose claim is made the basis for holding that the land was excepted from the company's grant.

This being a case in which the hearing was ordered for the information of this Department, to the end that it might determine whether a suit was advisable, the land having been patented on account of the grant, I am of the opinion that resort might be made to any record, either in your office or the local office, to the end that the actual condition of the land at the time of the attachment of rights under the grant might be determined, but for the reasons hereinafter given, I deem it unnecessary to examine the record in the case referred to now pending before your office for determination of the question under consideration, namely, whether suit should be brought to set aside the patent issued on account of this grant.

It appears from the testimony taken that this tract was a part of a ranch of some twelve or thirteen hundred acres of land claimed by one Holliday, and that one Calvert, who was in his employment as foreman, occupied this land from 1859 until about 1866. It is admitted that Calvert made no claim to this land under the settlement laws.

Calvert was succeeded by Weaver, as foreman of the Holliday ranch, and he occupied the land until some time after the definite location of the road January 21, 1870.

Holliday's claim was transferred to one O'Brien, and at or about the time of the definite location of this road, Weaver seems to have repudiated the claim made by O'Brien and set up claim in himself, on account of which he was ejected from the land by O'Brien, and never returned to make claim thereto.

At this time the land was unsurveyed; the approved plat not having been filed in the local office until April 1, 1883.

The first question for consideration is the effect of the withdrawal upon the filing of the map of general route, the order on account of which was received at the local office, as before stated, January 31, 1865. At this time the land was embraced in the Holliday claim and occupied by one Calvert, who was there in the interest of Holliday, acting as his foreman, and who made no claim on account of the settlement laws.

It must be admitted, therefore, that if the withdrawal upon the map of general route was effective for the purpose of preventing settlement thereafter, or in other words, to retain the land in a state of reservation to await the definite location of the road, that no rights could have been acquired by Weaver, who went upon the land after said withdrawal, even if it be conceded that he was duly qualified and intended to claim the land under the settlement laws, and that his improvements were placed upon the tract in question—about which there is a grave question of doubt.

In the case of the Kansas Pacific Railway Company *v.* Dunmeyer (113 U. S., 629), the grant to aid in the construction of which was made by the acts under consideration, it was held that Miller's entry was properly allowed after the filing of the map of general route for the reason that said map was not filed within the time limited by the acts of 1862 and 1864, but was filed under the period of extension granted by the act of July 13, 1866 (14 Stat., 79), and as said last mentioned act merely directed that lands be reserved from sale, it was held that the allowance of said entry by Miller was proper, and as the same was uncancelled at the date of the definite location of the road, it was held to have served to defeat the grant for said Kansas Pacific Railway Company.

In the present case, however, the map of general route was filed within the period of extension granted by the act of July 2, 1864, supra, and the lands were regularly withdrawn as directed by the seventh section of the act of 1862, from pre-emption, private entry, and sale.

In the case of the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864 (13 Stat., 365), the sixth section provides:

That the President of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and 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 pro-

vided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale.

The effect of the withdrawal under this section has been several times determined by the supreme court of the United States, its purpose being held to be, to reserve the land from other disposition after the filing of the map of general route, to await the definite location of the road, and no rights can be acquired adverse to the company, after the filing of such map. See *Buttz v. Northern Pacific Railroad Company* (119 U. S., 55), and *St. Paul and Pacific Railroad v. Northern Pacific Railroad* (139 U. S., 1).

Under the act of 1862 the Secretary was directed to cause the lands to be withdrawn upon the filing of the map of general route, while under the act of 1864, making the grant for the Northern Pacific Railroad Company, it was provided that the odd sections granted "should not be liable to sale or entry or preemption, before or after they are surveyed, except by said company as provided in this act."

In the case of the Kansas Pacific Railroad Company *v. Dunmeyer*, *supra*, it was held that the filing of the map of general route does not, like the filing of the map of definite location, vest in the company a right to any specific piece of land; it merely authorizes the Secretary of the Interior to withdraw certain lands from pre-emption, sale, etc., and the question was raised by the court as to what the rights of the company would be if he failed to make such withdrawal, which question it fails to answer.

In the present case, however, the lands were regularly withdrawn, and, surely, after said withdrawal, the effect of the reservation under the act of 1862, making the grant for the company under consideration, must be the same as that made by the sixth section of the act of 1864, making the grant for the Northern Pacific Railroad Company.

I am clearly of the opinion that after the withdrawal made upon the map of general route, no rights could be acquired adverse to the company by settlement upon the land, and that a settlement so made, even though it existed at the date of the filing of the map of definite location, would not serve to except the land settled upon from the operation of the grant to said company.

The effect of the withdrawal upon the filing of the map of general route does not seem to have been considered either by your office or the local office, and for the reasons above given I must hold that the showing made is not sufficient to hold that the land was erroneously certified on account of the grant, and therefore direct that Beck's application stand rejected.

PRACTICE—PETITION FOR RE-REVIEW—RULE 114.

STANLEY v. JONES.

A motion for the reconsideration of a decision that was rendered on review and reversed a former decision, must be treated as a petition for re-review, and should not be filed in the General Land Office but should be addressed to the Department.

*Secretary Smith to the Commissioner of the General Land Office, July 20,
(J. I. H.) 1894: (J. L. McC.)*

On March 3, 1893, this Department rendered a decision dismissing the contest of Moses M. Standley against the homestead entry of George W. Jones for the SW. $\frac{1}{4}$ of Sec. 17, T. 15 N., R. 3 W., Guthrie land district, Oklahoma. (See 16 L. D., 253.)

Counsel for Standley filed a motion for review; and on April 5, 1894 (18 L. D., 495), the Department sustained the motion, and vacated and set aside its former decision.

By letter of June 2, 1894, your office transmitted a paper purporting to be a "motion for review" of the departmental decision of April 5, 1894 (*supra*), on review.

This motion must be considered as a petition for re-review (*Augur v. McGuire*, 18 L. D., 408). As such, it should not have been filed by your office, but should have been returned to the sender, with the information that the application should be addressed to the Department—in accordance with Rule 114 of Practice, as amended August 19, 1893 (17 L. D., 194):

Motions for a re-review, or a second reconsideration of a decision, shall not be received and filed; but the defeated party, if able, may invite the attention of the Secretary, by a duly verified petition, to important matters of fact or law not theretofore discussed or involved in the case; who, upon consideration thereof, will either recall the case, or send the petition to the files without further action.

In the case of *Neff v. Cowhick* (8 L. D., 111), the Department directed that:

If the defeated party is able to present any suggestions of fact or points of law not previously discussed or involved in the case, it may be done by petition, which shall contain all the facts and arguments. On the filing of such petition, if it appears important, the Secretary will make such order for recalling the case from the General Land Office, and such direction for further action, as may be necessary. Otherwise, no further action on the petition will be taken.

In the case at bar the motion presents no suggestion of fact and refers to no point of law not previously discussed or involved in the case. No action by the Department is necessary; and the papers are herewith returned for the files of your office.

RAILROAD SELECTIONS—ADVERTISEMENT.

INSTRUCTIONS.

*Secretary Smith to the Commissioner of the General Land Office, August
(J. I. H.) 15, 1894. (V. B.)*

I am in receipt of your letter of the 9th instant, in reference to the departmental instructions of July 9, 1894, 19 L. D., 21, prescribing rules and regulations to be observed in regard to railroad selections, and for the purpose of "determining whether the lands selected are mineral or non-mineral lands."

In those instructions it is prescribed that if any selected lands are found to be within a radius of six miles of any mineral entry, claim or location, notice by advertisement shall be given, in newspapers, to be designated, that the company has applied for patents for said lands, &c.; that the local land officers will receive protests or contests within the next sixty days for any of said tracts claimed to be more valuable for mineral than agricultural purposes; and "at the expiration of said sixty days," the register and receiver are to return lists of said lands and any protests filed to your office, for action, as prescribed.

You now call my attention to the supposed omission from said instructions of anything definite "as to the number of publications, or the period over which they are to extend," and request definite instructions in the matter.

In response to your request, I have to state that when notice by advertisement for sixty days was specified, it was with the intention that said notice should be given in accordance with the settled rule which has prevailed for many years in your office, viz: that publication should be made once a week for ten consecutive weeks, as is done in the case of mineral applications (see *Miner v. Marriott*, 2 L. D., 709), and applications to purchase timber and stone lands. See General Circular of 1892, page 68.

You are therefore directed to cause notice to be published in the matter of the railroad selections, in accordance with the rule as above stated.

MICHAEL DERMODY.

Motion for review of departmental decision of September 21, 1893, 17 L. D., 266, denied by Secretary Smith, August 17, 1894.

PRACTICE—NOTICE—JURISDICTION—CONTESTANT.

MOTT v. COFFMAN.

In the exercise of administrative authority the Department may assume jurisdiction though the service of notice in the case is not in accordance with departmental regulations.

The qualifications of a contestant are not material until such time as he may apply to exercise the preferred right of entry accorded to the successful contestant.

Secretary Smith to the Commissioner of the General Land Office, August 17, 1894. (G. B. G.)

The land involved herein is the NE. $\frac{1}{4}$ of Sec. 6, T. 5 S., R. 66 W., Denver land district, Colorado.

The defendant, Daniel S. Coffman, made timber culture entry for the tract January 24, 1885.

On August 20, 1890, the plaintiff, Frank J. Mott, initiated contest against said entry, charging failure to comply with the law as to cultivation and planting.

Notice of contest, fixing the date for the hearing October 28, 1890, was served by registered mail, on which day both parties appeared, the defendant entering a special appearance and demurrer to the jurisdiction of the local officers, and moved to dismiss the contest, on the ground that notice of contest by registered mail is not such personal service as is required by the Rules of Practice.

This motion was overruled, on the authority of *Auderson v. Tannehill, et al.* (10 L. D., 388), and other cases, which held that such service is personal service, within the meaning of the Rules of Practice, to which ruling the defendant excepted at the time, and the trial proceeded, both parties introducing testimony.

The register and receiver rendered their joint opinion in the case in favor of the plaintiff, finding that the defendant had not attempted in good faith to comply with the requirements of the timber culture law, and recommended the cancellation of the entry.

On appeal, your office affirmed the finding of the local officers, and held the entry for cancellation, on the ground that

Defendant has not attempted in good faith to comply with the requirements of the timber culture law; that the planting done by him was not for the purpose of securing a growth of trees, but to give a color of compliance with the law, to enable him to hold said tract for speculative purposes.

Further appeal brings the case before the Department on the following assignment of errors:

1. Error in not deciding that the whole proceedings in the case, at and after trial, are void, for want of jurisdiction over the defendant.
2. Error in not dismissing the contest because Frank J. Mott, the contestant, up to August 20, 1889, was register of the land office in which Coffman's claim was pending, and under section 190, Revised Statutes, was debarred from, in any manner, participating in a controversy concerning said claim.

3. Error in not finding that the timber culture entry of Coffman, having been contested by Harry Croft, in May, 1888, and the register and receiver having found that the claimant had complied with the law, and acted in good faith up to the end of the third year, which decision became final, and was approved by Commissioner's letter "H", of March 22, 1890, claimant's compliance with the law and good faith, up to the end of the third year, cannot now be questioned in another contest.

4. Error in finding that the claimant had not acted in good faith in attempting to grow trees upon the land in dispute.

5. Error in holding Coffman's entry for cancellation.

On the question of jurisdiction, it appears that your office was not asked to pass, and it declined to raise the question *sua sponte*.

The question is now made, and as such question may be made upon slight suggestion, in all tribunals, and at any stage of proceedings, its consideration will be indulged.

In *Driscoll v. Johnson* (11 L. D., 604), it was held that service of notice of contest by registered letter, is not personal service, within the meaning of the Rules of Practice. The earlier departmental opinions on this question had held that such service was good. See *Crowston v. Seal* (5 L. D., 213); *William W. Waterhouse* (9 L. D., 131); *Anderson v. Tannehill, et al.* (10 L. D., 388).

The ruling in *Driscoll v. Johnson, supra*, has since been followed, and in the recent case of *Elting v. Terhune*, (18 L. D., 586), the authorities on this question were collated, the later rulings of the Department re-affirmed, and the case of *Crowston v. Seal*, *William W. Waterhouse*, and *Anderson v. Tannehill, et al., supra*, overruled. But in that case, in the exercise of the discretionary and supervisory power with which the Secretary of the Interior is clothed by law, for the just administration of the public land laws, a judicial anomaly was indulged, and it was therein held that

A case will not be remanded on objection to the notice, though such objection be well grounded, where the defendant appears, participates in the trial, and appeals, asking for a judgment on the merits of the case, and no prejudice is shown.

The case at bar is in all respects analogous, in principle, with the case in which the foregoing ruling was made, and said ruling warrants the assumption of jurisdiction herein, not in the application of judicial rules, but in the exercise of administrative authority.

The question raised in the second specification of errors is not material. Any person may contest an entry in the interest of the government, and the question of his qualifications to enter the land is not in issue, that being a question to be determined on his application to exercise a preference right of entry.

After an examination of the record, I concur in the conclusion of fact, as found by your office, and the local officers.

There is abundant evidence of bad faith on the part of the claimant, and the contention that the *bona fides* of his cultivation has been previously determined in the affirmative, by an adjudication of the General Land Office, in a prior contest against the same entry, is without merit, it appearing that the affidavit of contest in the present case, not only

charges default during the third year, but also charges in substance, that since that time there has been no bona fide effort to grow trees on the land in controversy.

I find that these allegations are proven, and the judgment appealed from is affirmed.

EAMES v. BOURKE.

Motion of review of departmental decision of February 19, 1894, 18 L. D., 150, denied by Secretary Smith, August 17, 1894.

AFFIDAVIT OF CONTEST—SUFFICIENCY OF CHARGE—REVIEW.

SILVERIA v. PAUGH (ON REVIEW).

Where an affidavit of contest contains an allegation as to a condition existing at the date of the contest, which from its nature must also have existed at the date of the entry, the allegation will be regarded in the same light as if the condition had been alleged to exist at the inception of the entry.

A motion for review, on the ground that the evidence does not warrant the judgment, will not be granted, where the decision in question affirms concurring decisions of the local and General Land Office, unless it is made to appear that manifest injustice has been done.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 17, 1894. (E. W.)

William J. Paugh, defendant in the case of Antonio Silveria v. William J. Paugh, presents a motion for review of the departmental decision in said case (18 L. D., 2).

- The assignments of error may be reduced to two grounds, to wit:
1. That the affidavit of contest was insufficient.
 2. That the evidence did not authorize a cancellation of defendant's timber-culture entry.

The motion is also accompanied by a number of affidavits tending to show that the land in controversy was devoid of timber at the time of said entry.

The sufficiency of the allegation in the affidavit of contest, was the main question determined by the Department in the decision under review.

The language of the affidavit, which formed the subject of departmental construction, is as follows:—Said Paugh "has not cultivated or planted trees on said land, as required by law, and that it is not subject to entry under the timber-culture act, there now being timber on the land."

Said allegation is held in the decision complained of to be a sufficient allegation that there was timber growing on the land at the time of claimant's entry.

This principle of construction was adhered to in a subsequent decision of the Department in the case of *Russell v. Haggin* (18 L. D., 420).

The charge in the affidavit of contest against a desert land entry, which received departmental construction in the decision above mentioned, reads as follows:

That said land was entered by fraud in the inception of said entry; that said land will produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons; that said land will produce without irrigation, a crop of barley, potatoes, or other agricultural crop, in amount to make the cultivation reasonably remunerative; etc.

It was therein held—

The charge that the land was entered by fraud in the inception of the entry, should be read in connection with the allegations that the land will produce native grasses, etc. and that it will produce, without irrigation, a crop of barley, potatoes, etc. If the affidavit is so construed, it is equivalent to a charge of illegality in the entry, and is sufficient to warrant a contest.

From a comparison of the decisions in the case at bar, and that of *Russell v. Haggin*, *supra*, it may be inferred that where an affidavit of contest contains an allegation as to a condition which exists at the date of the contest, and which, from its very nature, if true, must also have existed at the day of the entry, said allegation will relate back and will be regarded in the same light as if the condition had been alleged to exist at the inception of the entry.

I can see no valid reason for a departure from the doctrine announced in said decisions.

With reference to the ground in defendant's motion, that the evidence did not authorize the cancellation of his entry, it is only necessary to say, that the judgments of the local officers and of your office, and of the Department, concurred in holding that the evidence, as disclosed by the record, shows that the land in controversy was not "devoid of timber" within the meaning of the act. In such a case a motion for review will not be granted for insufficiency of evidence, unless gross and manifest injustice has been done.

The affidavits accompanying the motion for review, tending to show that there was no timber upon the land at the time of defendant's entry, among which is the affidavit of defendant himself, who was not introduced as a witness on the trial, are merely cumulative in their character, and for that reason will not be considered. Besides, no diligence is shown on the part of defendant, and no sufficient reason is assigned for his failure to introduce said evidence on the trial before the local officers.

The motion is therefore denied.

RAILROAD LANDS—SECTION 8, ACT OF MARCH 2, 1889.

SIPCHEN v. CYR ET AL.

The act of March 2, 1889, confers a superior right of confirmation upon pre-emption and homestead claims that fall within the letter of its terms, irrespective of notice, or any other fact or consideration whatever, save that the claim must be a bona fide one, it must subsist on the first day of May 1888, and it must arise out of, or be asserted by actual occupation of the land under color of the laws of the United States.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 17, 1894. (W. F. M.)

This controversy involves the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 4, 5 and 6, of section 19, township 42 N., range 35 W., of the land district of Marquette, Michigan. The land lies within the granted common limits of the grant made by act of Congress of June 3, 1856, in aid of the Ontonagon and State Line and the Marquette and State Line Railroad Companies.

Joseph Le May, Eugene Forrest and Menzo Swart claim the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Charles Smith, Louis Gibson and Adam Schaible lot 6, and Louis D. Cyr lots 4 and 5, all by virtue of cash entries severally made at different dates in 1880, and ask for confirmation and issuance of patent under the third section of the act of March 2, 1889, 25 Statutes, p. 1008.

John G. Sipchen, claiming to have been an actual occupant of the land under color of the homestead laws of the United States, on May 1, 1888, asks for confirmation of his homestead right thus acquired, and also provided for in the act above cited.

A hearing was had before the register and receiver to determine these conflicting claims, and these officers found for Sipchen. The decision of your office affirming their action has been brought here on appeal.

While there is conflict in the testimony as to the material matters of fact involved, a careful perusal of the massive record leaves scarcely a doubt that Sipchen settled on the land in the spring of 1888, and that on the first of May of that year he had made substantial improvements thereon, and was occupying it with the view of acquiring it under the homestead laws, as evidenced by his application filed on March 3, 1888.

The counsel for the cash entrymen contend, *in arguendo*, though it is not assigned as error in the appeal, that, inasmuch as Sipchen's improvements are confined to lot 6, he can not be heard to claim lots 3 and 4 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, which are in a different technical quarter section, citing Pooler *v.* Johnston, 13 L. D., 134.

If the question of notice of settlement entered as a feature or as an element into controversies of this class, there is no doubt that the doctrine of that case would control the one at bar. The statute, how-

ever, confers a superior right of confirmation upon pre-emption and homestead claimants that fall within the letter of its terms, irrespective of notice, or of any other fact or consideration whatsoever, save that the claim must be a bona fide one, it must subsist on the first day of May, 1888, and it must arise out of or be asserted by actual occupation of the land under color of the laws of the United States. Legislation is not within the province of this Department, and it can not, therefore, insert new terms and conditions into the body of a statute free of ambiguity and clear as to its meaning.

The decision of your office is affirmed.

PRE-EMPTION—SECOND FILING—TRANSMUTATION.

BATTERS *v.* SHAFER.

A pre-emption filing that is subsequently changed to a homestead entry exhausts the pre-emptive right.

Secretary Smith to the Commissioner of the General Land Office, August 18, 1894. (J. W. T.)

The above cause is before me on appeal from your office decision of January 31, 1893, in which was affirmed the decision of the local officers rejecting final proof of John Shafer, and holding his declaratory statement No. 245, for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 53 N., R. 3 W., in the Coeur d' Alene land district, Idaho, for cancellation.

On September 22, 1890, said Shafer filed his pre-emption declaratory statement for the above described tract, alleging that he settled on the same August 28, 1890.

On the 12th of October, 1891, George Batters, the plaintiff, made homestead entry No. 214, for the same tract.

March 10, 1892, the defendant gave notice of his intention to submit final proof in support of his claim, on April 20, 1892, before the register and receiver.

On said last mentioned date, Shafer appeared with his witnesses, and submitted final proof, and said George Batters also appeared with witnesses, and by attorney, and protested against the allowance of Shafer's proof. He made no written protest, but made oral objection and protestation, and cross-examined witnesses, and offered rebutting evidence, as he had a right to do. *Baker, et al. v. Biggs* (15 L. D., 41); *Houge v. Tremain* (2 L. D., 596).

It appeared from the evidence that Shafer filed pre-emption declaratory statement No. 2571 (Lewiston Series) on August 1, 1884, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 53 N., R. 3 W. April 21, 1887, he filed homestead entry No. 45 on the same tract, and on June 18, 1890, made final proof, and received final certificate for the same, and receipt No. 50.

It was quite doubtful upon the testimony whether said defendant showed settlement on the tract in question, but I am relieved of considering the question of fact, by the former admitted declaratory statement, followed by homestead entry, final proof and certificate.

Section 2261, of the Revised Statutes, provides that—

When a party has filed his declaration of intention to claim the benefit of such provisions for one tract of land, he shall not file, *at any future time*, a second declaration for another tract.

It is claimed by defendant that he has not had, by his first filing, the benefit of the pre-emption law, but the evidence shows that this is not true, and it is quite a suggestive fact that on April 20, 1892, the very day when he was endeavoring to make final proof on his second entry, following his second declaratory statement, a patent issued upon the original claim for which declaratory statement was made August 1, 1884, and homestead entry June 18, 1890. The original homestead entry was allowed without formal proceedings for transmutation, but it was treated as such, and credit was given Shafer for residence from the date of settlement.

Under these circumstances, it must be held that said defendant had exhausted his pre-emption right previous to the initiation of the claim to the land in controversy in this cause, even though settlement had been satisfactorily proven. *Brooks v. Tobien* (4 L. D., 560); *Todd Knepple* (5 L. D., 537); *Bywater v. Hill, et al.* (5 L. D., 15).

Your office decision is therefore affirmed.

AMENDMENT OF CASH ENTRY—SECTION 2372 R. S.

B. F. BYNUM ET AL.

An application under section 2372 R. S., for the amendment of a cash entry must be supported by the affidavit of the original purchaser or his legal representative.

*Secretary Smith to the Commissioner of the General Land Office, August
(J. I. H.) 18, 1894. (J. W. T.)*

I have examined the case presented by the appeal of B. F. Bynum and W. H. Hall, from your office decision of April 22, 1893, rejecting their application to amend cash entry No. 32201, made July 26, 1860, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 4 N., R. 5 E., Huntsville land district, Alabama; so as to have that portion of said entry described as the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, changed, so as to describe it as the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the same section.

Said application to amend, was made in March, 1893, by affidavit, a copy of the material portion of which is in the words and figures following:

STATE OF ALABAMA,

County of Jackson:

W. H. Hall (assignee of James M., deceased,) and Benjamin F. Bynum.

L. F. Knight and Benjamin F. Bynum being sworn on oath, say that *said Bynum*, are the same persons who made graduation cash entry No. 32201, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, T. 4 N., R. 5 E. That said entry was a mistake as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ —that they intended to enter, and thought they did enter the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, township and range. That the mistake, we suppose, was made by the scribe in writing down the numbers; that we have been paying taxes upon, and cultivating said N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and claiming the same ever since. We have never claimed the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and further, that we have never sold the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, nor any of said land above mentioned, and we desire that our said entry be changed to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and patented to us.

Section 2372, United States Revised Statutes, authorizing amendments of entries, provides, that:

Where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or in *case of his death*, the legal representatives, *not being assignees*, or transferees, may in any case, coming within the provisions of this section, file his own affidavit, etc.

The record shows that this was a graduation cash entry, jointly made, of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, by James M. Bynum and Benjamin F. Bynum. It also shows in the caption of the affidavit hereinbefore set forth, that said James M. Bynum, one of the original entrymen, is deceased, and that he was so deceased at the time of the making of this application.

The statute in terms required the affidavit of the original purchaser, in support of the claim for amendment. There is, however, only the oath of Benjamin F. Bynum, one of the entrymen, who does not swear that he is agent or representative of the deceased James M. Bynum, whose "legal representative", under the statute, is the only one who could be sworn in this behalf.

As James M. Bynum could not make the necessary affidavit, under the statute, and his "personal representative" has not done so, neither he nor his heirs nor representatives are here upon this record, asking for the amendment sought by the application, nor do they give any indication that they desire it. It logically follows that it is not yet shown that James M. Bynum, deceased, made any mistake in the entry claimed to have been erroneously made.

Your office decision, rejecting said application, is affirmed.

RAILROAD LANDS—HOMESTEAD—COMMUTATION.

HERBERT H. AUGUSTA.

A homestead entry made under section 2, of the forfeiture act of September 29, 1890 can not be commuted until after a period of fourteen months residence and cultivation from the date of entry, if such entry is made subsequently to the passage of the act of March 3, 1891, amending section 2301 R. S.

Secretary Smith to the Commissioner of the General Land Office, August 18, 1894. (J. I. H.) (A. E.)

This is an appeal from your office decision of April 1, 1893. Said decision held, substantially, that the entry of Augusta, for the SE. $\frac{1}{4}$, Sec. 7, Tp. 48 N., R. 8 W., Ashland, Wisconsin, made on May 13, 1891, could not be commuted to cash entry until after fourteen months from the date of entry, and instructed the local officers to require Augusta to furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequent to May 13, 1891, the date of entry.

From this decision, which was based on the 6th section of the act of March 3, 1891, 26 Stat., 1095, Augusta has appealed to the Department.

The land involved is within the conditional grant of May 5, 1864, to the State of Wisconsin to aid in the construction of railroads, which vested finally in the Wisconsin Central Railroad Company, for its line between Bayfield and Superior.

On September 29, 1890 (26 Stat., 496), the Congress passed an act to forfeit certain lands theretofore granted for the purpose of aiding in the construction of railroads. This act forfeited all lands opposite the unconstructed portions of said roads, and declared the same part of the public domain, excepting, however, the right of way and station grounds. The 2d section of this act provided:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited, and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights.

On January 16, 1891, the Commissioner of the General Land Office issued an order to the registers and receivers to publish in a newspaper the fact that the lands designated by odd-numbers, included within the limits of the grant for the Wisconsin Central between Ashland and Superior, and outside the fifteen mile indemnity limits of both the main and branch lines of the Omaha Company,

have been restored, and that such lands will be opened to entry upon a day to be fixed by you, not less than thirty days from the date of the notice, with preference

right of entry, under the homestead laws, within six months after the passage of said act (September 29, 1890), to all persons who at the date of the passage of the act were actual settlers in good faith upon any of the lands restored, and are otherwise qualified . . . that the provisions of the forfeiture act, in regard to actual settlers, may have immediate application, I have, with the approval of the Hon. Secretary of the Interior, to direct that in the notice of restoration under the forfeiture there be inserted a notice to prior applicants for such lands that such prior applications confer upon them no right to the lands, and that upon the date set by you and mentioned in the notice, all lands included in the forfeiture will be open to entry under the provisions of the forfeiture act, without regard to such applications, which applications shall be held to be rejected by said notice.

Under the above mentioned instructions, the local office published a notice, and the lands were opened to entry on February 23, 1891. Just prior to this date, however, Congress, on February 18, 1891, passed an act extending the time within which those who were bona fide settlers on September 29, 1890, would "be entitled to a preference right to the same under the provisions of the homestead law and this act," to six months from the date of the promulgation by the Commissioner of the General Land Office of the instructions to the officers of the local land offices for their direction in the disposition of said lands. As the date of the promulgation by the Commissioner was, as heretofore shown, January 16, 1891, the act extended the time until six months from that date, excluding the day of its date, within which this preference right could be exercised.

On February 24, 1891, Math. W. Miller made homestead entry of the SE. $\frac{1}{4}$, Sec. 7, Tp. 48 N., R. 8 W., being a part of the forfeited Wisconsin Central lands. On May 13, 1891, Miller filed a relinquishment, and Herbert H. Augusta, appellant herein, made homestead entry.

In his affidavit to sustain his application, Augusta stated that he had made settlement on the land in question on July 17, 1888, and maintained said residence ever since that date.

On May 14, 1891, the day after making homestead entry, Augusta filed a notice in the local office that he intended making final proof of his claim on July 8, 1891. After due publication in a newspaper of his intention as aforesaid, Augusta was allowed to make proof and purchase the land, receiving the usual certificate.

In passing upon this case, the Commissioner made the decision hereinbefore mentioned, the appeal from which brings the case here.

The contention of attorney for Augusta is, that the forfeiture act gave a right to make homestead entry immediately after the passage of that act, and that as it was the delay of the Department which prevented Augusta making entry, and not his own neglect, his entry made May 13, 1891, should be considered as relating back to that time, and thus he would not come within the provision of the act of March 3, 1891, which restricted the time of making proof to fourteen months after entry; and that if said entry were considered as made when Augusta was ready to make it, that his proof as made July 8, 1891, was sufficient.

The objection to this contention is that it is not based on what must be considered a proper construction of the act of September 29, 1890, of section 2301 of the Revised Statutes, and of the act of March 3, 1891.

In passing the forfeiture act Congress recognized that there were persons on these lands who, though there as trespassers, had in some cases made what were to them extensive improvements. It likewise recognized the fact that, as the act would throw the land open to settlement, these settlers would be subjected to conflicts from new comers. To prevent this, the preference right was given to actual settlers at the date of the act over new comers. But these new comers, in anticipation of the passage of this act, were crowding on the lands already occupied by old settlers, knowing said old settlers were trespassers and could claim no rights prior to the passage of the act. To add still further protection to the old settlers, Congress declared that such actual settlers on the land at the passage of the act should "be regarded as such actual settlers from the date of actual settlement or occupation." The object of these words was not to give any rights as against the government, but to establish a criterion by which the rights of settlers should be determined as between themselves, just as the preference right determined the rights of settlers as against future entrymen. If Congress had not made this provision that these persons should "be regarded as such actual settlers from the date of settlement or occupation," the thousands of persons who went on these lands just prior to the passage of this bill, in order to obtain its benefits, would have stood on exactly the same footing as those who had been there three years, and it was to legalize this long settlement, in order that the old settler might be protected as against the new comer, that the words were used. It was applying the rule used in determining preference rights where on lands being surveyed two settlers are found on the same land. Here, the oldest settler is accorded the preference right, and in throwing these forfeited lands upon the market Congress applied this doctrine, in the act.

This did not affect the relations existing between the government and settlers as to the time when the latter could make homestead entry. Congress left the time when these entries should be allowed to the discretion of the officers having such matters in charge. These officers could not tell what lands were subject to entry until after examination, and hence it was impossible to allow entries immediately. Congress fully recognized a good reason for delay when it passed the act extending the time within which to exercise the preference right. That act was passed in order that the necessary delay by the land office should not defeat the preference right under the forfeiture act.

In the case under consideration there is nothing to show that Augusta attempted to exert his preference right promptly. The land was open to entry on February 23, 1891, yet Augusta did not make

entry until May 13, 1891, nor did he contest the entry of Miller, which remained on record nearly three months. Had Augusta made entry on February 23, he would not now be restrained by the act of March 3, 1891, relating to the time of making final proof. It was his own neglect which brings him within its restrictions.

Section 2301 of the Revised Statutes is the revised form of section 8 of the act of May 20, 1862 (12 Stat., 392), though there is no practical difference in the sections, certainly none in their application to the case under consideration.

When these sections became law, the act of May 14, 1880, had not been passed, and a homestead right could not be initiated except by entry; therefore the right to commute was confined to the homestead law as set out in section 2289, which was practically the same as section 1 in the act of May 20, 1862.

The act of March 3, 1891, in amending section 2301 of the Revised Statutes, says:

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, etc.

Here is an express reference to one who shall "avail himself of the benefits of section 2289." This section 2289 provides for the initiation of a right by entry only. It has no reference to rights initiated any other way, and the Congress, as if to enforce its intention, refers to land as "entered," and fixes the time from the date of such "entry."

In view of this, it must be held that the provision of the act of March 3, 1891, requiring fourteen months settlement and cultivation after entry, meant exactly what it said, and, therefore, the proof made by Augusta was premature, and the decision of your office is affirmed. *Ex parte Francis A. Lockwood*, 16 L. D., 285; *Eames v. Bourke*, 18 L. D., 150.

HOMESTEAD ENTRY—ADVERSE CLAIM.

SMITH v. NOLAN.

A departmental decision awarding the priority of right to a homestead claimant as against a prior pre-emptor, and directing the suspension of the pre-emption entry to await the consummation of the homestead claim, does not relieve the homesteader from the necessity of showing compliance with law during the time prior to such decision where such question was not then taken into consideration.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 18, 1894. (F. W. C.)

I have considered the appeal by John J. Nolan from your office decision of July 7, 1892, in the case of *Patrick Smith v. John J. Nolan*, involving the SE. $\frac{1}{4}$, Sec. 33, T. 102 N., R. 57 W., Mitchell land district,

South Dakota, holding that the final proof tendered by Nolan upon his homestead entry covering the land before described should be rejected and that patent should issue upon the entry by Smith to the same land.

It appears that Patrick Smith on April 7, 1882, filed pre-emption declaratory statement for the land in question, alleging settlement March 11, 1882, and that on March 13, 1882, John J. Nolan was permitted to make homestead entry for the same land.

On October 18, 1883, Smith made final proof and payment under his filing upon which cash certificate was issued, and on the 20th of the same month, he mortgaged the same to the Edinburg American Land and Mortgage Company, Limited, which mortgage has never been satisfied.

Nolan protested against the acceptance of Smith's proof, and from that time until the present there seems to have been a constant litigation between the parties, a recitation of which in detail is not necessary to a consideration of the rights of the parties.

After several hearings had to determine the respective rights of these parties, your office decision of February 10, 1886, held Smith's cash entry for cancellation as illegal, for the reason that it appeared from the records of your office that he had made homestead entry for another tract prior to filing for the land in question, which was not formally relinquished until April 21, 1884, which was subsequent to the submission of his final proof under his filing in question.

From said decision Smith appealed to this Department said appeal being considered in departmental decision of January 4, 1888, and your office decision was affirmed in so far as it awarded to Nolan the prior right to the land, but in view of Smith's good faith, and that he had made valuable improvements, his pre-emption entry was directed to be suspended "to await the consummation of Nolan's homestead entry and in case that it is allowed, Smith's cash entry will be canceled."

A review of this decision was denied March 1, 1888. On September 3, 1887, acting under said direction, Nolan gave notice of his intention to make final proof under his homestead entry on October 11, following, the same to be made before the clerk of the district court of Alexandria, Dakota.

Smith appeared and protested against the acceptance of Nolan's proof at the time of the offer of proof under said notice, and appearance was also made by the mortgage company. Smith's protest urged a superior right in himself to the land and also Nolan's failure to comply with the law. Nolan objected to the introduction of testimony relative to Smith's prior rights in the premises and refused to submit himself and witnesses to his proof, to cross-examination.

Upon the record as made the local officers held that Nolan's proof should be rejected, which was sustained by your office on appeal, and the case was further prosecuted to this Department, resulting in departmental decision of August 12, 1891, which held that the previous deci-

sion of this Department (January 4, 1888,) disposed "of any question as to the conflicting rights of the parties and the same has become *res adjudicata*."

Upon the question as to the sufficiency of Nolan's proof (as he claimed, due to the misguidance of the local officers he had not made a full showing) the case was remanded that a new day might be set for a hearing, after notice to both parties, at which they might make any further showing desired in the premises.

It is upon this order that the case is again before this Department. From the record it appears that on March 22, 1882, Nolan, with the aid of his friends, built a small shanty on the land in question, about eight by nine feet in size, eight foot front and six foot back, with shed roof. This shanty had a door and window but no floor and was scantily furnished. He broke five acres, which were planted in sod corn the year that his entry was made, and in 1884 broke about five acres more. These are the only improvements that he seems to have made upon the land prior to the year 1886. His residence upon the land for the four years following the date of his entry, seems to have consisted of occasional visits, the longest time spent upon the land being at the periods when the breaking was cultivated in the spring and harvested in the fall. His excuse for not living upon the land more continuously and for not making better improvements was his poverty and that he was obliged to work elsewhere in order to secure the means whereby to defend himself in his rights to this land. It is admitted, however, that shortly after making the entry in question he purchased a lot in an addition to the town of Alexandria, but claims that he had to mortgage the same soon after making the purchase to obtain money to defend his suits arising from his connection with this land.

Due to the lack of attention in failing to improve and protect his house the same was blown over in the spring of 1885, and although it was righted soon after, it was entirely destroyed by a storm in the following winter and remained scattered on the ground for some time, until in February, 1886, he began the erection of a new house in which he has resided with more regularity and increased his breaking to the amount of between forty and fifty acres.

He seems to have spent a great part of the time prior to 1886 in the town of Alexandria, distant between eight and nine miles from the land in question and to have been interested in a carriage repair shop in said town. About the time of building the second house in the spring of 1886, he seems to have disposed of his possessions and belongings in the town of Alexandria and to have engaged in the improvement and cultivation of the land in question.

The question therefore arises as to the effect of the departmental decision of January 4, 1888, upon the claim of Smith to the land in question. It is true that by that decision Smith's previous entry was

held to await the consummation of Nolan's homestead entry, and in case Nolan completed said entry, Smith's cash entry was to be canceled.

It could not have been intended by that decision to hold that Nolan had complied with the law up to that date, for the case came before the Department upon Smith's appeal from the decision of your office holding his cash entry to be illegal.

No question as to Nolan's compliance with law was raised by these proceedings.

When Nolan offered proof Smith appeared and protested against the acceptance of the same on the ground that Nolan had not complied with the law. Under the circumstances it seems to me that the only effect of the departmental decision of January 4, 1888, was to award to Nolan under his entry made subsequently to Smith's settlement, priority of right, but from the very nature of the case it would seem that Nolan must be held to a strict account in the matter of his compliance with law and, if he were in default prior to 1886, that the same might be taken advantage of by Smith, and that as between the two judgment must be in favor of Smith.

Upon the record made and before the local officers at the time of their decision on February 2, 1892, they held that Nolan's residence upon the tract from March, 1882, to March, 1886, was constructive in character, but as no attempt was made to question his compliance after the building of his new house in March, 1886, such latter compliance warrants the acceptance of his final proof and the dismissal of Smith's protest.

Your office decision appealed from reversed the decision of the local officers and held that Nolan had not acted in good faith in the matter of his pretended residence prior to 1886 and that his proof should therefore be rejected and Smith's entry passed to patent.

Upon a careful review of the entire matter, I am clearly of the opinion that Nolan never established and maintained a *bona fide* residence upon the land in question at any time prior to the building of his second house in March, 1886, and that whatever he did in the matter of an attempted compliance with the law, was a mere pretense for the purpose of continuing his asserted claim to the land in question. Prior to this time Smith had fully complied with the pre-emption law, made proof of the fact and payment for the land, and without attempting to disturb the previous adjudication of the Department as to the effect of Smith's outstanding uncanceled homestead entry at the time of his filing an offer of proof for the land in question, yet, by Nolan's failure to comply with the law in good faith, for the period preceding the spring of 1886, he thereby forfeited his right in favor of Smith, and I therefore sustain your decision, rejecting the proof tendered by Nolan and direct that his entry be canceled and that patent issue upon Smith's cash entry covering this land.

DESERT LAND ENTRY—CONTEST—AMENDATORY ACT.

BOLAND v. BIGLAND.

The failure of a desert entryman, who has made an entry under the act of 1877, to advise the government, within the lifetime of such entry, of his intention to accept the extended provisions of the amendatory act of 1891, leaves said entry subject to contest as if said amendatory act had not been passed.

After the expiration of three years from the date of the original entry, and subsequent to the intervention of an adverse claim or contest, it is too late to accept the option given by the amendatory act.

Secretary Smith to the Commissioner of the General Land Office, August 18, 1894. (J. I. H.) (C. W. P.)

I have considered the case of Thomas C. Boland against Samuel H. Bigland, involving his desert-land entry, dated January 19, 1889, for the S. $\frac{1}{2}$ of Sec. 3, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 16 S., R. 36 E., containing four hundred and sixty acres of land, Independence land district, California.

On the 20th of January, 1892, Boland filed affidavit of contest charging that Bigland

has failed to irrigate and reclaim the land embraced in said entry, or any part thereof, by conducting water thereon, within three years from the date of entry; that said tracts of land, and every part thereof, are now, more than three years from date of entry, in their original arid and unreclaimed condition, wholly unirrigated, unoccupied, and unimproved.

A hearing was ordered and notice given, but Bigland did not appear. Boland appeared and offered proof. The local officers recommended that the desert-land entry be cancelled. On appeal, your office reversed the judgment of the register and receiver and dismissed the contest; holding that the entryman, Bigland, has, under the provisions of the act of March 3, 1891, (26 Stat., 1093) four years to make final proof, and that he is not required by said act, or by the regulations of the land office, to indicate by affidavit, or otherwise, that he has elected to proceed under said act before the expiration of the three years within which entrymen are required to perfect their entries under the act of March 3, 1877.

I do not concur with your office in this construction of the act of March 3, 1891, for the reason that the amendatory act (26 Stat., 1095) section 6, expressly provides that all claims under the act of March 3, 1877, are "subject to the same limitations, forfeitures and contests," as if said amendatory act had not been passed. This plain provision of the act surely needs no explanation. It means simply what it says.

The provision contained in said section that all claims under the act of March 3, 1877, "at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable," implies acceptance or rejection within a definite time. In this instance, acceptance must be manifested by the entryman within

the life-time of the entry, under the law in force at the time it was made. A failure to accept such option and to advise the government thereof, within the period of three years from date of entry, it is clear, leaves the entry subject to contest, as if the amendatory act had not been passed. After the expiration of three years from date of entry, and subsequent to the intervention of an adverse claim or contest, it is too late to accept the option given by the amendatory act.

The evidence establishing the charges in the affidavit of contest, Bigland's entry should be cancelled.

HOMESTEAD CONTEST—ACTS OF SETTLEMENT.

STRUTZ v. CRABB.

Digging a small hole in the ground is not such an act of settlement as will confer priority of right as against one who, without knowledge of such act, subsequently makes settlement on the land in good faith.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 18, 1894. (C. W. P.)

I have considered the case of Herman Strutz v. Robert B. Crabb, on appeal of the latter from your office decision of March 11, 1892, holding for cancellation his homestead entry of the NW. $\frac{1}{4}$ of Sec. 11, T. 119 R. 52, Watertown land district, South Dakota, made April 18, 1892.

May 16, 1892, Herman Strutz filed affidavit of contest, alleging settlement April 16, 1892, at fifteen minutes past 9 a. m., and that he followed up his settlement by residence and valuable improvements.

A hearing was had before the register and receiver, who sustained the contest and recommended the cancellation of Crabb's entry. Entryman appealed. Your office affirmed their judgment. Entryman now appeals to the Department.

I have read the testimony carefully.

If it is admitted that Crabb went upon the land in controversy on the 15th day of April, 1892, and dug a hole thereon, about eighteen inches square and eight or ten inches deep, with the view of acquiring title thereto, under the homestead law, the question arises, is it such an initial act of settlement as gives him priority of right to one who, without knowledge of such act, made bona fide settlement subsequently, but before his entry.

I agree with your office that it is not.

The Department in a long line of decisions, has adhered to the rule that to make a settlement, a person must go upon the land claimed, and do some act connecting himself with the tract claimed, which is equivalent to an announcement of his intention to claim the land, and from which the public may have notice of his claim. Samuel M. Frank (2 L. D., 628). In Seacord v. Talbert (2 L. D., 184), it was held that driv-

ing some stakes into the ground to indicate a site for a house; in *Howden v. Piper* (3 L. D., 162) "picking" the ground to the depth of six or eight inches, and erecting two boards in the form of a cross, were not acts of settlement. See, also, *Witter v. Rowe* (3 L. D., 449) and *Fuller v. Clibon* (15 L. D., 231). In *Hurt v. Giffin* (17 L. D., 162), it was held that as between two claimants for Oklahoma lands, each of whom allege settlement in the afternoon of the day on which the lands were opened to settlement, priority of right may be properly accorded to him who first reached the tract and put up a "stake", with the announcement of his claim thereon, when such initial act of settlement is duly followed up by the establishment of residence in good faith.

This case goes further than any previous case, but I cannot think that a claimant who simply digs a small hole, has performed an act which is a sufficient notice to the public of an intention to claim the land.

I am therefore of opinion that Strutz has the better right to the land, and the judgment of your office is affirmed.

REHEARING—NOTICE BY PUBLICATION.

TIENSVOLD *v.* BELL.

A case should be remanded for a further hearing where judgment by default is obtained against the entryman, and it is made to appear that the notice of contest was served by publication and was not published in the newspaper nearest the land, and that a meritorious defense exists.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 18, 1894. (P. J. C.)

This case comes before the Department by reason of a writ of certiorari granted June 9, 1893, at the instance of James D. Bell.

It seems that Bell made timber culture entry on November 11, 1884, of the NW. $\frac{1}{4}$ of Sec. 35, T. 32 N., R. 41 W., Valentine, Nebraska, land district.

On January 23, 1892, Ferdinand E. Tiensvold filed an affidavit of contest, alleging that the entryman had failed to cultivate the ten acres during the year 1891, and had failed to plant seeds, trees or cuttings during the same year, and that the breaking heretofore done had gone back to weeds.

Service was had on the defendant by publication, and the testimony was taken before a notary public. The defendant made default, and the judgment rendered by the local officers on March 9, 1892, sustained the charges made by the contestant.

On June 16, 1892, the defendant forwarded to your office an application for rehearing, in which he alleged a compliance with the law; that

his residence was in the State of Nebraska, and his whereabouts could have been ascertained; that the notice of contest was published in the "Rushville Standard," a newspaper printed thirty miles from the land claimed; that it should have been published in the "Gordon Journal," a paper published within ten miles of the land; that he knew nothing about the contest until long after the rendition of the judgment.

Your office, by letter of July 20, 1892, overruled said motion, declared the entry canceled and the case closed, but allowed defendant twenty days in which to apply for a writ of certiorari.

Said application was duly made, but by reason of the fact that a copy of your office decision did not accompany the application, the same was denied, but it was held that the statement of facts made by the entryman would indicate that it had been canceled without the entryman having been afforded an opportunity to defend it, and if such an opportunity had been afforded him, he might have presented a valid defense. Your office was therefore directed to notify him to furnish the Department with a copy of your said office decision, and serve the application for certiorari on the opposite party, and the application would be further considered.

All this seems to have been done, and on a reconsideration of the matter, your office was ordered by said letter of June 9, 1893, to transmit the record to this Department for its consideration.

The record is now before me. The contestant does not appear or refute in any way the statements sworn to by the defendant and his witnesses. The defendant claims to have complied with all the requirements of the law, and his statements are verified. He shows that living in the immediate vicinity of the land was his agent, who had taken care of the land for several years, and that the agent knew of his whereabouts; that also others in the neighborhood where the land was situated knew that he lived at Fremont, in the State of Nebraska.

In view of the fact that the publication notice was not made in the newspaper nearest the land, and the strong showing made by the defendant of his compliance with the law, it seems to me that this case should be remanded and he be allowed to put in his evidence.

Your office judgment, therefore denying his motion for rehearing, is hereby reversed, and you will remand the case to the local officers for their further action, in accordance with this opinion.

EVIDENCE—NOTICE OF TAKING.

DALLAS *v.* JONES.

Objection to evidence, on the ground that it was not taken before the officer designated in the notice, is properly overruled, where it appears that on the day set for hearing both parties were present in court, and at such time the local officers named the officer before whom the evidence should be taken, and that the evidence was taken in accordance with said order.

Secretary Smith to the Commissioner of the General Land Office, August 18, 1894. (J. I. H.) (J. W. T.)

The above cause is before me on appeal from your office decision of April 22, 1893, in which was affirmed the decision of the local officers, sustaining the contest of timber culture entry No. 7574, which entry was made by John Q. Jones, for the NE. $\frac{1}{4}$ of Sec. 29, T. 4 S., R. 35 W., in Oberlin land district, Kansas, on February 24, 1890.

Contest was initiated by George C. Dallas on February 16, 1892, by affidavit, in which he alleged that contestee:

Wholly failed during the first year after making said entry, to plow, break or cultivate the first five acres, or any portion of said described land. That said defendant has performed no work of any kind since making said entry, or caused the same to be done, and no work has been done on the above described tract, since the date of said entry, and said failure exists at this date.

Hearing was set for April 15, 1892. On said last mentioned date, the parties to the above cause appeared at the local office, and made joint application (not stipulation) to have the cause adjourned to June 19, and the testimony taken by John F. Price, clerk of the district court, but the register and receiver report that the case was continued, by agreement of the parties, to June 17, 1892, and that the local officers ordered that the testimony be taken before S. W. Gaunt, a notary public, at his office in Atwood, Kansas, on June 7, 1892.

At the time and place last mentioned, both parties appeared in person, and by their attorneys, and contestee objected to any testimony being taken before S. W. Gaunt aforesaid, for the reason that the notice of taking the same states that the testimony is to be taken before John F. Price, clerk of the district court, of Rawlins county, Kansas. No notice, however, was produced.

The officer before whom the objection was made, and by whom the testimony was taken, reports that contestant introduced the original letter from the local officers, continuing the above cause to June 17, 1892, and ordering the taking of testimony before S. W. Gaunt aforesaid, on June 7, 1892; at 10 o'clock, a. m., and also post office registered receipt, dated May 3, 1892, for a registered letter addressed to John Q. Jones, Upland, Nebraska, and also introduced an affidavit, made by George C. Dallas, showing the mailing of the letter for which the

receipt was shown, but these papers are not returned with the testimony.

The motion was then and there overruled, and testimony was taken on the part of the contestant alone.

On June 17, 1892, the day to which the cause had been continued, the motion, in the form it was made before the officer taking the testimony, was not insisted on, but the register and receiver were asked to dismiss the case, for the reason that the evidence had not been taken by the officer before whom the notice acknowledged it would be taken. This was overruled, and I think properly so. The local officers had full jurisdiction by the appearance of both parties on the day named in the notice of contest, and on said day they ordered the testimony to be taken on June 7, 1892, and designated S. W. Gaunt as the person before whom it should be produced, so that if their report is true, made under their official oaths—and I must hold it so, in the absence of any sworn denial—the defendant had full notice of the time when, and the place where, and the person by whom, the evidence would be taken, and his appearance before the officer designated, at the time fixed, corroborates it.

It appears that a notice was sent to the defendant, of the taking of said testimony, at a place different from the one he gave as his post office address at the time of his application, but no point is made upon its non-reception, and no claim made of it, as a fact. I therefore hold that the contestee had sufficient notice of the time and place of taking the testimony, and of the person before whom the same would be taken. But if the same had been taken irregularly, it would scarcely warrant the dismissal of the cause.

The evidence showed that no work whatever, of any kind, had been done upon any portion of the tract in question, from February 24, 1890, to February 18, 1892, and there was no improvement.

I have no doubt that the allegations of the affidavit of contest are fully established, and your office decision is therefore affirmed.

SWAMP GRANT—INDEMNITY CLAIM.

LINN COUNTY, IOWA.

The State will not be heard to say that a decision on a claim for swamp indemnity is rendered without due notice that the claim "would be adjudicated in its then condition," where said State has waived its claim to a part of the lands, and repeatedly thereafter requested final action on the remainder.

In determining a claim for swamp indemnity the Commissioner of the General Land Office is the judge as to whether the evidence presented constitutes "due proof," and where such evidence is not deemed sufficient he is authorized to order a re-examination in the field of the land for which indemnity is claimed.

Where the field notes of survey do not show the tracts claimed to be swamp and overflowed, the burden of proof is upon the State to show such tracts to be of the character granted.

Where the State presents its claim upon evidence alleged by its agent to be of the best and highest character obtainable, and such evidence, on investigation, is found unreliable, the case must rest on the record as made.

Secretary Smith to the Commissioner of the General Land Office, August (J. I. H.) 29, 1894. (G. C. R.)

I have considered the case arising upon the appeal of the State of Iowa, from your office decision of December 19, 1892, in the matter of the claim of Linn county, through its authorized agent, Isaac R. Hitt, for the purchase money received by the United States for certain lands sold after September 28, 1850, and prior to March 3, 1857, which lands are alleged to have been swamp and overflowed, within the true intent and meaning of the swamp land grant of September 28, 1850.

The claim is on account of 1,027 tracts, equal to about 40,750 acres, for which the government has received about \$50,000, which amount is claimed by the county, under act of March 2, 1855, and of March 3, 1857 (10 Stat., 634, and 11 Stat., 251).

The claim has been investigated by three special agents: First, by Mr. W. C. Forry, in 1888. The county agents presented no proofs to him, and he made no report. It was examined a second time by Agent J. B. Satterlee. He commenced his work February 5, 1890, and concluded it August 4, of that year, and submitted his report August 16, following. His findings were:

Swamp lands	467 tracts or 18,352.68 acres;
Agricultural lands	560 tracts or 22,397.32 acres;
Total examined.....	1,027 tracts or 40,750.00 acres.

The county agent (Isaac R. Hitt) made waiver of the tracts found by Agent Satterlee to be agricultural (560), and asked an accounting and payment for the residue (467 tracts), amounting to the sum of \$22,500.

Satterlee reported that he first proceeded to obtain the names of the owners of the several tracts included in the indemnity list; also the names of well informed citizens in the various localities contiguous to the lands, who have for a great length of time known the land. He reported Linn county to be unlike any other part of Iowa; that the table lands of the county differ from the lands generally known as table lands in that

they abound in lands sufficiently depressed or sunken below the general level to hold excessive rainfall, in view of the fact that they are pretty generally underlaid with a solid clay sub-soil, and much of this land is devoid of natural drainage and is very wet in wet seasons, and is never very dry land, though much of it is excellent soil, and a large portion of it is and has been for many years in successful cultivation;

that a large proportion of the lands on his list is situated on the "Divide between the Wapsipinicon and Cedar rivers, and is for the most part table land, rolling to some extent, but generally quite flat, with such depressions as I have described;" that his report shows in

each case not the present status alone, but the original conditions of each tract, so far as the same could be ascertained; that he kept the deputy state agent, J. J. Novak, with him during his personal examination of the tracts, "and we have agreed as far as practicable on the spot as to the status of each tract, with a full understanding on the part of said deputy state agent as to what the facts were in each case;" that at the close of the personal examination in the field with the said Novak, they compared results, and he thereupon procured Novak's waiver of the right of the State "on each and every tract found by me to be dry," and subsequently procured the waiver of Hon. I. R. Hitt, the state agent, as to the same dry list—in all five hundred and sixty tracts; that at the close of his examination, he required the deputy state agent (Novak) to take evidence on the tracts "found by me to be wet and not waived by him, and we did so proceed, and did take such evidence in my presence;" that Novak closed his proofs of the wet character of four hundred and sixty-seven tracts "by me found to be of the character contemplated by the swamp land grant;" that he inquired into the character of the witnesses offered on the part of the State, their means of knowledge and general competency to testify as to the original condition of said lands, and "found them to be men of the highest personal character, as well as possessed of the requisite general knowledge."

With his report, which contained a statement of the character of each tract, some reported "wet," and some "dry," he also transmitted four hundred and sixty-seven sheets containing the evidence of witnesses, namely: Messrs. Fay, Pugh, Fee, Neighbors, Bontty, Shunka, Gunnison, Forrester and Rogers. This evidence was produced by Novak, the State agent, and is that to which Satterlee referred in his report as being produced to prove the wet character of the land previously examined by him and Novak, and found by such examination to be "wet." Generally, two witnesses were examined for each tract.

On examination of this report, your office declined to accept the testimony submitted, and ordered another special examination into the character of the claim and the testimony submitted. This examination was to be of the four hundred and sixty-seven tracts reported "wet," and W. L. Reilly was directed to make the examination. He apparently engaged in that work from August, 1891, to January, 1892. During this time he appears to have been making a personal examination of the tracts reported "swamp" by Agent Satterlee, taking evidence of witnesses as to some of those tracts and statements of the former witnesses who testified before Satterlee at the instance of Novak, the county agent.

On the motion of I. B. Kinkead, of this city, my predecessor, on December 1, 1892, deeming "the best interests of the government require that this claim should proceed to an early determination," directed your office to "have such action taken as will complete the

investigation already instituted," and without going into the merits of the case, he further directed your office to "proceed to the conclusion of the business with as little delay as possible," and then concluded with the following observations:

I do not credit the assaults upon the chief of the swamp land division, who, I think, has been earnest and just in the discharge of his duty. The case has many noticeable particulars—not the least among them being the extraordinary fee that is to be paid by this county for all that can be made for it over six thousand dollars, the methods pursued at the examination, especially in cross-examining aged witnesses for hours at a time, in regard to a very small tract of land, and the appearance of Mr. Satterlee, formerly a special agent of the land office, among the claimant's attorneys or agents. . . . Allow no interference with any head of a division in your bureau.

In pursuance of this order, and on December 19, 1892, your office adjusted the claim, the State, through its agent, having filed a certificate under the regulations of September 19, 1891 (13 L. D., 301), showing the claim then on file to be the complete and final claim of the county under the existing swamp land laws.

Upon the pending claim of the 1,027 tracts, your office found:

1st. That 398 tracts (therein described), upon which proof was submitted by Agent Satterlee, were not swamp lands at date of the grant.

2d. That sixty-nine tracts (described), upon which proof has been submitted, appear *prima facie* to have been swamp lands.

3d. That 560 tracts (also described), upon which no proof was submitted, and upon which the claim of the county was formally waived, were not swamp lands.

As to the sixty-nine tracts, the field notes and other evidence showing *prima facie* that the same were probably swamp lands, your office directed that the county agent be permitted to submit "new, proper and sufficient testimony," as soon as an agent is assigned for duty in Linn county.

Your office rejected outright the claim for indemnity as to all other tracts.

From that judgment the county, through its agent, has appealed to this Department, and as grounds of error insist:

1. That the decision appealed from was made without notice to the county agent that the claim would be adjudicated in its then condition.

2. That the investigation in the field had not been completed, and the decision was rendered on an incomplete record.

3. That the decision is not based upon legal and competent proof, but upon influences and presumptions, etc.

Relief is sought in the alternate, viz:

That if, on review of the case, it should appear that the county has not made out its case, a further investigation and examination into the merits of the claim be ordered, and a special agent be detailed to take further testimony in the field.

It will be observed that of the 1,027 tracts claimed by the agents of the county as being swamp, the claim to 560 of them was waived, and

the residue 467 tracts were reported by Agent Satterlee as having inured to the State under the swamp land act, and having been sold by the United States, the purchase price thereof (\$22,500) was due the State under the acts of 1855 and 1857 (*supra*). By the State's waiver of the 560 tracts, the agent rested his case upon the showing made by Satterlee, and on November 1, 1890, Agent Hitt requested your office to take up the adjustment "within the next ten days."

On November 14, 1890, Mr. Hitt again inquired of your office as to when the adjustment would be made.

On January 19, 1891, Mr. Novak, the sub-agent, inquired as to what progress was being made in the adjustment of the claim.

On July 25, 1891, ex-Secretary of the Interior, Kirkwood, at the instance of Mr. Novak, "as agent of Linn Co." called attention to the proof submitted, and requested early action thereon.

On September 5, 1892, Judge S. H. Fairall, one of the agents of the county, wrote as follows:

The county demands as a matter of right that action be had. . . . The authorities of the county, as well as myself, in the exercise of legal rights, again respectfully demand that the claim be taken up, acted upon, without further delay, and determined upon the facts and the law.

On September 6, 1892, Hon. J. T. Hamilton, M. C., called attention to the claim, saying: "The agents of the county inform me that their claim is complete," etc., and, finally, my predecessor, on the motion of Mr. Kinkead, directed your office to "proceed to the conclusion of the business with as little delay as possible."

It follows, therefore, that the agents of the county can not consistently complain that the decision appealed from "was made without notice to the county," since repeated requests and even demands were made that the matter be adjusted.

Agent Satterlee made his report August 16, 1890; he submitted the same "trusting that it will be instrumental in accomplishing the desired adjustment on the Linn county, Iowa, list." Of the 560 tracts found by his personal examinations, in company with Agent Novak, to be dry, he secured, apparently, without any difficulty, a waiver of the county's claim by its agents. The residue (467 tracts) found by him to be wet, he directed Agent Novak to produce the testimony to prove that which he had already found. There was apparently no difficulty between them, and agreements were easily reached.

Upon consideration of all the facts, and not satisfied with this report, your office, on August 15, 1891, directed Louis W. Reilly to "proceed to Cedar Rapids, Linn county, Iowa, to specially investigate the claim of the county," further saying: "It is desired that a critical examination of the land and an investigation into the character and competency of the witnesses who have testified as to its character be made to enable this office to make a proper adjustment."

This agent proceeded to make the examination as directed; but, from what appears as hereinafter described, he did not have the same co-opera-

tion and help from the sub-agent Novak as was accorded Agent Satterlee. The agents of the county were very solicitous to have Satterlee's report accepted by your office, and protested against any further investigation by Agent Reilly.

Of the 467 tracts reported "wet," one George W. Fee testified as to 336 of them. On November 24, 1891, he made an affidavit before one Dunbar, a notary public, stating that of the lands in six of the townships (describing them), reported to have been swamp, he never saw any of them to know their boundaries and to examine them, "except when I rode by them in a buggy, with Mr. Novak and Mr. Morris Neighbors, on or about the fall of 1889, and that I was instructed to grade those lands on the test of tillable plow lands for one-half or more than one-half of each tract;" that he saw the lands at a distance, as he rode along the road in a buggy; that he did not then know the boundaries of the tracts he testified to, outside of Tp. 86, R. 8, and some few tracts in Tp. 86, R. 7. "If I had been instructed that tame grass is considered a crop, as well as any of the cereals, I would not have given in as much land as swampy in the year 1850 as I did. I testified that some tracts were swampy that I did not see at the time I went around with Mr. Novak and Mr. Neighbors, but my understanding was that they joined land I had seen, and that they were like them."

To nearly the same effect is an affidavit made by Morris Neighbors, who at the instance of Novak testified to 336 tracts. It appears that Fee and Neighbors together testified to 332 tracts.

Witness E. B. Pugh, who testified as to the swampy character of ninety-one tracts, signed a written statement in the presence of H. B. Gott and Agent Reilly, practically to the same effect as the affidavit of Fee, further saying: "I do not now remember having looked at lands in Marston Tp. Mr. Fry and I were advised, however, that the lands we testified to at Cedar Rapids were the same that we had looked at about three or four years before, but I do not know of my own knowledge that they were."

Witness David S. Fay, who testified as to ninety-one tracts, made a sworn statement, substantially to the same effect as did Witness Fee. He makes it clear that he had no personal knowledge whatever as to the character of many of the tracts he had previously sworn were swamp.

Mr. Hitt, agent for the county and State, made an affidavit before Willis W. Hitt, notary public, Cook county, Illinois, on July 28, 1890, stating that the witnesses who testified to the character of the lands in support of the claim for indemnity

are respectable and disinterested persons fully entitled to credit, and who, after diligent search, were found to be the most reliable, well informed witnesses having a personal and exact knowledge of the condition of the lands during a series of years extending to or as near as possible to the date of the swamp grant (September 29, 1850,) that could be found, and the reason why competent witnesses, having the

requisite knowledge of the lands at the date of the swamp grant in every case here-with presented, do not testify is, that after due and diligent search, as aforesaid, they can not be found.

Taking Mr. Hitt's statements as being true, diligent search failed to reveal better witnesses than those presented. If the testimony of those witnesses can not be received, they being the "most reliable, well informed witnesses having a personal and exact knowledge of the condition of the lands," then it is manifest that the claim of the county can not be established.

Agent Reilly examined witnesses as to about thirty tracts reported by Satterlee to be "wet."

The following will illustrate the difference in the two agents reports: Having examined the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 19, Tp. 86, R. 7, Satterlee reported that at least twenty-two acres of it were wet enough to be worthless without drainage. Subsequently, and on June 14, 1890, Novak introduced G. W. Fee and Morris Neighbors (above referred to), who, in the presence of Satterlee, gave their usual stereotyped statements, namely: that Fee was fifty-two years old and a farmer; Neighbors was sixty-two and a farmer; that they knew the land from examination and observation; had examined the lines and had frequently seen the land in various years and seasons; known it for forty years; that it was enclosed and about half cultivated; and a ditch across it from about the middle of the east line to the middle of the south line, and not more than ten acres could be made to produce a crop of tame grass and hay without reclamation. "It is springy and spouty, and tile drainage alone will reclaim it."

On January 23, 1892, witness A. D. Robinson appeared before Agent Reilly and sub-agent Novak. He testified that he formerly lived adjoining the land; first saw it in 1856; that it was all good land, except a piece of slough. When this witness was asked this question: "What proportion of this tract was dry, and what proportion was marshy and wet, when you first knew it?" the notary makes this written statement: "Mr. Novak here interrupts the witness and progress of the investigation to the amount of fifteen minutes; the interruption is so boisterous that I went out for a peace officer." The witness, however, answered the question as follows: "About thirty-five acres are dry and five acres are wet." He further testified that the only drainage that had been made to the forty acres was a small ditch through the slough (covering five acres), and that the whole forty is now dry; that the land is not affected by overflows; that the surface of the land is rolling; that the land in its natural state would produce crops and was then all in grass.

As to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 5, T. 85, R. 7, Fee and Neighbors again testify, stating that eighteen acres could be cultivated in its natural state—balance wet, spongy and swampy, and tile drainage alone will reclaim it.

Agent Satterlee reported the tract wet, saying: "There is no dry land on it at all, and only twelve acres safely tillable. A pasture tract and a wet one."

As to this tract, witness H. R. Lyman testified before Agent Reilly, stating that he lived in the vicinity of the land all his life, and that thirty acres of the tract were dry, and all dry enough for crops, and not affected by overflow, and it would in its natural state produce crops of grass or hay in a majority of years.

As to the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 33, T. 86, R. 7, Satterlee reported it wet, and Fee and Neighbors swore that not more than six or seven acres of it could be cultivated without reclamation, and none of it had been reclaimed.

Thomas Wright, aged sixty-one years, testified before Reilly as to this tract, and stated that he had known the land since 1868 and had owned and farmed it; that the land is a black loam, "except thirty acres sand ridge," has general fall to southwest, slough takes up about twenty acres of it, but he had mowed the land with his mower, and it would produce crops in its natural state in a majority of years; use it all for pasture—more than half dry.

Satterlee reported the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 33, T. 86, R. 7, as "wet," saying there "was a wide, deep, well-worn ditch through it."

Fee and Neighbors testified that none of it could be called dry land; "Spongy;" drainage will reclaim it.

As to this tract Wright also testified before Reilly, saying he owned the tract; that thirty acres thereof were dry, and no artificial means had been employed to change its character; that a slough of ten acres was on it; land rolling; thirty acres in natural state would produce crops; cropped to corn, oats, grass, etc.

Satterlee reported the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 33, T. 86, R. 7, as "wet." Fee and Neighbors reported all but thirteen or fourteen acres wet; "sponge-like basin;" ditch runs through it.

Wright testified before Reilly that he owned it, and knew it since 1868; that there was no ditch on it, and that all but five acres of it is dry.

Satterlee reported that the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 1, T. 85, R. 8, as wet, and Fee and Neighbors testified they had known the land for forty years; and that all but fourteen acres of the tract is wet, and must be reclaimed to produce crops.

Reilly examined Jacob Thomas, age seventy-one years, and W. H. Martin, age fifty-one years. Thomas had known this tract forty years, and Martin saw it in 1854, and frequently since. Both say land is black loam, and that from twenty-five to thirty acres thereof were dry and would produce crops without reclamation; land not affected by overflow.

As to the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 11, T. 85, R. 8, Satterlee reports it wet, and the same witnesses, Fee and Neighbors, say thirty acres thereof are wet, spongy, etc. Jacob Thomas and George Ward testified before

Reilly; had known the land respectively, since 1852 and 1857; that no changes had been made by ditching, etc., not affected by overflows; land slopes to south; no sloughs or ponds, and from twenty-five to thirty acres would in natural state produce buckwheat and tame grass when they first knew it. It is not wet or spongy.

It is thus seen that not only did the witnesses produced by Novak (who swears "I have had almost the exclusive control of the management of and proceedings in said claim for the county,") have no personal knowledge of many of the tracts concerning which they testified, but witnesses were produced who knew the lands for many years, and who swear that many of the tracts reported wet by Satterlee and Novak's witnesses were in fact agricultural lands at the date of the swamp land act, or soon thereafter.

A copy of a contract, certified by the auditor of Linn county, shows an agreement was made with J. J. Novak by which he was to receive thirty-five per cent of all indemnity received in excess of \$6,000 in money.

Novak appears to have been the principal mover; and from the partial reports of Reilly, made at sundry times while in the county, Novak appears to have given that agent much trouble, resulting, finally, in Reilly's declining to proceed further in the investigation, owing to Novak's interference with his duties.

Henry C. Printy, the notary who took the rebutting testimony offered by Agent Reilly, made an affidavit sworn to before George B. Dunbar, a notary public, on January 2, 1892, stating that on December 21, 1891, J. J. Novak, the sub-agent, came to his office and stated that he (Novak) was interested in the swamp land investigation which would be held before him (Printy): "That as such it could be quite an object for me not to note all the evidence; that I could do quite well if I was so disposed;" that prior to Novak's coming, and on the same day, one Whit Langsdale, of Center Point, came to him, and said that: "I could get a good fee out of it; that it was not necessary for me to take down or note all the evidence of the witnesses; that there would be a man in to see me."

While Novak seems to have objected seriously to Reilly's investigation, he appears to have acquiesced in Agent Satterlee's judgment.

Satterlee determined for himself (but always in company with Novak) what tracts were wet and what dry; he at once obtained waivers from Novak of the dry tracts, and those adjudged by him to be wet, he afterwards required Novak to obtain the evidence of two respectable witnesses to swear such tracts were wet. This may account for Satterlee's failure to cross-examine Novak's witnesses, for those witnesses only swore to such things in relation to the tracts as had been previously determined by Satterlee.

It is manifest that your office did right in refusing to accept his report, without further investigation.

Already three agents have investigated this claim at an expense to the government of \$3,774.26.

The Commissioner of the General Land Office is the judge as to whether the evidence constitutes the "due proof" referred to in the 2d section of the act of 1855, *supra*; and when the proof presented to him is not deemed sufficient, he is authorized to order a re-examination in the field of the land for which indemnity is claimed. Hardin County (Iowa), 5 L. D., 236.

It is conceded that the State has made its best proofs, and these proofs have been found to be worthless, in the light of the entire record.

The field notes only show five of the four hundred and sixty-seven tracts to be swamp and overflowed lands. In such case the burden of proof is with the State to show that the greater part of each forty acre tract was of the description of lands granted, viz: "Swamp and overflowed lands made unfit thereby for cultivation." *Nita v. State of Wisconsin*, 9 L. D., 385.

The witnesses presented by the county to prove the character of the land practically nullify their own statements in affidavits subsequently made.

The State has been given a full opportunity to prove its claim; the evidence accompanying Agent Satterlee's report, while upon its face apparently satisfactory, is shown to be utterly worthless; and, as Agent Hitt made affidavit that the persons who testified "are the most reliable, well-informed witnesses that could be found," and since "diligent search" failed to reveal better ones, the case must rest upon the record already presented.

As to the sixty-nine tracts which upon the showing made appear *prima facie* to be swamp lands, you will permit the agents of the county to submit proper testimony; and, with that end in view, you will, as soon as practicable, assign an agent of your office to be present and cross-examine such witnesses as may appear for the county. The agent should be instructed to report facts, both from his own observations and from the testimony of credible witnesses, and, if, generally, in the adjudication of indemnity claims, interested parties at any stage of the proceedings attempt to interfere with the just and lawful acts of the government agents, upon the report of the agent, together with proofs of such conduct, you will withdraw such agent, and allow the claim to lie dormant until such time as ample assurances are given that such practices will cease.

The decision appealed from is affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

PIERCE ET AL. v. MUSSER-SAUNTRY COMPANY.

Lands lying within railroad indemnity limits, not required in the final adjustment of the grant, nor selected on behalf of the same, but sold as a part of said grant to purchasers in good faith, are of the character subject to purchase under section 5, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, September 5, 1894. (P. J. C.)

This case comes before the Department on the appeals of E. A. Pierce and a large number of other settlers upon the land involved, from your office decisions of October 3, and November 2, 1892, wherein your office affirmed the action of the register and receiver in accepting the proof and allowing entry to be made under section 5 of the act of March 3, 1887 (24 Stat., 556), by the Musser-Sauntry Land, Logging and Manufacturing Company, of the land involved, and others, in the Ashland, Wisconsin, land district.

The status of the lands involved has been frequently passed upon by this Department (see 6 L. D., 195; 10 L. D., 63; 11 L. D., 608; 11 L. D., 615; 12 L. D., 259, and other cases that might be cited); and nothing is disclosed in the present case to induce a change of the rulings in that behalf heretofore made. It is sufficient now to say that the lands were within the indemnity limits of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, under the grants made to the State of Wisconsin by the acts of June 3, 1856 (11 Stat., 20), and of May 5, 1864 (13 Stat., 66); upon the final adjustment of those grants, not being needed therefor, they were restored to the public domain, by executive order, on November 2, 1891 (see *Newell v. Hussey*, 16 L. D., 302). In 1883 selections of the lands in question as indemnity lands, with the fees therefor, were presented by the Omaha Company, and accepted by the local officers, but no list, specifying the losses, or bases for the selections, was filed. The selections then made, so far as the particular lands here involved are concerned, were not approved by the Land Department, but prior to 1884, the State of Wisconsin patented them to said company, as inuring to it under the grants. Afterwards, in 1885, the Omaha Company, for a valuable consideration, sold and conveyed them, by warranty deed, to F. Weyerhauser and associates, all of whom were citizens of the United States. In 1886 Weyerhauser and his original associates, with one exception, organized, under the laws of Iowa, the Musser-Sauntry Company for the purpose of conducting the timber business upon these and such other lands as might be purchased. Upon its organization, Weyerhauser and his associates conveyed the lands in question to that company, which is now here seeking to purchase and enter the lands under section 5 of the act of 1887.

The discussion in this case, both oral and by brief, has taken a wide range; but it seems to me that there are only two questions, arising

upon the record, necessary for me to decide; these are, (1) whether the lands in controversy are of the character which may be purchased under the adjustment act of 1887, and (2) whether the applicant company, being a corporation, may make said purchase. All other questions presented by counsel have been heretofore fully considered and determined, and no good reason is seen for changing the conclusions then reached.

As to the first question, it is insisted, in substance, that in order to support a sale and purchase, under the fifth section, the land must have been sold and bought under "a claim" of right by the grantee company; that claim to lands within indemnity limits of a railroad grant can only be made by proper selections, by the grantee company, accompanied by a designation of losses, as bases for the selections; and that even then the selection must be approved by the Secretary in order to vest any claim in the railroad company; and that in the absence of such selections having been made by the Omaha Company, it had no more "claim" to the lands inside than to those outside of the indemnity limits. This seems to me to be a most narrow and technical view to hold in regard to a remedial statute.

A complete answer to that portion of the contention, which holds that the selection of the company must be approved by the Secretary of the Interior before a purchaser will be protected, is to be found in the opinion of Attorney-General Garland, in 6 L. D., on the proper construction of the act of 1887. On page 275, in answer to the direct question, he says:

That the selection sold by the railroad company shall have been approved, is not required by the fifth section, nor that it shall have been patented.

His opinion was not asked as to whether proper selection was necessary, and therefore he expressed no direct opinion as to that proposition, but whilst stating the scope and purpose of the law, he is careful not to say that proper selection or any selection by the grantee company is a necessary prerequisite to the exercise of the pre-emptive right accorded to its vendee. And from the tenor of his opinion, as I read and understand it, he could not have consistently said that selection was necessary.

He first holds that the word "grant" as used in the act must have necessarily included lands within both the primary and indemnity limits. In connection with several reasons for this view, he argues that—

The wrong done the settler who in good faith shall have purchased lands of the railroad company, to which the company by the adjustment is shown to have no legal right, is identical whether the purchases are in the indemnity or primary limits. The hardship he may be subjected to by loss of his land, improvements and labor, is the same in either case. The whole scope of the law, from the second to the sixth section inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers who, through the wrongful disposition of the lands in the grants by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized.

After stating that the "selection sold" need not be approved or patented, as quoted, the Attorney-General proceeds to say that the only requisites established by the statute "to entitle those wronged to its benefit," are that they shall be citizens or have declared their intention to become such; that the land "shall have been sold to them by a railroad company as a part of its grant;" that the lands have not been conveyed to or for the use of the company; that the lands are of the numbered sections prescribed in the grant and coterminous with constructed parts of the road, and that the purchasers shall have bought in good faith. Continuing, so as, apparently, to emphasize these views, it is said—

It was not intended to limit the redress to cases in which the railroad could rightfully have sold the lands. The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claim. The fifth section expressly refers to such lands as had been sold, which had not been conveyed "to or for the use of such companies." It is not required that the sale by the railroad companies shall have been made in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity.

The provision that the lands sold shall be of those "excluded from the operation of the grant," is not specified as one of the requisites by the Attorney-General, because he seems to have considered it as a corollary to the other conditions, describing "lands not conveyed to or for the use of such company." That this was his view is shown, I think, by the text of the last quotation from his opinion.

But independent of this, I think unselected indemnity lands come fairly within the class, described in the act, which are "for any reason excepted from the operation of the grant."

Unquestionably the indemnity limits are included in the word "grant" as used in the fifth and other sections of the act. This must be so, for if the company does not obtain its right to indemnity lands by the grant, such right is not obtained at all.

These lands then being within the grant and subject, in their order, to its operation, equally with other indemnity lands, were not selected for the all sufficient reason that they were not needed to satisfy the grant. This failure to select practically, and most effectually, "excepted" said tracts from the operation of the grant.

In the adjustment of railroad grants it is well settled that all selections are to be made of the nearest undisposed of sections. (*Wood v. Railroad Company*, 104 U. S., 331.)

Under the act of June 3, 1856 (11 Stat., 20), making the grant to this company, it is specifically required that the indemnity selections shall be taken from the alternate sections "nearest to the tier of" granted sections. In following the above rule, the grant was satisfied by the selection of the nearest sections, while those more remote, not being needed, were thus "excepted" from the operation of the grant. Not to so hold in this case, it seems to me, would be to come within the maxim which says—"Qui haeret in litera, haeret in cortice."

It seems to me very clear, that the present case comes within the letter of the statute, and within its spirit as expounded by the Attorney-General.

The lands are within the limits of the grant; of the sections from which it is prescribed indemnity may be selected; are coterminous with the constructed portion of the road; excepted from the grant; were not conveyed to or for the use of the company, and unquestionably must have been sold by the railroad company as part of its grant, for certainly it did not set up any claim to them otherwise than as growing out of the grant.

If the lands were purchased in good faith under a claim, whether rightful or wrongful, asserted or dormant, inchoate or complete, the equity is established and the statute will operate if the other requisites exist.

Vast bodies of land, along the lines of railroads, had for very many years been in a state of reservation, withdrawn by the executive from sale and entry, under settlement laws, for the purpose of protecting and effectuating the claim or right, or whatever it may be termed, of the railroad companies under their grants. This claim or right of the companies to lands within indemnity limits, inchoate, remote, contingent and latent as it was known to be, was yet regarded as so substantial and important that the executive deemed it to be its duty to extend its protecting arm over it, and to prohibit all citizens from seeking in any way to interfere with it. With the swelling tide of our population and the gradual absorption of other portions of the public domain, the reserved lands were more and more sought after. Those seeking to make homes upon them, on application at the local land offices, were told the lands could not be entered nor bought, because they were "within railroad limits," "reserved for the railroads." What so natural as that the applicants should turn to the railroad company and seek to purchase from it? They had been refused by the government officers, but met with no such rebuff by those of the companies, who, "claiming the earth," readily made sale to the home-seekers, caring for their money, and not very particular as to the validity of the right or title to the land sold. Thousands of such cases exist, and Congress, well aware of their existence, passed the act of 1887, by which it was sought and intended to protect such unwary but innocent purchasers.

What difference can it possibly make to the government whether the company had formally, by selection, asserted its claim to the particular tract? It had some sort of a claim; a claim which, in fact, is regarded by the government as so superior to the right of the home-seeker under the settlement laws that he is prohibited from exercising that right until the claim of the railroad company is satisfied. This is proven by the withdrawal; and it does not become the Land Department to deny the existence and potency of that claim. It is not necessary that it should be a legal or valid one. It is sufficient if it be colorable. But

if there be such a claim, it is sufficient, and the fact of sale shows in this case that there was such a claim. It is not the policy of the government to throw obstacles in the way of the settlement and improvement of these lands. Then why refuse to recognize a sale made prior to selection? What is to be gained by it? It was not possible under the decisions of the supreme court that settlement and improvement of lands within railroad limits should have been made during their withdrawal. That tribunal says in the *Riley v. Wells* case, that such settlement is null and void and no rights can be acquired thereby. Why should those who had been led to purchase from the company, because of the recognition of its rights by the government, now be ignored and deprived of the fruits of their labor?

Much more might be added, but enough has been said to show my conviction that the statute covers the case.

I therefore hold that the lands in controversy are of the character which may be purchased under section 5 of the act of 1887.

As to the other question, whether the applicant company, being a corporation, is a citizen of the United States, and authorized to purchase, within the purview of said section and act, it may be said that it is not necessary to decide it, in this case, because the record shows that Weyerhaeuser and his associates, who bought the lands from the Omaha Company, are all unquestionably citizens of the United States, and as such come clearly within the purview, the letter and spirit of said section as to the class who are authorized to purchase and the evidence in the case, in my opinion, clearly establishes their good faith in behalf. So that the case might rest upon these facts.

But counsel for appellants pressed the point with much persistence that the Musser-Sauntry Company, being a corporation, is incompetent for want of citizenship of the United States, to make entry of the lands. For answer to this contention, reference is made to the cases of *Dailey v. Michigan Land and Iron Company*, and of *Telford v. Keystone Lumber Company*, on review, this day decided, wherein the question is directly in issue, is discussed, and decided affirmatively.

Entertaining these views, your judgment is affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

TELFORD ET AL. v. KEYSTONE LUMBER CO. (ON REVIEW).

A contract of sale by a railroad company conveying the right to cut and remove, within a specified time, the pine timber standing and being on certain land, is a sale of an interest in the land, and entitles the purchaser thereunder to purchase said land of the government under section 5, act of March 3, 1887.

A corporation, organized under the laws of a State or of the United States, that has purchased in good faith lands sold as part of a railroad grant, is entitled as a "citizen" to perfect its title to said land under section 5 of said act.

Secretary Smith to the Commissioner of the General Land Office, September 5, 1894. (E. W.)

Plaintiffs in the case of *Telford et al. v. Keystone Lumber Company* present a motion for review of departmental decision in said case, (18 L. D., 176).

In order that the relevancy of the question presented therein may be apparent, it is necessary to recite some of the facts upon which said decision is predicated.

Certain lands in the Ashland district, State of Wisconsin, within the indemnity limits of the grant of June 3, 1856, (11 Stat., 20), to said State, to aid in the construction of the Chicago, St. Paul, Minneapolis and Omaha Railway, (Bayfield Branch) were also within the place limits of the grant of May 5, 1864, (13 Stat., 66) to aid in the construction of the Wisconsin Central Railroad.

In May, 1885, the Wisconsin Central Railroad Company sold to the Superior Lumber Company the standing pine timber on said lands, and such interest as passed by said conveyance, was transferred to the Keystone Lumber Company in 1889.

In January, 1890, it was determined in the case of the Wisconsin Central Railroad Company, (10 L. D., 63), that said lands did not pass under the grant of 1864, because previously withdrawn for the benefit of the Omaha Company, whereupon the Keystone Lumber Company, in January, 1891, applied to purchase said lands under the provisions of section 5, act of March 3, 1887, (24 Stat., 556).

Against this application the plaintiffs, who settled upon the lands in the latter part of 1890, and the early part of 1891, entered a protest, averring that there was no right in the company to purchase under said act of 1887.

The lands in controversy were formally opened to settlement in November, 1891.

Applying the act of 1887 to the facts just enumerated, the Department, in the decision under review, held that the application of the Keystone Lumber Company should be allowed.

Before considering the question presented in the motion for review,

I notice the second ground of the motion to dismiss the motion for review, which reads as follows:

Because, as protestants only, Telford *et al.* are not entitled to make such motion, nor to have the same considered.

In support of their motion to dismiss, counsel for defendant cited the case reported in 6 Copp's Land Owner, page 52, and in 2 L. D., 361.

I do not think the ground well taken, inasmuch as the cases cited are not similar to the one at bar.

It has been decided by the Department that protestants have a right to clear the record as to public lands, for the purpose of making entry thereon, and to do that they have a right to show the disqualification of applicants, or their non-compliance with law. See McKinley *v.* Walsh (13 L. D., 507); also (16 L. D., 532).

As to the motion for review, there is no question presented which was not thoroughly considered in the decision complained of, except what is substantially embraced in the first ground of error, to wit, that the act of Congress relied upon by the Keystone Lumber Company, does not confer the right of purchase upon a corporation aggregate.

The sixth ground of error embodied in plaintiffs' motion, reads as follows:

Error to rule that the Wisconsin Central Railway Company, as the reversioner under the lease or license, or grant of an interest limited to a term of years, should have the lands confirmed to it by patent, certifying and conveying the land to the transferee of such license, or lease or grant of an interest, expressly limited to the right for a term of years "to cut and remove" the timber only, and in which agreement it is expressly stipulated that "time is the essence of the contract", and wherein judicial declaration for recovery, or decree of forfeiture for breach of covenant, is expressly waived.

In support of the contention predicated upon this ground, counsel for plaintiffs submit the following propositions:

A grant of all the pine timber would be a corporeal hereditament, and an interest in the land.

A grant of the whole use of the pine timber, with no limit to the grantees' right, but his own will, would be a grant of the timber itself, and be a corporeal hereditament, and therefore an interest in the land. (Caldwell *v.* Fulton, 31, Pa., 475).

A grant of the right to cut and remove all the pine timber, with the enjoyment of the right conditioned or limited in any manner, is not a corporeal hereditament. (Marble Company *v.* Ripley; Lor Mountjoy's Case, 4 Leonard, 147; Caldwell *v.* Fulton, 31 Pa., 475.)

The question presented, was considered by the Department in the decision under review, but inasmuch as counsel insist that the authorities cited in the decision under review, do not support the legal proposition therein announced, some of those authorities are herein referred to, more at length.

In the case of Strasson *v.* Montgomery, reported in 32 Wisconsin, page 52, the plaintiff sued the defendant, charging that the defendant broke and entered into the enclosure of the plaintiff, and cut down and carried away certain trees and timber therefrom, to the damage of the

plaintiff, etc. Both the plaintiff and defendant held under deeds from one Gleason. The defendant held under an instrument in writing, in which Gleason sold and conveyed unto one White, all the trees and timber of every kind growing and being upon said premises, said instrument containing the proviso: "That the said party of the second part shall take all of said trees and timber off of said lands, within four years from this date." The plaintiff held under a conveyance in fee of a subsequent date. It was material in this case to determine whether the deed of defendant conveyed title to real property, in construing which, the court says:

Standing timber, like a fence, is part of the realty. If the plaintiff was the owner of the timber in controversy, he owned it as a part of his land. If the defendant was the owner thereof, he owned it by virtue of a conveyance from Gleason to White, which was a conveyance of an interest in the land. Hence, although it is conceded that the plaintiff owns the soil, yet the dispute concerning the title to the standing timber, raises the question of title to real property.

Again, in the case of *Golden v. Glock* (57 Wisconsin, 118), the court construes an instrument conveying title to timber to be removed within a certain time. The instrument before the court was a deed to the timber standing, lying, or being upon certain premises, containing the following clause: "It is agreed and insisted . . . that the timber on the south half of the (premises described) shall be removed within one year from the date hereof, and the balance within two years." In construing this instrument, the court says that "the bill of sale or deed to the parties under whom the plaintiff claims, undoubtedly transferred an interest in the land," citing *Strasson v. Montgomery* (32 Wis., 52); *Young v. Lego* (36 Wis., 394); *Daniels v. Bailey* (43 Wis., 566).

In the case of *Henry W. Williams v. J. H. Flood et al.* (63 Mich., 487), it was material for the court to construe an instrument in writing, where the purchaser of standing timber paid in full for the same, and received a written contract, signed by the owner of the land, in which he sold and conveyed said timber to the vendee, with the undisputed right of removal for two years from this date. The court, after quoting the operative words in the written agreement, says:

These words express the intention to sell and convey the standing timber as timber attached to, and a part of, the freehold, by which a present title was to pass, and cannot be construed into an executory agreement to sell and convey the timber when it should be thereafter severed. The agreement conveyed an interest in the land, and was such as the statute of fraud required to be written to be valid.

It appears from the foregoing, that the fact that an instrument conveying standing timber, contains also a limitation which requires the timber to be removed in a given period of years, makes no change in the application of the rules of construction.

But counsel for movants, however, insist that an instrument which sells and conveys the right to *cut and remove*, is different in character from an instrument which conveys the standing timber upon land.

The supreme court of Indiana, in the case of *Owens v. Lewis* (46 Ind.,

488), after an exhaustive review of authorities bearing upon the point at issue, in which it was material to construe a contract for the sale of growing trees, arrive at the same conclusion as that reached by the supreme court of Wisconsin and Michigan, in the cases hereinbefore cited. In the case last mentioned, the court says:

Analogous to an agreement for the sale of growing trees by parol, is the sale of ore in a mine. When the ore is severed from the land in which it is imbedded, it becomes a mere chattel; until then it is a part of the freehold.

In support of this announcement, the court says further:

In Riddle v. Brown (20 Ala., 412), a verbal contract had been made for the right 'to dig and carry away ore' from a mine, and it was decided that this agreement 'was devoid of efficacy as a contract of sale, because not in writing' and within the statute.

In further support of this position, the court cites the case of Anderson *et al. v. Simpson et al.* (21 Iowa, 399). In this last mentioned case, the defendant claims under a parol license to dig for and remove mineral from premises, and upon a suit in equity, to enjoin the defendant from mining lead ore upon the said premises, it was ruled as follows: "In order to make the parol license valid, and exempt it from the operation of the statute of frauds, it is necessary to show a possession taken and held under it", etc.

If a license to dig and remove ore from land is a contract conveying an interest in realty, it follows that a sale of the right to cut and remove timber, partakes of that character.

The operative words of the contract under investigation in the decision under review, reads as follows:

Has bargained and sold, and by these presents does bargain, sell, grant and convey to said Superior Lumber Company the right to cut and remove for his own use during the period of twenty years, all the pine timber standing and being on the following described premises, etc.

Such a contract in parol would, under the above rule of construction, be devoid of efficacy, because not in writing.

It is urged by counsel for the motion in the case under consideration, that a corporation is not a citizen, in the meaning of that term, as used in the act of March 3, 1887.

A remedial statute, not clear as to any proposed application, admits of resort to many rules of construction, to determine what the courts are authorized to assume is the meaning and intention of the law-maker. (Sutherland on Statutory Construction, Sec. 347).

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. (U. S. v. Kirby, 7 Wall., 482).

Whatever the legislative power may be, its acts ought never to be so construed, as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. (Rutherford *v. Green's heirs*, 2 Wall., 196).

The spirit and intent of the act must not be lost sight of in a strict adherence to its letter. (Felton *v. United States*, 6 Otto, 702.)

In view of these canons of construction, and applying them to the

statute under consideration, does a corporation come within the meaning of section 5 of the adjustment act of 1887?

It will be noticed that the language of the section in defining the personal qualifications of purchasers, is: "Citizens of the United States, or to persons who have declared their intention to become such citizens." Unlike the settlement laws, the further qualifications that they be over twenty-one years of age, or the head of a family, are not included in the section. No personal act, such as settlement, residence and cultivation, is required, or could be interpolated into the statute, and the acreage is not limited that the citizen could purchase. It seems to me that in view of this, it is not going too far in the construction of this section, to say that a corporation, where the purchase is made in good faith, and under the conditions prescribed, may have the benefit of the remedial statute, and that "citizen," as here used, should be construed as including corporations.

This view of the law is in entire harmony with legislative construction of the law, as adopted by Congress upon the same subject, as shown by reference to the act of March 3, 1887, (24 Stat., 476): "An act to restrict the ownership of real estate in the Territories to American citizens, and so forth." By section 1 of that act, it is declared that it shall not be lawful "for any corporation, not created by, or under the laws of the United States, or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate", etc., etc., in any of the Territories of the United States, or the District of Columbia; and by Section 2 of the same act, it is provided that, where more than twenty per cent of the stock of a corporation is held by persons or corporations "not citizens of the United States", such corporation shall not acquire or hold real estate in the Territories, or District of Columbia.

Here is a clear recognition that, under existing law, corporations, "created by, or under the laws of the United States, or of some State or Territory of the United States, are citizens of the United States, and as such, may acquire and hold real estate.

Congress, in another instance, and in express terms, construed the word citizen to include corporations.

Section 2319 of the Revised Statutes provides:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under 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.

It will be observed that this section confers the right upon citizens to purchase mineral lands, and it uses the same language as to who may purchase, that is used in the act of 1887, now under consideration.

Section 2321 of the Revised Statutes provides how proof of citizenship shall be made, and is as follows:

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

This section of the Revised Statutes does not confer any right of purchase, but merely prescribes the mode for proving citizenship, i. e., the qualifications of purchasers. The right to purchase, is given to citizens by section 2319, *supra*, and Congress, in prescribing the mode for proving that a person offering to purchase is a citizen, expressly recognizes a corporation as included within the term "citizen".

The supreme court of the United States, in the case of *McKinley v. Wheeler*, 130 U. S., 630, has also held that the term "citizen", used in section 2319, Revised Statutes, included a corporation. Mr. Justice Field, speaking for the court, said:

It will be observed that no prohibition is here made against citizens of the United States uniting together for the occupation and purchase of public lands containing "valuable mineral deposits". Nothing is said of partnerships or associations or corporations; it is to citizens that the privilege is granted, and that they may unite themselves in such modes in all other pursuits was, as a matter of course, well known to those who framed, as well as to those who passed the Statute. There was no occasion for special reference to the subject, to give sanction to these modes of uniting means to explore for mineral deposits, and to develop them when discovered. Many branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth, and the use of powerful machinery, requiring expenditures generally far beyond the means of single individuals.

At the present day, nearly all enterprises, for the prosecution of which large expenditures are required, are conducted by corporations. They occupy in such cases, almost all branches of industry, and prosecute them by means of the united capital of their members with increased success. In many States they are formed under general laws, by a very simple proceeding—by an instrument signed by the proposed members, agreeing to thus unite themselves, stating their number, the object of their incorporation, the proposed capital, the number of shares, the period of duration and the officers under whose direction their business is to be conducted. Such a document being acknowledged by the parties, and filed in certain designated offices, a corporation is created. The facility with which they may be thus formed, and the convenience of thus associating a number of persons for business, have led to an enormous increase of their number. They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution. We think, therefore, that it would be a forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens, was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred, which would impose such a limitation. It is in that respect unlike grants of lands for homesteads and settlement, indicating in such cases that the grant is intended only for individual citizens.

The supreme court held in this case that section 2319, of the Revised Statutes, must not be held to preclude a private corporation, formed under the laws of a State of the Union, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States.

To the same effect is the decision of the supreme court of Colorado, in the case of *Thomas et al. v. Chisholm et al.*, 13 Colo., 105.

The language which describes the character of persons who may locate mining claims, being the same as that which is contained in the act of 1887, descriptive of the persons who may purchase under that act, and as the members of the Keystone Lumber Company are citizens of the United States, I adopt and apply to this case the construction given by the supreme court of the United States to the term "citizen", as used in section 2319 of the Revised Statutes.

It should be borne in mind that section 5 does not confer a gratuity upon any person; that the statute is not a confirmatory one. As was well said in the oral argument, when this case was on appeal, it is in the nature of a pre-emptive right, that is, those qualified have the right to purchase from the government, at government price, lands that they had in good faith theretofore bought from the railroad company, upon a compliance with the rules showing that they came within the purview of the act.

It is suggested by counsel, that there is a strong intimation that a corporation could not make proof of citizenship, as required by the act, in *Union Colony v. Fulmele et al.* (16 L. D., 273), rendered by First Assistant Secretary, Mr. George Chandler. This question was not in issue in that case. Briefly stated, it was shown there that the railroad company deeded to Horace Greely, trustee, in trust for the Union Colony Company of Colorado, several thousand acres of land; and it in turn conveyed it in twenty-acre lots to individuals; that the life of the company was limited to twenty years from 1870. When the controversy arose, by the purchasers seeking to secure title under section 5, your office held that the Colony Company could make proof, but, on appeal to the Department, it was held that the individual purchasers should make the proof and entries, because the Colony Company had ceased to exist. This is the gist of that case, so far as the question at bar is concerned. The language counsel refer to, is as follows:

If (the company) is certainly, therefore, not in a condition to make the proof required by the act of March 3, 1887, even if a corporation could make proof for land which, at the time of making proof, it did not own. Then, too, one of the matters required to be shown by the applicant for a patent, was that he is a citizen of the United States, or had declared his intention to become one. There are several obstacles, therefore, it seems to me, in the way of your decision being carried into effect.

The "several obstacles" are then discussed, but not the question of citizenship as applied to a corporation. It was not a question that could arise in that case. The Colony Company as such, was not before the Department, nor the question of citizenship. Hence, even if there were any force in the intimation, it would not be taken as a precedent.

I am unable to conceive of any reason why a corporation may not have the privileges of this section. It seems to me to be in consonance with justice, and that this construction of the act comes fairly within the rules of construction as applied to remedial statutes.

I therefore hold that a corporation is, to all intents and purposes, a citizen, as used in section 5, and as such, may make the application proof and purchase, as provided therein, and patent may issue to it.

Your judgment stands reversed, and the motion for review is overruled.

RAILROAD GRANT-ADJUSTMENT—SECTION 4, ACT OF MARCH 3, 1887.

DAILY v. MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO. ET AL.

The authority conferred in a railroad grant upon the governor of a State to certify to the completion of the constructed sections of the road does not empower such officer to fix the terminals of the grant during the construction of the road, or on its completion. The authority to fix the lateral and terminal limits of a railroad grant rests entirely with the Land Department under the direction of the Secretary of the Interior.

In fixing the terminal limits of a constructed road the line of such road, with its sinuosities, is measured backward from the end for the distance of the statutory section, and from that point the general course of the road to its end is taken, and the terminal line drawn at right angles or perpendicular thereto.

The provisions of the act of 1871 authorizing the Houghton and Ontonagon Company to make a new location of the unconstructed portion of its road, on condition that the company should be entitled to receive "only its complement of lands for each mile of road constructed and completed within the limits heretofore assigned to said line of road," do not require the Land Department to disregard the constructed road as the measure of the grant, and fix the terminal limit of the grant on the basis of the old location.

Lands falling outside the limits of a grant on the establishment of the end lines of the road, but certified to the use thereof, and sold by the company to purchasers in good faith, are of the class of lands the purchase of which is confirmed by section 4, act of March 3, 1887.

A corporation, organized and existing under the laws of a State, is in contemplation of law a citizen of the United States, and as such entitled to invoke the confirmatory provisions of section 4, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, September 5, 1894. (V. B.)

On May 1, 1889, Amasa Daily made application to the register and receiver at Marquette, Michigan, land office, to be permitted to make homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 17, T. 50 N., R. 34 W. His application was denied on the same day, "for the reason that the land applied for was approved to the State of Michigan for the M. & O R. R. Co. July 21, 1860." From this action Daily appealed, and your office reversed the ruling of the local officers.

As a number of similar applications to enter adjacent lands were rejected at the same time and for the same reason, you were instructed to certify said case to this Department. In pursuance of that order, the case is now before me for consideration. It was argued elaborately by counsel on both sides, and I now proceed to render judgment therein.

By act of June 3, 1856 (11 Stat., 21), Congress made a grant of land to the State of Michigan to aid in the construction of railroads from Little Bay de Noquet to Marquette; and thence to Ontonagon, and from the last two named places to the Wisconsin State line. It is a present grant, in the usual form, of every odd-numbered section for six sections in width on each side of said roads, with the right to select indemnity for losses ascertained when the lines of said roads or either of them, are definitely fixed. The said land grants are to be subject to the disposal of the legislature of the State, and the railroads are to be public highways for the use of the government, free from toll or other charges upon the transportation of any property or troops of the United States; and the mails are to be transported over said roads at a price to be determined by the Postmaster-General until Congress fixes a price therefor.

The legislature of the State, by act of February 14, 1857, accepted the grant, and conferred that portion of it, applicable to the proposed road between the Little Bay of Noquet and Marquette upon a company of that name, and that portion between Marquette and Ontonagon, on the Marquette and Ontonagon Railway Company. The legislature also created a board composed of the governor and six commissioners, with full control over the apportionment of the grants, and power to declare forfeiture of the same.

The Marquette and Ontonagon Railway Company filed the map of definite location of its road on January 14, 1859, and thereafter the Land Department on July 21, 1860, certified to the State all the vacant odd-numbered sections within the six-miles granted limits, and between the termini of said road, as shown by its map. This certification included the land in controversy here.

Subsequently, by the act of March 3, 1865, (13 Stat., 520), the grant was increased by four additional odd-numbered sections per mile; the time for completion of the road was extended to December 31, 1872, by joint resolution of May 20, 1868 (15 Stat., 252), and, by act of July 20, 1871 (17 Stat., 643), the Houghton and Ontonagon Railroad Company, then owner of the grant, was authorized to make a resurvey and new location of its road; this new location was made from Champion to L'Anse, a distance of about thirty-two miles, and the map thereof accepted by the Department on April 9, 1872.

On November 20, 1862, Governor Blair of Michigan certified to the construction of twenty miles of the road, westward from Marquette, which was built by the Marquette and Bay de Noquet Company; on November 17, 1865, Governor Crapo certified to the construction of another twenty miles westward, by the Marquette and Ontonagon Company; and on February 6, 1873, Governor Bagley certified to the construction of thirty-two miles and one thousand three hundred and ninety feet westward, by the Houghton and Ontonagon Company, thus completing the line from Marquette to L'Anse. Though this last certifica-

tion was in 1873, it appears that the road was actually completed to L'Anse prior to December 21, 1873—the time appointed by law.

In the meantime, the Marquette, Houghton and Ontonagon Railroad Company, by consolidation, became the owners of the grant from Marquette to Ontonagon, but did not construct the road beyond L'Anse.

In June, 1873, the governor of Michigan, under authority from the legislature, and on the recommendation of the board of control, before mentioned, issued the patent of the State to the Marquette, Houghton and Ontonagon Railroad Company for 462,000 acres, being that portion of the lands theretofore certified to the State, and which were supposed to appertain to the road as far as constructed. Subsequently, on August 30, 1881, the railroad company, for a valuable consideration, sold and conveyed a large portion of said patented lands, including those here in controversy, to the Michigan Land and Iron Company (limited), one of the appellants here. And the last company sold the standing timber thereon to other parties.

Matters remained in this condition until March 2, 1889, when Congress passed an act (25 Stat., 1008), "to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette and Ontonagon, in said State," and the provisions of which, so far as applicable to the matter now in hand, are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto to all lands heretofore granted to the State of Michigan by virtue of an act entitled "An act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State and for other purposes," which took effect June third, eighteen hundred and fifty-six, which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted: *And providing further*, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Sec. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any act of Congress making a grant of public lands in the State of Michigan, *Provided*: That such lands lie opposite such constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road.

Sec. 3. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior under color

of the public-land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed.

On June 15, 1889, the legislature of Michigan, taking notice of the forfeiture, passed an act directing the governor of that State to reconvey to the United States all lands certified to the State for the benefit of the road between Marquette and Ontonagon, and which were opposite to the unconstructed portion of said road; excepting, however, from the operation of the act the lands patented to the railroad company in 1873, and which were sold to the Michigan Land and Iron Company. In pursuance of this direction, the governor reconveyed to the United States 214,000 acres, among which were *not* included the lands in controversy.

On March 13, 1889, the Commissioner of the General Land Office transmitted to the local officers at Marquette a diagram showing the terminal lines of the constructed road at L'Anse and ordering the lands west of the terminal line thus established to be restored to the public domain and thrown open to settlement and entry. The lands here in controversy are found to be west of said terminal lines; and, if the same be correctly established, said lands, in the language of the forfeiture act of 1889, are "opposite to and coterminous with the uncompleted portion" of said railroad, and are of the class declared to be forfeited by said act, unless within some of the exceptions therein specified, or protected from said forfeiture for other good reasons.

The foregoing statement, though perhaps not containing all the matters argued and pressed by counsel, is sufficiently full to present the salient and most prominent points in the case, a ruling upon which will, in my opinion, finally determine the controversy.

Counsel for the companies specify eighteen exceptions to the rulings of your office; but in their brief state the substance of those exceptions within seven propositions, which were discussed elaborately by both sides. I do not think it necessary to restate those propositions in detail at this time, but to discuss the questions which present themselves to my mind in the order in which they arise, until a conclusion is reached.

The first matter in order is the inquiry as to whether the terminal line is properly fixed by your office.

It is insisted on behalf of the companies that said line is arbitrarily and erroneously fixed, and I am asked to correct the alleged errors in the location, which correction, it is asserted, if made, would place the lands in controversy within the proper terminal line,—opposite to and coterminous with, the constructed portion of said railroad.

The matter of the accuracy and correctness of this terminal line was before this Department in 1891, when the same objections to it were urged as now. After a careful examination of the subject, my predecessor, Secretary Noble, on March 2, 1891, held that "the line heretofore

fixed by your office is correctly fixed, and that there is no good reason for granting the petition" to change the same. (Michigan Land and Iron Co., 12 L. D., 214.)

On the one side it is insisted that the decision of my predecessor has finally determined the matter of this terminal line, and that it has passed into *rem judicatum*; whilst on the other hand it is earnestly contended that said decision does not bring the matter within the rule applicable to things adjudged.

Inasmuch as the matter is one touching the proper administration of this Department, and a continuing subject for investigation, I have concluded to examine the subject of this terminal line myself, and do not consider that I am precluded from making such examination by any previous action of the Department.

Counsel for the companies argue that because, under the granting acts, the governor of the State was to certify to the completion of the constructed sections of the road, this necessarily implies that he is to fix the terminals of the grant during the progress of the construction of the road, and also on its completion. This contention cannot be sustained.

Under the acts of Congress, it is unquestionably true, that the governor is to certify to the completion of each section of the road as it is constructed. He thus certifies to the construction of so many miles of the designated road to a certain point. Then his authority, in that respect, comes to an end.

This authority, given to the governor, to certify to the construction of the road, as the work advances, is a very different thing from authority to adjust the land grant, made by Congress for the benefit of the road. This is a matter confided by law entirely to the officers of the Land Department under the direction of the Secretary of the Interior. The authority and duty to administer and adjust land grants has resided, and been recognized as residing, in the land officers ever since we have had a land system to be administered. A most essential requisite to such adjustment is the power to fix the lateral and terminal lines of such grants. If, therefore the officers of the State be authorized to establish the terminal lines through the lateral limits during construction, as here contended on behalf of the company, the land officers would be mere instrumentalities to administer the grant in accordance with boundaries established by State authorities. I cannot believe Congress ever intended a condition so anomalous to exist. Innumerable land grants, containing similar conditions, have been administered by the Land Department in the usual way, and this is the first time, so far as my research goes, that the authority so to do has been questioned.

The fact is, the authority thus given to the governor, to certify to the construction of the road, is intended as an aid to the land officers in the adjustment of the grant, which it was evidently intended should

keep step with construction of the road as far as possible. Nor can there be a doubt that, as to the determination of the fact of the construction of the road, and the consequent earning of the lands coterminous therewith, the certification of the governor has all the efficacy of the ascertainment of a special tribunal, charged with that duty. (*United States v. California and Oregon Land Company*, 133 U. S., 31.) But the identification of the coterminous lands is a matter which can be ascertained alone by the land officers.

Much space has been devoted, in the briefs, to a decision of this matter of fixing terminal lines generally, and in this particular case; and theories have been asserted which are not in accord with the well settled rules by which such grants are adjusted in the Land Department.

In accordance with well established rules, the fixing of the lateral or terminal limits of a grant is merely a matter of mathematical ascertainment.

When, in order to derive any benefit under this grant, the beneficiary, as a first step, filed a map of definite location of the line of road, that map being approved, the road thus shown became "the measure by which the locality and quantity of the grant is to be ascertained and determined." (*Scott v. Kansas Pacific R. R. Co.*, 5 L. D., 468, 472.) This location was then transferred to another map, and thereon were laid down the lateral limits of the grant,

by drawing lines on each side of the route of the road through a series of points precisely six miles distant therefrom on tangential lines to arcs of six miles radius, on each side of the route, every point of which will be six miles from some point on the route. (*Ibid*, 469.)

The lateral limits being thus established, when the certificate of the governor is filed, showing the construction of so many miles of road to a certain point, the land officers would ordinarily note on the map the point to which the construction has gone. A terminal line would then be drawn through that point, perpendicular, or at right angles, with the general course of the road, as prescribed by the statute. Here the original act provides for the filing of the certificate when twenty miles were constructed, therefore the land officers on the filing of the first and second certificates would have drawn the terminal line at right angles to the general course of the constructed road for the first and second twenty miles respectively. (*Northern Pacific R. R. Co.*, 5 L. D., 459.)

When the third certificate was filed, in 1873, which was for thirty-two miles and thirteen hundred and ninety feet, the length of the constructed section having been reduced, by the act of 1865, to ten miles, the terminal line would have been drawn through a point at the end of the third section, or thirtieth mile certified to, and at right angles or perpendicular to the general direction of the third section of ten miles, ignoring the fraction of constructed section, of two miles and thirteen hundred and ninety feet, until the next certificate should be filed. (6 L. D., 47, 51.)

Within the lines, lateral and terminal, thus established, would be found the granted land which the company had earned by construction, and which, under the act of Congress, is directed to be certified, or patented, to it as the construction of the road progresses, and which it is thereby authorized to dispose of.

In this case, inasmuch as all the land between the termini and within six miles of the line of road on each side, was certified over to the State, in July, 1860, shortly after the map of definite location was accepted, there was no fixing of construction terminal lines, nor further certifying or patenting of those lands upon the filing of the certificates of the governor during the progress of construction. It was not until after the passage of the forfeiture act that any terminal line was fixed by the land officers. Then it became their imperative duty to fix the end lines of the grant as far as the road was constructed. Here the method of ascertainment, though mathematical, is somewhat different from that which obtains in fixing sectional terminal lines during the progress of construction. That difference being that when the end of construction, now become the end of the road, is reached, the line of constructed road, with its sinuosities, is measured backward from the end for the distance of ten miles, or whatever may be the statutory section; then from that point, the general course of the road to its end is taken and the terminal line is drawn at right angles or perpendicular thereto (11 L. D., 625).

A careful examination of the record and maps on file in the railroad division of your office, which I have caused to be made, shows that this rule was followed in fixing the end lines of this road to L'Anse, the point where construction was ended.

This is strenuously denied by counsel for the companies who, in their brief, say that said end line as established,

is simply a right angle to the base line run from L'Anse to an arbitrary point on the constructed line sixteen miles southeasterly from this last mentioned village, and they file a diagram, with a straight line drawn from an arbitrary point on the constructed road, sixteen miles southeasterly from L'Anse, to illustrate the correctness of their criticism. The answer to this contention and illustration is very simple and conclusive. It is that the straight line shown upon the diagram crosses the constructed road at a point ten miles from L'Anse, before it passes on to the point sixteen miles thereon. The land officers in seeking to ascertain the end lines went back only ten miles from the end of the road, and there stopped; and from *that* point ran a straight line to L'Anse, whilst counsel have thought proper to extend the said straight line six miles further back to a point sixteen miles from L'Anse, utterly ignoring the ten mile point, and now insists that the land officers did the same thing. The fallacy of this contention is made self evident by an examination of the diagram, and need not be further referred to. I therefore hold that the terminal or end lines at L'Anse are properly fixed, in accord-

ance with the settled rules and practice of the Land Department, as stated in the cited decisions of Secretary Noble.

The further contention of counsel for the companies can not be here given in detail, but it is urged substantially by them that said end lines should have been fixed in accordance with the course of what is called by them the "located" line instead of the "constructed" line; that said end line should have been drawn through a point at the end of constructed line, at right angles with the general course of the last ten miles, of the old location of February 14, 1857, reckoned from the point of its nearest approach to L'Anse.

The two lines, it is apparent, differ greatly in the general course of their approach for the last ten miles towards L'Anse. The line on which the road is constructed runs in a direction west of north until it reaches L'Anse, whilst the old location runs to a point west and south of L'Anse, then turning, runs in a northeasterly direction to a point south of Keweenaw Bay, then turning, runs in a northwest course, past the south end of that bay, on its way to Ontonagon. This line does not go to L'Anse, its nearest point to it being about one mile west of south therefrom; and the general direction for the last ten miles of its approach to this nearest point, being nearly a due north course. A terminal line drawn in accordance with this contention would run nearly due east and west, north of the lands in controversy, which would thus appear to be within the terminal line and opposite to the constructed road.

This contention is claimed to be based upon the provision of the act of 1871, authorizing the Houghton and Ontonagon Railroad Company to make a resurvey and new location of the unconstructed portion of the road; provided that the company shall be entitled to receive only its complement of lands for each mile of road constructed and completed . . . within the limits heretofore assigned to said line of road.

As I understand this act and the cited proviso, it simply means that the company is to receive its complement of lands within the limits, established when the map of definite location of February 14, 1857, was filed and accepted. In other words, whilst it was permitted that the actual road might, with the approval of the Land Department, be constructed elsewhere, the lands granted must be taken within the limits of the grant as first established, which were not to be in any respect changed because of a new location of the line of road. Under the authority to make a new location, it would, perhaps, have been competent for the company to have made it outside of the limits of the old grant, as was done in the matter of the grant for the Cedar Rapids and Missouri River Railroad Company (see 110 U. S., 27); at least, there is nothing in the act of 1871 prohibiting such location outside of those limits. But for many good and sufficient reasons which might be assigned, it was not desirable that the *locus* of the grant, so long ago established, should be changed.

The company did not make a very radical change in the line of its location; at least, not to the extent of going outside of the limits of the grant as formerly established. Indeed, under the rulings of this Department, and of the supreme court (see Chicago, St. Paul, Minneapolis and Omaha Railroad Company, and cases cited therein, 6 L. D., 209), deviations in the actual construction of the road from the exact line marked on the map of definite location, are permissible, under certain circumstances, provided the deflections do not go beyond the limits of the grant as located. Inasmuch as the only change made was to adopt a shorter and more direct route than that designated originally, such change might have been made without the previous authority of Congress. (*Van Wyck v. Knevals*, 106 U. S., 366). Therefore, the changes made, after the passage of the act, whether considered as done under the authority of that act or otherwise, in no respect changed or affected the rights and obligations of the company under the original act and location, and the grant may be adjusted as though no such change was made. In any case, however, it must be recollect that the grantee company is only entitled to lands so far as the same have been earned by construction; consequently, in the adjustment of a grant, it must be held that it does not extend beyond the end of the constructed road, and at that point the end lines must be drawn. (*Burlington and Mo. River R. R. Co.*, 6 L. D., 589, 593; *Gulf and Ship Island R. R.*, 16 L. D., 236.)

The new location is positively of no importance further than by construction of the road thereon, it becomes "the measure by which the locality and quantity of the grant is to be ascertained and determined," and furnishes the point at the end whereof the terminal line is to be fixed under the rules. (*Ontonagon and Brule River R. R. Co.*, 13 L. D., 463, 475.)

The end line being thus properly established at L'Anse at right angles with the general direction of the constructed road, the lands in controversy are unquestionably outside of that line, opposite to the *unconstructed* portion of the road, and therefore of the class of lands declared by the act of Congress to be forfeited, unless protected from said forfeiture by some other provision of the act.

The second proviso of the first section of the act of 1889, forfeiting said lands, declares that nothing therein shall be construed as limiting the rights granted to purchasers by the adjustment act of March 3, 1887 (24 Stat., 556), or as repealing, altering, or amending said act.

The first section of the adjustment act referred to directs the Secretary of the Interior to "immediately" adjust all *unadjusted* railroad grants.

Section two provides that when it appears that lands have been erroneously certified or patented to or for any grantee company, suit shall be brought to restore title of said lands to the United States, unless within ninety days after demand the title shall be reconveyed, etc.

Section three relates to the restoration of homestead and pre-emption entries of *bona fide* settlers which have been erroneously canceled because of railroad grants or withdrawals and section four is as follows:

That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be considered as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry of the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Section five protects purchasers from a company of lands, coterminous with constructed roads, and of the designated sections granted, but which lands for any reason are excepted from the operation of the grant.

This adjustment act is a measure intended to protect two classes, viz: *bona fide* settlers upon lands within railroad limits; and purchasers from grantee companies of lands which it was believed they had a right to sell, though in fact no such right existed.

Its intent is to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized. That the selection sold by the railroad company shall have been approved, is not required by the fifth section, nor that it shall have been patented. That the land shall have been approved to the company before the purchasers shall be entitled to the benefit of the sixth section, is not required.

. The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claim. It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of a grant to another in good faith is the ground of his equity. (Opinion of Attorney-General Garland, 6 L. D., 273.)

These views of the Attorney-General, as to the proper construction to be placed upon the provisions of said act, and its purposes, are believed to be correct, have been accepted and acted upon by this

Department in a number of instances. This being so, it is apparent that the lands here in controversy are in the exact category of lands, the purchase of which, it is contemplated, is to be confirmed by the provisions of section four.

They are lands which, it now appears, upon the establishment of the end lines of the road, were unearned and certified and therefore "erroneously certified" "for the use and benefit" of the railroad under a grant from the United States; and they "have been sold by the grantee company." (*Drake et al. v. Button*, 14 L. D., 18, 23.) It follows, then, that unless there be some other objection, the purchaser, upon meeting the other requirements of the law, would be entitled to the land and a patent therefor from the United States at the proper time.

One of the essential requirements is that the purchase must have been made in good faith on the part of the buyer. Though bad faith were shown on the part of the vendor it would not defeat the confirmation under the act, if the purchaser acted in good faith. Therefore the contention that the railroad company has already received more lands than it is entitled to can have no force in this respect. (See Attorney-General's opinion, *supra*, and 11 L. D., 230.) In this particular case I do not think the good faith of the purchaser can be in any way impugned.

The donation to the State was made by a present grant upon the definite location of the line of road the lands thereby granted were identified, and the title thereto became vested in the beneficiary, subject only to be defeated by a subsequent failure on its part to comply with the conditions of the grant. (*Schulenberg v. Harriman*, 21 Wall., 44; *Railroad Company v. Baldwin*, 103 U. S. 426, 429.) The definite location was made in 1859, and the land authorities in 1860 certified the lands in question as part of those granted to the company; the road as far as L'Anse was completed in the time required by law and thereafter the State patented these lands, with others, to the company, as lands earned by the construction of the road. It was after all this was done, and under these circumstances, that the railroad company sold the lands, and the Michigan Land and Iron Company bought them, for which it is shown a large and valuable consideration was paid. Certainly the purchaser had reasonable grounds for believing that the railroad company's title was good. The United States, by its proper officers, had said so, and the State, to whom the execution of the trust was confided by the United States, had said so, and both by solemn acts of conveyance, had evidenced the fact. It seems, therefore, that the good faith of the purchasing company is substantially shown in buying the land when it did.

But the adjustment act not only requires good faith on the part of the purchaser, but that the party claiming confirmation of such purchase should be a citizen of the United States or have declared his intention to become such citizen.

The Michigan Land and Iron Company, the first purchaser of said lands from the railroad company, is "a copartnership association created and existing" under the laws of Michigan, or, in other words, a corporation organized under the laws of that State. It is insisted, in behalf of Daily that being such a corporation, it is not a citizen of the United States, and therefore does not come within the purview of the fourth section of the adjustment act, and cannot avail itself of the provisions thereof. This objection is pressed with much insistence, and a number of decisions are cited to sustain the contention. An examination of those decisions shows that their purport has been, in each instance, misunderstood and misconstrued. They only go to the extent of holding that a corporation is not a citizen for all purposes. There is, however, a long line of decisions which hold that a corporation is a citizen of the State wherein it has a legal existence, and as such citizen can sue and be sued in the courts of the United States. (*Railroad Company v. Wheeler*, 1 Black, 285; and *Santa Clara Co. v. Southern Pacific R. R. Co.*, 118 U. S., 395⁶, where the supreme court refused to hear an argument on the question.) For a full discussion of the question, reference is made to the case of the *Louisville R. R. Co. v. Letson* (2 How., 497), where the court concludes, p. 558,—

that a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person.

And many other authorities to the same effect might be cited. As such citizens of the State they are in contemplation of law citizens of the United States, and entitled to the equal protection of its laws. (*Minneapolis R. R. Co. v. Beckwith*, 129 U. D., 26.)

The objection, on the ground that the land company is not a citizen, is overruled.

It is my opinion, therefore, that the purchase made by this company is protected by the fourth section of the adjustment act of 1887.

Under the terms of that section, the land company will be entitled to the lands here in controversy, and should have a patent issued therefor after the said railroad grant is adjusted, and upon making the necessary formal proof satisfactory to your office. This being so, it would be improper to permit the possession of the property, in the meantime, to be interfered with by entries thereon.

Entertaining these views, your judgment admitting the entry of Daily is reversed, and his application to enter is rejected. The papers in the case are herewith returned.

Many other points have been presented in this case and argued with much zeal and ability, but in view of the conclusion herein reached, I have not deemed it necessary to pass upon them, further than to say that there is nothing in any of them which militates against the judgment now made.

When the grant is adjusted and patents issued to the purchasers in accordance with the fourth section of the act of 1887, you will proceed to make demand upon the railroad company, as therein provided, and report to this Department.

DESERT LAND APPLICATION—SOLDIERS' ADDITIONAL HOMESTEAD.**STANTON ET AL. v. CONSTANTINE.**

A desert land declaration may be executed before the judge of a county court. A departmental decision allowing an application to make entry, subject to the preferred right of a contestant, cuts off all claims arising after the filing of said application, if it subsequently appears that the contestant is not entitled to make entry.

The act of August 18, 1894, validating soldiers' additional homestead certificates in the lands of bona fide purchasers, can not be invoked to defeat rights which accrued prior to its passage.

Secretary Smith to the Commissioner of the General Land Office, September 5, 1894. (G. C. R.)

This case involves Sec. 8, T. 13 N., R. 66 W., Cheyenne, Wyoming, and is before the Department on the appeal of William Constantine *et al.* from your office decision of May 1, 1893, which allowed Mary Stanton to make desert land entry for the land, under her application presented March 23, 1886.

It appears that one Frederick J. Stanton made desert land entry for the land May 25, 1883. On March 17, 1886, William Constantine filed his affidavit of contest against the entry, alleging, substantially:

1. That the land is not desert in character.
2. That the entryman had done nothing to reclaim the land.
3. That the entry was made for speculative purposes.

On March 23, 1886, Frederick J. Stanton tendered a relinquishment of his entry, and thereupon, as agent, filed the application of his wife, Mary Stanton, to enter the land under the desert land act.

His relinquishment was not accepted, and Mrs. Stanton's application was rejected by reason of his subsisting entry.

On appeal, your office affirmed the action of the register and receiver, and on further appeal the Department, in case of Mary Stanton (7 L. D., 227), held that when Stanton filed his written relinquishment, the land covered thereby "should have been held as open to settlement and entry, without further action on the part of the Commissioner of the General Land Office;" also that "Mary Stanton's application should have been allowed, but subject to the preference right accruing to Constantine upon the filing of the relinquishment after the initiation of the contest."

It appears that during the pendency of this appeal, Birdie G. Parker was allowed to make desert-land entry for the entire tract.

On May 14, 1888, the register and receiver advised Mrs. Stanton that her application might be allowed subject to the preference right of Constantine. It does not appear, however, that Constantine was notified, but on February 9, 1889, he applied to make timber-culture entry for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, also to make homestead entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and desert-land entry for the NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, of said Sec. 8. His applications were all rejected, by reason of the desert-land entry of Birdie G. Parker, also because of his allegation as to the non-desert character of the land in his contest affidavit against Stanton's entry. He appealed, and as a result Parker's desert-land entry was canceled, and his several applications, above described, were allowed, and on November 2, 1889, Susana R. Quimby made desert-land entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

On January 11, 1890, Constantine filed his relinquishment of the tract covered by his homestead entry, and on the same day Marshall E. Johnson made desert-land entry therefor; on March 4, 1890, Constantine relinquished his desert-land entry, and on the same date Matilda E. Johnson made desert-land entry therefor. Four days thereafter, Quimby, Marshall E. and Matilda E. Johnson filed relinquishments of their respective entries, and on the same day C. W. Riner, as attorney in fact, made the following soldiers' additional homestead entries:

No. 2424, James H. Young, N. $\frac{1}{2}$ NW. $\frac{1}{4}$; SE. $\frac{1}{4}$ NW. $\frac{1}{4}$.

No. 2425, Elijah Brown, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$;

No. 2426, William Meyer, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$.

On March 8, 1890, one Gideon M. Kepler applied to make desert-land entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, which application was rejected by reason of Constantine's timber-culture entry. On appeal, that action was affirmed by your office.

In the meantime, F. J. Stanton filed his affidavit of contest against Constantine's timber-culture entry, and, on May 14, 1890, Mrs. Stanton filed her contest against the soldiers' additional entries.

The several appeals, contests and protests and applications to contest came before your office, August 20, 1890, where it was held that the allowance of the several entries of Constantine and that of Quimby concluded Mrs. Stanton's rights, and her contest against the soldiers' additional entries was dismissed.

On appeal, this Department, on February 27, 1892 (L. and R. No. 236, p. 312), ordered a hearing, and it was directed in the decision that the following inquiries, among others, should be made:

1. Did Constantine prosecute to a final determination his contest filed March 17, 1886?
2. Was the relinquishment filed by Frederick J. Stanton the result of Constantine's contest?
3. What was the character of the land?

Hearing was accordingly had, and the register and receiver found therefrom:

1. That Constantine did not prosecute his contest to a final determination.
2. That Mrs. Stanton's application was irregular, her desert-land entry declaration not being executed before an officer authorized by law to execute papers of that character, and that the relinquishment of F. J. Stanton's desert-land entry was induced by Constantine's contest.
3. That the land was desert in character.

The register and receiver upon that finding, recommended that the several entries of record be allowed to stand.

On appeal, your office, as above seen, reversed that action, and allowed Mrs. Stanton to make desert-land entry of Sec. 8, thus holding the several entries in conflict therewith for cancellation.

The record in this case is quite voluminous. It is manifest that the local officers were greatly at fault in allowing many of the entries, while questions were pending before them as to the rights of prior applicants. The many entries, relinquishments, contests, protests, and appeals, with extensive arguments both for and against the action taken, serve more to mystify than to enlighten. Eliminating the tangible and controlling features of the case from the mass of rubbish, the case hinges upon the single question, was Stanton's relinquishment of his desert-land entry the result of or caused by the contest filed by Constantine? I do not think it was.

Constantine, as above seen, made three charges against Stanton's entry, i. e., that the land was not desert in character, that Stanton had done nothing to reclaim it, and that the entry was made for speculative purposes. His first charge was nullified by his own affidavit, when he applied to make desert-land entry of part of the land. As to the second charge, it was prematurely made, the three years in which Stanton was allowed to comply with the desert-land act not having expired when the affidavit charging non-compliance was filed. No evidence whatever was given to show that the entry was speculative.

There is nothing in the record which shows that any of those charges could have been sustained, except the one alleging non-compliance with the law, and since that charge was prematurely made, it is evident that the contest—had it gone to a hearing—would have failed.

Moreover, the hearing ordered by the Department was for the purpose of determining whether Stanton's relinquishment was caused by Constantine's contest. That evidence has been carefully examined, and it fails to show that the relinquishment was the result of said contest.

Had Constantine proceeded with his contest, and proved his allegations, quite another result would have followed; but he did not do so, and, as before shown, he could not have done so. His subsequent acts in swearing to the very reverse of that which was set forth in his contest affidavit, demonstrate his indifference to truth, and want of good faith.

I concur in the decision appealed from, that Mrs. Stanton's declaration to make entry, sworn to before J. J. Minor, county judge of Fremont county, Colorado, sufficiently met the requirements of law and the regulations of the Department. The ex parte statements as to the standing and veracity of F. J. Stanton have no proper place in the records, and can not be considered.

When, on March 15, 1888 (7 L. D., 227), the Department decided that Mrs. Stanton's application should have been allowed (on March 23, 1886), but subject to the preference right accruing to Constantine, the only question then to be determined was as to Constantine's alleged rights as a successful contestant.

It having been decided that Constantine did not by his contest secure a preference right, Mrs. Stanton's right relates back to the date of her application, which, as above seen, should have been allowed. This cut off all subsequent claims, including the soldiers' additional entries, for portions of the land, presented March 8, 1890, by C. W. Riner, as attorney in fact for Young, Brown and Mayer. It is clear that had these soldiers gone in person to the land office and had been allowed to make these entries in their own proper persons, it could not have served to defeat the prior rights of Mrs. Stanton, based upon a departmental decision of her right of entry. It follows, therefore, that the recent act of Congress, approved August 18, 1894, which only purported to validate soldiers' additional homestead certificates in the hands of bona fide purchasers for value, can not be invoked to defeat rights which accrued prior to its passage.

For the reasons above given, the decision appealed from is affirmed.

CONTEST—SOLDIERS' ADDITIONAL HOMESTEAD.

DENNIS v. INGALLS.

A soldiers' additional homestead entry, made in pursuance of a contract to sell the land on the issuance of final certificate, should be canceled as speculative and fraudulent.

Secretary Smith to the Commissioner of the General Land Office, August 14, 1894. (P. J. C.)

The land involved in this appeal is lot 9, Sec. 9, T. 29 N., R. 5 E., Seattle, Washington, land district.

The record shows that Wallace W. Ingalls made soldier's additional homestead entry of said tract in person October 26, 1891, and on the same day final certificate was issued thereon. The necessary affidavits seem to have been made and filed by the entryman, and the usual statement "that I have not sold my additional homestead claim" is made under oath and corroborated by two witnesses.

On May 2, 1892, John Dennis presented an affidavit of contest against said entry, which, shorn of unnecessary verbiage, alleges that said

entry is fraudulent and void; that prior to the date thereof Ingalls made a contract with one William F. Brown to locate and enter said tract and sell and assign the same to Brown as soon as the certificate was issued, for which Brown paid him the sum of \$1200; that in pursuance of said contract, Ingalls and his wife executed and delivered a deed to Brown, on said October 26, for the land. A certified copy of this deed is exhibited. The contestant sets forth at some length Brown's connection with the tract, and his efforts to secure title to it through others prior to Ingalls' entry. It is shown that Brown purchased the relinquishment of one Spitehill, and paid him \$5,000 for the same; that he caused his mother to make a homestead entry of the same; that this entry was contested; that on the day Ingalls made his entry, this last contest was withdrawn, and Mrs. Brown relinquished, thus clearing the record for Ingalls' entry. Contestant alleges that the entry of Ingalls was made for the sole benefit of Brown, and not for a home or farm for himself, and in violation of the spirit and intent of law; and asks that he may be allowed to prove these charges, paying the expenses thereof.

The entry being completed, the local officers forwarded this application, and your office, by letter of August 8, 1892, refused to order a hearing, holding, first, that Ingalls' entry having been made in person, "it is evident, I think, from the consideration paid him by Mr. Brown, that said entry was made for the soldier's benefit. The fact that Mr. Ingalls intended to sell the land after making entry, or had agreed so to do, does not, in my opinion, invalidate the entry." And, second, the allegations appeared to be in part founded on information and belief.

A motion for review of this decision was filed, and on October 29, 1892, your office decided "that the objection to the affidavit on the ground that it is made on information and belief is not well taken," but adhered to the former decision on the ground "that no sufficient cause of action has been alleged by the contestant." An appeal brings the matter before the Department, and the specifications of error raise the question as to whether the allegations here made are sufficient upon which to base a contest.

A supplemental affidavit of contest, sworn to August 11, 1893, has been filed in this office, by which it is alleged that the entryman did not file in the local office, at the time he made his entry or since, the affidavit required by Sec. 2290, Revised Statutes, as amended by section 5 of the act of March 3, 1891 (26 Stat., 1095). The record before me does not contain this affidavit.

The section of the statute (2306, Revised Statutes), under which this entry was made, reads as follows:

Every person entitled, under the provisions of section two thousand three hundred and four, to enter a homestead, who may have heretofore entered under the homestead laws a quantity less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2304, referred to in this section, provides that soldiers and others, who served ninety days in the war of the rebellion, and were honorably discharged, may, on compliance with the homestead laws, enter one hundred and sixty acres of land, and by the terms of section 2305, the term of service may be deducted from the period required to live upon the land. The Department has decided a great number of cases involving the transfer of the certificates issued to soldiers for these additional entries, and the uniform ruling has been that they were not transferable or assignable, but created a personal right in him, and that he must make the entry personally in all instances (John M. Walker, 10 L. D., 354; Cleveland *et al.* v. North *et al.*, 16 L. D., 484; Paulson *v.* Owen, 15 L. D., 114). Authorities might be multiplied on this subject, but those cited are sufficient to show the unvarying position taken by the Department. Mr. Secretary Noble, in the Walker case, *supra*, clearly defined the position of the Department in the following language:

The soldiers' homestead act, even though it be considered separately and apart from the provisions of the general homestead law, must, of itself, be construed as a whole, in order to ascertain the real intent of Congress relative to its several provisions. By thus constraining the act, it is clear to my mind that Congress did not intend the privilege, granted to the soldier by the second section thereof, should be made the subject of barter and sale, or of assignment to another. In my judgment, the right thus conferred is strictly a personal right. It is so because it depends, not only upon the existence of the soldier, but upon his personal qualifications to make the entry. It is not, in itself, properly speaking, a right of property, but it is merely a right to acquire property in a certain way and upon a given state of facts, which without the right thus given could not be so acquired. It is, under the statute, essentially a personal right, which becomes, or ripens into, a right of property, only when it is exercised by the soldier through his personal entry of a specific tract of the public land.

It will be conceded in the case at bar that if this entry had been made under the homestead laws proper, or, perhaps, under any of the other land laws, it would be illegal, and would be canceled on proof of the facts alleged.

I am unable to see any difference in principle between the assignment of the certificates entitling the ex-soldier to the right of an additional entry and the entering into a contract before the entry made in person, to make it for the use and benefit of another. In either event, the beneficiary does not get the benefit of the entry in contemplation of law. I take it that this is what is meant by the language used in the Walker case, that it is "essentially a personal right, which becomes, or ripens into, a right of property, only when it is exercised by the soldier through his personal entry."

In the case at bar, the entry can not be claimed to be for his personal benefit in any just sense as contemplated by the public land laws. He is speculating on a personal right, in the shape of a privilege conferred on him alone by the Congress as a reward for services already rendered his country. A purely speculative intent on the part of any

one in availing himself of the beneficence of the government under the forms of law is abhorrent to the laws and rules governing its disposal, and where this intent is made clear the Department will not hesitate in meting out the efficacious remedy.

I think your judgment should be reversed, and the hearing ordered as prayed for. It is so ordered.

PRE-EMPTION ENTRY—FINAL PROOF.

HAZZARD *v.* MOCK.

A homesteader who, after receiving final certificate, discovers that his dwelling house is outside the boundaries of his homestead, and thereupon files a pre-emption declaratory statement for the tract on which his dwelling house is situated and continues to reside thereon, is not within the second inhibition of section 2260 R. S.

Failure to submit pre-emption final proof within the statutory period subjects the pre-emption claim to intervening adverse rights.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (J. I. H.) (J. L.)

I have considered the case of Howard B. Hazzard *v.* Robert F. Mock upon the appeal of the latter from your office decision of February 21, 1893, modifying the decision of the local officers, holding for cancellation Mock's pre-emption cash entry No. 569, and holding Hazzard's homestead entry No. 526, intact. The land involved includes lots 2 and 3, of Sec. 19, T. 57 N., R. 86 W., and 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. 57 N., R. 87 W., containing 158.93 acres, Buffalo land district, Wyoming.

On February 14, 1889, Mock filed his pre-emption declaratory statement for said land which was unoffered. The register's certificate of said filing contained the following clause:

Notice is hereby given that this pre-emption filing expires on November 14, 1891, after which date the tract will be subject to the claim of any other qualified party.

On April 16, 1892, Hazzard made homestead entry of all of said land except lot 3.

On June 4, 1892, Mock offered final proof. Hazzard appeared, filed a written protest, and cross-examined Mock. On July 15, 1892, the local officers accepted the final proof and issued final receipt and certificate as to lot 3; but rejected Mock's final proof as to the remainder of the land, "on account of conflict with homestead entry No. 526 of Howard B. Hazzard, the time given for making final proof on pre-emption having expired."

Mock appealed; and on February 21, 1893, your office affirmed said decision except as to lot No. 3, as to which your office reversed the action of the local officers, and held for cancellation Mock's pre-emption cash entry No. 569 for said lot No. 3.

Mock has appealed to this Department.

When Mock filed his declaratory statement he was the owner of a farm which he had entered and made final proof upon some time before. After receiving his final homestead certificate Mock had the land surveyed, and discovered for the first time that his dwelling-house was outside the boundaries of his homestead. Whereupon he made pre-emption filing on the land in controversy, which adjoined his homestead and contained his dwelling-house. He, in good faith, improved and cultivated the pre-empted land, and continued to reside with his family in the same building in which he had resided as a homesteader.

Your office held that Mock thereby constructively violated section 2260 of the Revised Statutes which enacts that—"No person who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory," shall acquire any right of pre-emption under Sec. 2259. Said holding is inconsistent with the ruling and reasoning of this Department in the case of *Brownlee v. Shill* (14 L. D., 309), and it is therefore reversed.

Mock having failed to offer final proof for more than five months after the time prescribed by law, the intervening right of Hazzard, as a homestead entryman, attached to so much of the land as was embraced in his entry. So much of your office decision as holds Hazzard's homestead entry intact, is hereby affirmed.

In respect to said lot No. 3, there is no intervening adverse claim. Mock's good faith and full compliance with the pre-emption laws are clearly proved. The notice of appeal filed by Mock's attorney July 12, 1892, was filed before the decision of the local officers had been promulgated, and it shows upon its face that the attorney was under the erroneous impression that Mock's final proof had been rejected wholly. When he discovered his mistake the attorney properly withdrew the paper, and Mock's right of appeal was not thereby impaired.

So much of your office decision as holds for cancellation Mock's pre-emption cash entry No. 569 is hereby reversed. Said entry is held intact.

CONTEST—INDIAN ALLOTMENT.

FALCONER *v.* PRICE.

The departmental approval of an Indian allotment is a final determination of the right of the Indian thereto, and a contest against the same will not be entertained.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (C. W. P.)

I have before me the appeal of Ebenezer Falconer from the decision of your office of April 5, 1893, declining to order a hearing upon his application to contest the Indian allotment of George W. Price, involv-

ing the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 9, T. 58 N., R. 18 W., Duluth land district, Minnesota.

It appears by the records and files of your office that, on the 28th of July, 1888, the said Price, as the head of a family, filed Indian allotment application No. 6, under the act of February 8, 1887, (24 Stat., 388) for the above described tract of land.

Subsequently, Price attempted to relinquish to the United States the land covered by his allotment application.

Wherenpon, on November 29, 1890, the Department held that a non-reservation Indian, who had made application for an allotment under section four of the act of February 8, 1887, has no authority to relinquish his allotment, except by the consent, and under the direction of the Department. (George Price, 12 L. D., 162.)

It further appears that the Indian allotment application was, as required under instructions, sent to the Commissioner of Indian Affairs for allotment, by special agent designated for that purpose; that the allotment was approved by the Commissioner of Indian Affairs, and by the Department, June 28, 1892, and on the same day sent to your office, with directions for the issue of patent, but that no patent was issued.

Your office held that the allotment having been approved by the Department, the question as to the right of Price, was settled, and your office declined to order a hearing in the case. Your action is approved.

The decision of your office is affirmed.

COAL LAND—SUFFICIENCY OF PROOF.

HAMILTON v. ANDERSON.

The character of land alleged to be more valuable for the coal it contains than for agriculture must be established as a present fact, and from the actual production of coal, but it does not follow that there must be an actual development of coal on each forty acre sub-division.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (G. B. G.)

On January 5, 1891, Swan Anderson filed pre-emption declaratory statement for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 16 N., R. 12 E., and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 6, T. 15 N., R. 12 E., Lewistown, Montana, alleging settlement December 10, 1890.

On July 23, 1891, Leslie H. Hamilton filed coal declaratory statement for the same tracts, alleging possession to have commenced June 20, 1891.

Final proof was offered by the pre-emption claimant on December 11, 1891, at which time Hamilton, the coal claimant, appeared and protested against the allowance of the pre-emption entry, alleging as

ground of protest that he had opened a valuable mine of coal on the land sought to be entered, and that the land is more valuable for mining than for agriculture.

The local officers found the land more valuable for coal than for agricultural purposes, and recommended that Anderson's pre-emption declaratory statement be cancelled, and Hamilton's coal declaratory statement be allowed.

On appeal from said decision by Anderson, your office modified the finding of the register and receiver, holding Anderson's pre-emption declaratory statement for cancellation, as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 16 N., R. 12 E.

The protestant has appealed to the Department on an assignment of errors, substantially of law and of facts.

The evidence shows conclusively that a valuable mine of coal has been opened on the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 31, and the decision appealed from is concurred in, in so far as your office holds Anderson's pre-emption declaratory statement for cancellation as to that forty-acre tract.

It further appears that said opening on the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ is a tunnel about ten feet from top to bottom, five feet of which is good merchantable coal. The mouth of this tunnel is only one hundred and fifteen feet from the line of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 32. The entry had been driven at the date of the hearing, a distance of about thirty-five feet, in a straight line directly towards this last named tract. The coal has increased in thickness as the opening has been extended, and the quality has improved.

These are indubitable evidences to my mind that the said SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ is coal land, although the surface indications on the tract itself are meagre.

The rule of the Department undoubtedly is that the land must appear mineral in character "as a present fact" and from actual production of mineral. Rucker, *et al. v. Knisley* and cases cited (14 L. D., 113), but it does not follow, and has never been held by the Department that there must be an actual development of coal on each forty-acre subdivision of the one hundred and sixty acres for which entry is allowed under the mining laws.

If the evidence is sufficient, as in this case, to show that the land in controversy is coal land, title cannot be acquired to it under the pre-emption laws. The questions of the sufficiency of the defendant's final proof as to the balance of the land, and the regularity of the coal claimant's application to purchase, are not properly before the Department, not having been passed on by your office.

For the purposes of this inquiry, it is sufficient now to hold that the said SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, are more valuable for the production of coal, than for agricultural purposes, and defendant's declaratory statement will be cancelled as to these tracts.

The decision appealed from is so modified.

The evidences of coal on the balance of the land in controversy are too meagre to warrant a conclusion that they are coal land, and they are held subject to the pre-emption claim.

Inasmuch as your office failed to pass on the pre-emption claimant's final proof, the case is remanded, with directions to allow the entry as to the remaining tracts, if, on examination, the proof is found sufficient.

RAILROAD LANDS—ACT OF FORFEITURE.

DILLON ET AL v. HEFFERMAN.

The railroad lands declared forfeited by the act of March 2, 1889, and restored thereby to the public domain, became subject to entry immediately upon the passage of said act.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (E. M. R.)*

This case involves the NW. $\frac{1}{4}$ of Sec. 19, T. 51 N., R. 35 W., Marquette land district, Michigan.

The record shows that F. A. Hefferman made homestead application for the above described tract, March 6, 1889, which was rejected by the local officers, on the ground that the land sought to be entered had been certified to the State of Michigan, and on April 3, 1889, Hefferman appealed.

March 13, 1889, your office informed the register and receiver of the act of Congress of March 2, 1889, and they were

directed to give notice by publication, for at least thirty days, that the lands forfeited by said act have been restored, and that the books of your office are opened for entry of the same at \$1.25 per acre, under the pre-emption, homestead and other laws relating to unoffered lands.

March 22, 1889, the local officers published notice

that the lands forfeited by public act of Congress No. 157, approved March 2, 1889, have been restored to the public domain, and that the books of this office will be open for entry of the same at \$1.25 per acre, under the pre-emption, homestead, and other laws relating to unoffered lands, on May 1, 1889, at ten o'clock a. m., at which time applications for entry or pre-emption filing, will be received, subject to the limitations and exceptions of said act.

May 1, 1889, Fred A. Hefferman renewed his application to enter the tract in controversy, and John F. Dillon made application to enter the same tract, alleging settlement March 7, 1889, and John Edwards made application to enter the W. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 19, alleging settlement March 12, 1889.

May 23, 1889, your office informed the local officers,

that by a renewal of an application to file, or enter lands previously applied for, or by filing an application for other lands, a party waives any right he may have acquired by previous applications, but settlement rights are protected by act of

March 2, 1889. While it is true that the act of March 2, 1889, forfeited all lands opposite the uncompleted portions of the Marquette, Houghton and Ontonagon Railroad, still, under departmental practice, Congress could not vest the United States with title to lands which had passed from it by approval, certification or patent, until a reconveyance by the grantee, or a judgment of the proper court, vacating the certification, had been obtained.

September 7, 1891, your office transmitted to the local office the relinquishment of the State of Michigan.

May 25, 1892, the register and receiver rendered their decision in favor of Dillon, and upon appeal, your office decision of January 3, 1893, affirmed the finding below. Subsequently, on a motion for review, your office decision of April 17, 1893, reversed the prior decision, and held that the land became subject to settlement and entry immediately upon the passage of the act, *supra*, and accordingly awarded the land in issue to Hefferman. From this decision the settlers appealed.

The act under consideration (25 Stat., 1008) contains, *inter alia*, the following:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan by virtue of an act entitled "An Act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes", which took effect June third, eighteen hundred and fifty-six, which are opposite to, and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain:

The point at issue is whether these lands became subject to entry immediately upon the passage of the act. In *McKernan v. Baily*, on review, (17 L. D., 494) whilst this was not passed upon directly, it is evident that such was assumed to be the case.

This case is the outcome of a mistake upon the part of the local officers as to the meaning of your office letter of March 13, 1889. They were not instructed to advertise that the land embraced within the forfeiture "would be", but "are", opened for settlement or entry.

It therefore becomes unnecessary to consider what would have been the effect of fixing a day subsequent to the passage of the act, on the status of the land, inasmuch as no such authority was assumed by your office.

In the absence of anything in the act fixing a future day for the opening of the land, and also in the absence of any regulations to that effect by the Department, there can be no question but what the act became operative immediately, and as the application of Hefferman was prior to the settlements of Dillon and Edwards, it follows that the land must be awarded to him.

The position taken by counsel that Hefferman's application of May 1, 1889, was a waiver of that of March 6, should not be sustained. This step was taken only out of an abundance of caution and it would not be proper to hold, under the circumstances, that it was a waiver of rights under the first application.

The decision appealed from is therefore affirmed.

TIMBER CULTURE CONTEST—SPECIFIC CHARGE.

GREENOUGH v. WELLS.

A contestant can not take advantage of a default, shown by the evidence to exist, which is not specifically alleged in the affidavit of contest.

The government will not require the cancellation of a timber culture entry on account of a failure to secure a growth of trees that is not due to bad faith or negligence. Planting done in advance of the time required by the statute may be regarded as in due compliance with the law, if the land has been properly prepared for the culture of trees.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (J. I. P.)*

April 16, 1887, the defendant made timber culture entry No. 8585 of the NW. $\frac{1}{4}$ of Sec. 4, T. 116 N., R. 78 W., Pierre, South Dakota, land district.

February 29, 1892, the plaintiff filed affidavit of contest, alleging, (1) that William S. Wells has totally failed to plant to trees, tree seeds or cuttings any part of said tract; (2) that he has not cultivated any part of said tract for four years last past; (3) that there are now no trees growing upon said tract; and (4) that said tract was totally abandoned as a timber culture entry.

May 2, 1892, hearing was had before the local office.

May 10, 1892, the local officers rendered dissenting opinions. The register recommended the dismissal of the contest, while the receiver recommended the cancellation of the entry.

Both parties appealed to your office, which, on February 16, 1893, affirmed the decision of the receiver, and held the defendant's timber culture entry for cancellation.

The defendant's appeal from that decision brings the case here.

The facts disclosed by the evidence are fairly set forth in your office letter as follows—

It appears from the record that the land in dispute was used by Mr. Wells, in connection with several thousand acres adjoining, as a horse ranch, with the exception of about twenty acres in the extreme northwest corner, which he had fenced, plowed and planted to corn during the first and second years after entry. Also that the said twenty acres were cultivated the third year; that in the last month of said year, ten acres thereof were planted to tree seed; that in June or July, 1890, the entire twenty acres were sowed to millet, in preparation for which the ten acres previously planted to tree seeds was gone over with a harrow to the depth of two to three inches.

The record fails to show whether the planting of millet on the ten acres referred to, at the time and in the manner above mentioned, was beneficial or otherwise to the growth of the tree seed planted on the same tract a few months previous. It is shown however that the tree seed so planted failed to grow.

Burtis Dickey, the brother-in-law and agent of the defendant, testified that he procured some tree seed in the spring of 1891, and hired one Joe Bruette, to plant the same on five acres of said tract prior to April 16, 1891. The witness had no personal

knowledge that the planting contracted for, was done, and several witnesses for the contestant testified that they frequently passed over the tract in question in the spring of 1891, and saw no signs of cultivation.

The first witness on behalf of plaintiff established substantially the above state of facts; whereupon the defendant moved to dismiss the contest, on the ground that the allegations of the contest affidavit were disproved, and no default shown on the part of the defendant. The plaintiff then tendered some amendments to his affidavit of contest, which he asked permission to make, and which admitted compliance with the law during the first three years after entry, but averred that the seed planted the third year did not grow; that defendant did not replant any during the fourth year, and had done nothing since the third year's planting up to filing affidavit of contest toward complying with the timber culture law.

The motion to dismiss and the motion to amend were both overruled, and the plaintiff continued the introduction of testimony which tended principally to corroborate the evidence of the first witness. When plaintiff rested, defendant renewed his motion to dismiss, on the same grounds as before, which was again overruled.

On his appeal to your office from the receiver's decision he alleges the action of the local office in overruling his motion to dismiss the contest as error, and in his appeal here he alleges that your office erred in not considering and passing upon that specification of error, which he insists is one of the most important points in the case.

Assuming that the first two allegations of the affidavit of contest were true, the third would follow as a matter of course, as would also the fourth. But from the facts above set forth, it is at once seen that the first two allegations were disproven, and that the converse of those propositions was true. The receiver and your office find the third allegation to be true, not because the first and second defaults alleged were proven, but because the tree seed planted the third year did not grow, and because of the apparent default which was established, viz: that the defendant did not plant or replant any trees, tree seed or cuttings the fourth year. And the receiver and your office hold that the third allegation having been established, "it is *prima facie* evidence of default," and therefore the burden is on the defendant to show that it was not because of his negligence, citing the rule laid down in *Phelps v. Rape* (7 L. D., 47).

There is no rule better established than that a contestant cannot take advantage of a default, shown by the evidence to exist, which is not specifically alleged in the affidavit of contest. *Platt v. Vachon* (7 L. D., 408); *Bell v. Bolles* (9 L. D., 148); *Tyndall v. Prudden* (13 L. D., 527); *Truex v. Raedel* (16 L. D., 380); *Alexander v. Hamilton* (17 L. D., 452).

It follows therefore that the apparent default of the fourth year not being alleged in the affidavit of contest, can not inure to the benefit of

the plaintiff, and that, so far as he is concerned, if the defendant can show that the failure of the third year's planting to grow was not the result of negligence on his part, it eliminates the plaintiff from the case, and leaves it between the entryman and the government on the apparent default of the fourth year, (see authorities above quoted) provided the fourth allegation of the contest affidavit be not established.

It is stated by the receiver in his decision that either of two reasons account for the failure to grow of the tree seeds planted the third year—(1) because the defendant planted them too deep, and (2) because of the drought which ensued during the season following said planting. The second reason would not show negligence on the part of the defendant. The first one might show bad judgment, but does not necessarily show bad faith. *Cropper v. Hoverson* (13 L. D., 90, at 91); *Haffey v. States* (14 L. D., 423, and authorities there cited).

The record shows beyond all question that the ground planted to tree seeds had been thoroughly ploughed and cultivated for several seasons prior to said planting, and was carefully prepared for the seed planted therein during the third year, and there is no attempt to show that said planting was not done in good faith and in such a manner as defendant believed most conducive to the growth of said seed. Hence their failure to grow was not due to any fault or negligence on the part of defendant, but to the dry season which followed.

Unless the apparent default of the fourth year shows bad faith, as between the government and the entrymen, the entry will not be canceled. *Andrews v. Cory* (7 L. D., 89); *Thompson v. Heirs of Partridge* (10 L. D., 107).

It is to be remembered that the third year's planting was done just before the expiration of that year, that is, just prior to April 16, 1890. The season following was extremely dry. It had passed and the time for replanting had got by before the failure of the seeds to grow was demonstrated, and even then defendant may have believed they would sprout the season following. Had they been planted a few days after the 16th of April, 1890, the result would have been the same. There could be no default until the end of the fourth year, because the acreage of planting required within that time had been done. True, it had been done in advance of the time required by the statute, but that is "a compliance with the law so far as time is of the essence of the matter, provided the land has been broken and properly prepared," all of which was done in this case. *Grengs v. Wells* (11 L. D., 460); *Friel v. Bartlett* (12 L. D., 502); *Swall v. Loeb* (15 L. D., 591).

It follows, then, that up to the end of the fourth year the law had been complied with. That being true, there could be no default until after that time. If there was a failure of seeds to grow during the fourth year, the defendant would have the fifth year in which to replant, and an affidavit of contest filed before the expiration of that year, as was this one, would not affect that right. The evidence shows

that before the expiration of the fifth year, but after the filing of the affidavit of contest, the tract planted to tree seeds was again carefully prepared and planted to cuttings and tree seeds.

Hence I am of the opinion that there is no bad faith shown between the entryman and the government, and no showing that will warrant the conclusion that the defendant has abandoned said tract as a timber culture entry.

Therefore, defendant's motion to dismiss the contest should have been sustained, and the failure of your office to pass on that question was error.

Your decision is therefore reversed, and the contest dismissed.

CONTEST—RELINQUISHMENT—RESIDENCE.

PRICE v. RILEY ET. AL.

The right of a contestant to be heard on a charge of abandonment is not defeated by a subsequent relinquishment, and intervening adverse entry of a third party, even though the relinquishment is not the result of the contest.

Residence on land while it is covered by the entry of another does not secure any right as against a contestants who institutes proceedings to secure the cancellation of said entry.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (J. W. T.)*

The above cause is before me on appeal from your office decision of September 10, 1892, affirming the decision of the local officers, dismissing the contest of Willie C. Price, and denying to him a hearing to determine his right to the NW. $\frac{1}{4}$ of Sec. 9, T. 9 N., R. 3 E., Oklahoma land district, Oklahoma Territory, as between him and Charles M. Rodman, who had made homestead entry covering said land; also denying said Price's application to make entry therefor.

On September 23, 1891, Francis M. Riley made homestead entry for the above described tract.

May 4, 1892, Willie C. Price initiated a contest, charging in his affidavit that said Riley had wholly abandoned said tract, and failed to establish his residence thereon since making entry.

On May 9, 1892, Riley's entry was cancelled by relinquishment.

On May 9, 1892, Charles M. Rodman made homestead entry for the same tract, subject to the rights of contestant.

May 9, 1892, said Price applied to make homestead entry for the tract, having in view the establishment of a preference right of entry, arising from the relinquishment aforesaid.

This application was suspended, to await the result of an order, requiring said Rodman to show cause why his entry should not be cancelled.

On the 8th day of June, 1892, said Rodman filed his affidavit, corroborated by John E. Carson, and his motion to dismiss Price's contest.

The motion was denied, and the parties were ordered to appear on July 6, 1892, for the purpose of allowing said Rodman to make a showing on the allegation that Riley's relinquishment was not the result of Price's contest. On the said last mentioned day, Rodman set up the following facts, in an affidavit corroborated by John E. Carson.

1st. That at the time the relinquishment hereinbefore mentioned, was filed, this affiant was a resident upon said tract, and had improvements thereon of the value of \$300.00. That the same had been settled upon and occupied by him, with the *bona fide* intention of taking the same for a homestead.

2d. That the relinquishment of Francis M. Riley was not the result of said contest by William C. Price—said relinquishment having been executed March 22, 1892—and on the afternoon of that day, together with the homestead application of this affiant, was tendered during the business hours, to the Oklahoma City land office. That owing to the fact that the office of register was at that time vacant, said office, and the receiver thereof, refused to receive said papers.

3d. That at the time of the presentation of said relinquishment, and homestead application for said tract, this affiant was informed by the receiver of said office, that his rights would not be jeopardized, if settlement and improvement were made, and continued in good faith, until such time as said office was again in a condition to do business, and that if said relinquishment and homestead application were presented within ninety days from the time of making such settlement, that affiant's rights would be secured. That, relying upon said statement, affiant immediately made settlement, as aforesaid, and has continued the same up to the present time.

In answer to this, the contestant filed the following statement:

Now comes the above named contestant, and says that *each* and *every* allegation set up in the showing of Charles M. Rodman, in answer to citation of the local office, requiring him to appear and show cause why his homestead entry for the above described tract, should not be cancelled, is true, and contestant admits that said showing is sufficient to overcome the presumption that the relinquishment of Francis M. Riley was the result of his contest herein, and now makes formal application to the honorable register and receiver of this office to have notice issue on his contest affidavit against the homestead entry of said Riley, and to have said matter set down for hearing, and to be allowed to introduce evidence in support of his charge made in said affidavit of contest—that the said Francis M. Riley had wholly abandoned said tract, and wholly failed to establish his residence thereon, for more than six months after the date of his said entry.

It seems that more than six months had elapsed after Riley had made his entry when Price filed his affidavit of contest. Rodman went upon the land while it was covered by a homestead entry, and for that reason gained no rights by his settlement.

The admission by Price that the relinquishment of Riley filed by Rodman on May 9, 1892, was not caused by his contest, was not an admission, as stated by your office, that at the time of the filing of said contest no cause of action existed against said entry, but was simply an admission that the action of Riley in filing the relinquishment was not induced by his contest. But although the filing of the relinquishment was not induced by the contest, it did not deprive Price of the right to show that the allegations contained in his contest affidavit

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were true, to wit, that said Riley had wholly abandoned said tract, and had failed to establish residence thereon since making said entry. This filing was not made until after service of notice of contest. If the statements therein made are true, Price's rights as a contestant could not be defeated by the entry of Rodman made upon the filing of the relinquishment, and he would be entitled to a hearing to prove the allegation in his contest that Riley had wholly abandoned the tract, and failed to reside thereon for more than six months after the date of his entry.

Your office decision is therefore reversed, and the application of Price for a further hearing upon his contest will be granted.

HOMESTEAD ENTRY—AMENDMENT.

ROBERT C. BELL.

A homestead entry may be amended to include an adjacent tract that was not surveyed at the date of said entry but was covered by the original settlement claim of the homesteader.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (C. W. P.)

Robert C. Bell made homestead entry of lot 3 of Sec. 4, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 1 of Sec. 9, T. 1 N., R. 6 E., Oregon City land district, Oregon, on April 20, 1891.

On the 19th of October, 1891, he filed in the local office an application to amend his entry, so as to embrace, in addition to the land therein described, 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. 9, of the same township and range. On the 8th of October, 1892, your office rejected his application. Bell appealed to the Department.

Bell's original affidavit in support of his application, duly corroborated, alleges that—

at the time of making said entry no more land adjacent to the tract so entered was available, for the reason that it was not surveyed, but was, subsequent to entry and settlement, surveyed and became subject to entry under the land laws this 19th day of October, 1891.

In an additional affidavit, which is duly corroborated, filed on the 12th of November, 1892, he alleges that he settled on the land described in his entry April 18, 1891, and has continued to reside thereon ever since; that when he first made settlement on said land, the additional tract applied for was claimed by him under, and by virtue of, his settlement; that he intended from the start, and from the day he first settled thereon, to enter the same under the homestead laws; that it was, from his first settlement, generally known in that vicinity as part of "Bell's homestead claim"; that the government surveyor was so informed at the time he made the survey thereof, and that the plats should so indicate.

It appears that Bell settled upon land, part of which was surveyed, and part not surveyed, and that he cultivated and improved the entire tract. After remaining on the surveyed portion for the full period that he could do so before making entry, without further delay rendering it subject to the claim of another, he made entry for the surveyed portion in order to preserve his right. At that time he could not make entry for the other portion, because it had not been surveyed. When it was surveyed, it had been improved by Bell, in connection with that which had previously been surveyed, and the whole tract was known as "Bell's homestead claim." His settlement upon both the surveyed and the unsurveyed land was authorized by law.

In view of these circumstances, this is, in my opinion, clearly a case in which the settler ought to be allowed to amend. No technical rule should stand in the way of allowing him to take the land which the law clearly contemplated that he might take.

The application to amend his entry is therefore allowed, and the decision of your office reversed.

APPLICATION TO ENTER—SETTLEMENT RIGHT.

FISTER v. BOYER.

An application to make homestead entry should not be allowed where the preliminary affidavit is executed at a time when the land is covered by the uncancelled entry of another.

The forcible ejection of one who is lawfully residing on a tract of land will not operate to defeat his right as a settler thereon during the period of enforced absence.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (E. W.)*

In the case of Sarah Fister v. Creed F. Boyer, the plaintiff appeals from your office decision of May 28, 1892, affirming the decision of the local officers of January 5, 1892.

The parties litigant are each seeking to acquire title under the homestead laws to the E $\frac{1}{2}$ lots 1 and 2 of the NW $\frac{1}{4}$ of Sec. 6, T. 21 and S $\frac{1}{2}$ lot 1, SW $\frac{1}{4}$ of Sec. 31, T. 22 N., R. 5 W., Ironton land district, Ironton, Missouri.

It appears from the record that on January 5, 1892, Sarah Fister made homestead application for the land in question, which was rejected by the local officers, and that Creed F. Boyer appeared fifteen minutes later and made a similar application which was allowed.

Sarah Fister appealed from the decision of the local office—rejecting her said application.

The local officers, in rejecting her application, did so in obedience to instructions from your office contained in a letter under date of January 2, 1892, directing that Creed F. Boyer be allowed to enter the land on

his meeting the usual requirements of the law affecting homestead entries.

It appears from the record that the land in controversy had been included in a homestead entry made in 1883, by one Aibjah Westover against which entry one Murphy had initiated contest. Said entry was subsequently canceled by direction from your office on the 2nd day of January, 1892.

The direction given to the local officers, touching the rights of Boyer, is thus explained in your office decision of May 28, 1892.

This office on January 2d, 1892, in the case of Murphy v. Westover, Myers and others, canceled Aibjah Westover's entry No. 7061, and directed you to allow said C. F. Boyer to enter the land on his meeting the usual requirements of the law affecting homestead entries.

The said direction was made by reason of the equities of Boyer's claim for the land, he having been a settler thereon and wrongfully ejected.

I do not think that such direction was a sufficient legal reason for rejecting the application of Sarah Fister, she being the first applicant. The application of Boyer has also another infirmity. His homestead affidavit was made on the 2d day of November, 1891, at a time when the land in controversy was covered by the uncanceled entry of Westover. See 14 L. D., 127. The affidavit of Sarah Fister, which accompanied her rejected application is void for a like reason, having been made on the 17th of October, 1891.

The papers in this case are accompanied by a record which discloses the fact that Sarah Fister initiated a contest against the homestead entry of Boyer pending her appeal to your office. Upon the hearing had upon this contest, Fister being unsuccessful took what is termed a supplemental appeal, which seems not to have been acted upon.

In the exercise of that supervisory power invested in the Department by law, inasmuch as the case has been heard on its merits, and since Fister's application should have been rejected on account of the defects above mentioned, the whole of the proceedings will be considered together.

The testimony of Boyer, taken on the trial of the contest begun by Fister, which does not seem to be contradicted, shows that Abijah Westover made homestead entry on said land in 1883, and lived there until his death in December, 1886, after which his widow, Hannah Westover, lived there until her death in February, 1888, and that Boyer, who married the granddaughter of the said Hannah, had been making his home with the old lady for three years.

After her death, Boyer continued to live on said land until March, 1890, when he, by some process which he could not understand, was dispossessed by force, by a town constable, through a mandate of a justice of the peace, the plaintiff being present at the time.

Plaintiff then took possession of the land and lived upon it until March, 1892, when she, in obedience to a notice of Boyer, peaceably abandoned the land, whereupon defendant again went upon the same,

and has lived there ever since, and has made valuable improvements thereon.

Boyer was on the land lawfully when ejected, and giving him the benefit of constructive possession of the land during the period covered by his absence, after forcible ejection therefrom, he was the first bona fide settler thereon, after the cancellation of Westover's entry.

This being true, his claim would have prevailed in a contest with Sarah Fister, even though her application, being first in order, had been allowed.

The case will, therefore, stand closed, and Boyer's application will be allowed.

SWAMP LAND SELECTION—HOMESTEAD.

PUTTEN *v.* STATE OF MINNESOTA.

The State is concluded from asserting a claim under a swamp land selection, where it fails to protest or ask for a hearing, after due notice from a homestead claimant who submits proof establishing his allegation that the land is not of the character granted to the State.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (J. L.)

I have considered the appeal of Lars H. Putten from your office decision of December 22, 1892, in the case of Lars H. Putten *v.* State of Minnesota, reversing the decision of the local officers, and dismissing Putten's contest, and holding for cancellation his homestead entry No. 12,226 for the SE. $\frac{1}{4}$ of Sec. 17, T. 120 N., R. 41 W., of the 5th principal meridian, Marshall land district, Minnesota.

On December 28, 1891, Putten made homestead entry of said land, subject to swamp land selection for the State of Minnesota; and at the same time filed therewith a statement under oath, corroborated by two witnesses, that the land in its natural state is not swamp and overflowed, and rendered thereby unfit for cultivation, as required by paragraph 1 of departmental circular of December 13, 1886, (5 L. D., 279).

On the same day the local officers, by registered letter, notified the governor of the State of Minnesota, as required by the 2d paragraph of said circular. Receipt of said letter was acknowledged by the governor on December 31, 1891, over his own signature, and he took notice that the usual sixty days was allowed the State to protest against the allowance of said entry, and to demand a hearing to determine the character of said tract. A copy of the notice sent to the governor was posted in the local office for sixty days, beginning on December 28, 1891.

The State of Minnesota, although duly notified, failed to object to the perfection of said entry, or to present any protest against the same,

or to apply for a hearing to prove the swampy character of said land, as required by the 4th paragraph of said circular.

Nevertheless, the local officers, on April 27, 1892, issued a notice, summoning both parties to appear at their office on July 6, 1892, to respond and furnish testimony to determine the swampy or non-swampy character of said tract. A copy of said notice was sent by registered letter to the governor of Minnesota, who received it May 1, 1892. It was also duly posted in the local office.

On July 6, 1892, Putten appeared with his witnesses, and their testimony was taken. The State of Minnesota did not appear.

On July 7, 1892, the local officers rendered their joint decision, recommending that the selection of the State of Minnesota of the tract involved be cancelled, and that the homestead entry of Putten remain intact, and allowing thirty days for appeal to the General Land Office.

Notice of said decision was sent to the governor of Minnesota, and was received by him on July 11, 1892. And no appeal was taken.

On December 22, 1892, your office, of its own motion, reversed the decision of the local officers, and held Putten's homestead entry for cancellation, subject to his right of appeal. Putten has appealed to this Department.

The action of your office in this case is based upon a mistake as to what the records of your office show. The list No. 2, of the Litchfield land district series, which was certified to the governor of Minnesota on June 19, 1873, contained in the aggregate 8,929.82 acres, and did not include the SE. $\frac{1}{4}$ of Sec. 17, T. 120 N., R. 41 W., involved in this contest.

When the governor received the first notice in this case, he doubtless caused the list No. 2, then in possession of his officers, to be examined, and discovered that the land in contest had not been certified to the State. Therefore he made no objection, presented no protest, and applied for no hearing, and thereby intelligently consented that his State should "be deemed concluded from thereafter asserting a claim to the land, under the swamp land grant", as prescribed by the 4th paragraph of the circular aforesaid. Therefore he disregarded the notice of the hearing, and did not appear, and also the notice of the decision of the local officers, and did not appeal.

The records of your office show that this quarter section of land in contest has never been certified to the State under the swamp land grant of March 12, 1860, nor under the railroad grant of March 3, 1857.

The State of Minnesota elected to take the field notes of the government surveys as the basis for selections of swamp lands; and therefore under the 6th paragraph of said circular the burden of proof would be upon Putten at the hearing of a proper contest.

After careful examination of the testimony in this case, I find that Putten proved that the land in contest in its natural state was not swamp and overflowed land, made unfit thereby for cultivation. Said

testimony is corroborated by the field notes of the government survey of said township, approved by the surveyor-general on November 28, 1866. The State of Minnesota is concluded from asserting a claim to said land under the swamp land grant.

Your office decision is hereby reversed, and the decision of the local officers is affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

FREW v. BUTLER'S HEIRS.

A purchase under section 2, act of June 15, 1880, should not be allowed pending contest against the original entry, but a purchase so allowed may stand subject to the exercise of the preferred right of the contestant. A subsequent pre-emption filing for the land by the contestant, who is not qualified to exercise the preferred right, will not, *proprio vigore*, effect a cancellation of the cash entry and open the land covered thereby to appropriation by other applicants.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (F. W. C.)

I have considered the appeal by Joseph Frew from your office decision of June 18, 1892, sustaining the action of the local officers in rejecting his homestead application for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, T. 5 N., R. 2 W., Salt Lake City land district, Utah, tendered October 3, 1891.

On March 12, 1880, Wm. H. Butler made homestead entry No. 4691, for the land in question, against which James Everett initiated a contest March 17, 1887, alleging abandonment.

During the pendency of this case, to wit, on June 18, 1887, Wm. Butler, as the legal heir of Wm. H. Butler, deceased, purchased the land under the provisions of section 2 of the act of June 15, 1880, and cash certificate No. 3134 issued to him same day.

From this action the contestant (Everett) appealed, and by your office decision of November 8, 1887, the local officers were directed to reinstate Everett's contest.

Trial was had upon said contest, resulting in favor of the contestant, under which the homestead entry by Wm. H. Butler was canceled, but the cash entry was allowed to stand subject to the exercise of the preferred right of entry in the contestant, Everett.

On June 17, 1887, Everett filed an application to file pre-emption declaratory statement for this land, alleging settlement June 16, 1887.

Upon the termination of his contest this application was returned to Everett advising him of his preferred right of entry.

It was returned to the local officers on October 3, 1891, with an affidavit by Everett to the effect that he had made no other tender of an application to file pre-emption declaratory statement since June 16, 1887, and that he had not entered or filed upon public land since August

30, 1890, in quantity such that added to the land in question, would exceed three hundred and twenty acres. His filing was accepted and went to record as declaratory statement No. 11,992.

Accompanying the application by Everett was filed a homestead application by Joseph Frew, being the application under consideration, which was rejected by the local officers for conflict with the cash entry No. 3134, before referred to, and Frew appealed.

On October 10, 1891, Wm. Butler filed a protest against accepting Frew's homestead application and moved the cancellation of Everett's filing. The grounds alleged, in substance, being as follows:

It is alleged that Everett never made settlement on the land on June 16, 1887, or at any other time up to the date of his filing; that for more than three years preceding said filing he had not resided in the territory of Utah, but resided in Idaho, and a transcript from the records of the office at Blackfoot, Idaho, shows that James Everett made homestead entry No. 2308, April 24, 1887, for the NE. $\frac{1}{4}$, Sec. 20, T. 3 N., R. 38 E., Idaho; that Joseph Frew is a relative of Everett's and that the filing of Everett's application was in the interest of Frew, it being proposed thereby to secure the cancellation of Butler's cash entry to the end that Frew might make entry of the land.

Your office decision upon the record as made, sustained the rejection of Frew's application and directed that Everett be summoned to show cause why his filing should not be canceled.

It is upon Frew's appeal that the case is brought before this Department.

The appeal does not deny the allegations contained in Butler's protest but urges that upon the assertion of claim by Everett, under his contest, that Butler's cash entry became extinguished and, as Everett's filing was no bar to an entry, that his (Frew's) application under the homestead law should have been allowed.

It has been repeatedly held by this Department that it is error to allow purchase of an entry under the act of June 15, 1880, pending contest, but purchases so allowed have always been permitted to stand subject to the right of the contestant.

In the present case, it appears that during the contest, the contestant left the territory and made a homestead entry in Idaho, which was unperfected at the date of final decision on his contest.

He was therefore unable to avail himself of the fruits of his contest as he could not hold two claims under the settlement laws at one and the same time; further, to make a valid filing it was necessary that it be preceded by settlement.

It is alleged that he never made settlement upon the land in question prior to filing, and it would seem that his only purpose in returning to file for the land was to secure the cancellation of Butler's cash entry, in the interest of his relative Frew.

The filing of Everett's declaratory statement did not *propri vigore* cancel Butler's cash entry, consequently, in the rejection of Frew's homestead application no error was committed.

Your office decision is sustained.

RAILROAD GRANT—PREFERENCE RIGHT—HOMESTEAD.

RINDA v. NORTHERN PACIFIC R. R. CO. ET AL.

An unexpired pre-emption filing existing at the date of withdrawal on general route excepts the land covered thereby from the operation of said withdrawal.

Land embraced within the occupancy of a qualified pre-emptor at the date of definite location is excepted from the operation of the grant, whether the settler then sought to secure title from the company or the government.

An agricultural claimant who secures the cancellation of a mineral claim is entitled thereby to a preferred right of entry.

The right to make a second homestead entry under the act of March 2, 1889, can not be exercised in the presence of an adverse claim arising prior to the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894.

This record presents the separate appeals of the Northern Pacific Railroad Company and Alexander Majors, from your office decision dated July 9, 1892, in the case of Venzel C. Rinda *v.* Northern Pacific R. R. Co., and Alexander Majors, involving the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 13, T. 10 N., R. 4 W., Helena, Montana.

The facts are fully set out in said decision and need not be restated in detail.

The tract in question fell within the limits of the grant to the Northern Pacific R. R. Co., "the withdrawal of lands for the benefit of which became effective February 21, 1872." The line of said company's road opposite said land was definitely located July 6, 1882. At the date of said withdrawal, the land was embraced in the pre-emption declaratory statement of Charles L. Bellrive, filed January 25, 1869, alleging settlement same day, and in the pre-emption declaratory statement of James E. Owens, filed June 21, alleging settlement June 18, 1869.

The land was also embraced in the mineral application of Carl Kleinschmidt, filed in July, 1881. Rinda and the Northern Pacific R. R. Co. filed protests against this application and, in June, 1888, a hearing was had thereon. Thereupon the local officers recommended the cancellation of said application. This ruling was affirmed by your office May 24, 1889, and "the case closed so far as the mineral applicants were concerned."

The company having applied to list the land, and Rinda to enter it, a hearing to determine its status at the date of said withdrawal and at the date of said definite location, was had at the local office, July 30,

1889. The company and Rinda then appeared and submitted testimony.

After said hearing and before a decision by the local officers, to wit, on August 2, 1889, Majors applied to make homestead entry for the land, under the second section of the act of March 2, 1889 (25 Stat., 854). Along with his application Majors filed affidavits showing that, with his family, he had resided on the land since 1882, cultivating and improving the same. He also applied to contest any applications for the land.

On January 18, 1890, the register and receiver, without passing on the rights of Majors, rendered their joint opinion that the mineral application of Kleinschmidt, subsisting at the said date of definite location, excepted the land from the grant, and that the application of Rinda should be allowed.

The company appealed; whereupon your office, by its said decision, affirmed the ruling below and held for cancellation the company's listing of the land, which it appears, was erroneously allowed pending the proceedings hereinbefore outlined.

Your office then held that, by reason of the homestead entry which Majors made December 9, 1886, for other land in the Helena district, and relinquished April 1, 1890, he was, in August, 1889, the date of his application to enter the land, disqualified to make entry under the act of 1889 (*supra*), and that Rinda's prior application must prevail.

Your office, accordingly, rejected Majors' application and allowed that of Rinda.

The action of your office in rejecting the railroad company's claim is clearly correct. The unexpired pre-emption filings subsisting at the date of withdrawal, served to except the land from the operation thereof (*Northern Pacific R. R. Co. v. Stovenour*, 10 L. D., 545), and the evidence shows that, since April, 1882, that is, prior to the definite location of the company's line of road, Majors had lived on the land continuously, and that he was a qualified pre-emptor. Majors' settlement prior to and at the date of definite location excepted the land from the grant regardless of the question whether he then sought to acquire it from the government or the company. *Northern Pacific R. R. Co. v. McCrimmon* (12 L. D., 554).

This being so, it is unnecessary to consider the effect of Kleinschmidt's mineral application.

As between Rinda and Majors, I also concur in the conclusion reached by your office. The cancellation of the mineral application, which covered the land, was brought about by the protests of Rinda and the company, and the company's claim being eliminated from the case, Rinda is entitled to the preference right, arising from such cancellation. *Dorner v. Vaughn* (16 L. D., 8). And Rinda's application pending at the date (May 24, 1889) when the mineral application was canceled, undoubtedly gave him an adverse claim to the land.

It follows that Majors, despite his settlement and residence thereon, cannot, in the presence of such adverse claim, be permitted to exercise, as he asks in his application, the right to make a second homestead entry under the act of 1889 (*supra*). *Talmadge v. Cruikshank*, 15, L.D., 139.

The judgment of your office is affirmed.

REINSTATEMENT—INTERVENING CLAIM.

UNITED STATES ET AL. v. HANLEY ET AL.

An entry should not be reinstated in the interest of a transferee who is negligent in prosecuting his claim, and where in consequence of such negligence adverse rights have intervened.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (P. J. C.)

The land involved in this appeal is 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. 19, T. 102 N., R. 52 W., Mitchell, South Dakota, land district.

It appears that Mary Jane Hanley made homestead entry of said tract May 9, 1879, and on July 14, 1880, made commutation proof and final entry. On September 22, 1884, the report of a special agent showed non-compliance with the law in regard to residence and cultivation of the tract, and conveyances of the same by the entryman on the day the entry was made—one a deed and the other a mortgage—and also showed that the title then vested in John C. Gates, by reason of other conveyances. These latter facts were gleaned from the records. The agent also reported that the whereabouts of Gates could not be ascertained.

Said entry was ordered suspended by your office letter of October 11, 1884, and a hearing ordered under "the terms of departmental circular of August 6, 1884" (11 L. D., 161). Hearing was had before the local officers July 22, 1885, service being had on Hanley by publication. She made default, and the register and receiver, after taking the testimony of three witnesses, held her entry for cancellation. Your office affirmed their action October 26, 1885.

On August 9, 1886, an attorney in this city entered his appearance for Gates in your office, but asked no relief of any kind. At the same time he filed an affidavit made by Gates, in which he swears that "at the time all the proceedings were had for such cancellation by the Commissioner of the General Land Office" he was "the party in interest," "and that I am still such party in interest." No action seems to have been taken by your office on this.

Again, on July 15, 1892, another firm of attorneys filed an abstract of title of the land, showing title in Gates; also his affidavit again stat-

ing that fact. They ask that the entry be reinstated, alleging that the "mortgagee in this case never had any notice of the said cancellation, and was not aware that the entry was canceled for many years afterwards," and request "that your office investigate this case thoroughly before passing upon the questions involved."

The abstract not having been certified to, your office, on September 8, 1892, advised the attorneys "that before your request can be considered by this office, you will be required to file" one with a proper certificate. On December 5, following, a duly certified abstract was filed, and your office, by letter of January 21, 1893, ordered that the Hanley case be reinstated, on the ground that Gates had not had notice of the proceedings against said entry. It seems that one Charles N. Draper had filed his pre-emption declaratory statement for said tract February 24, 1890, and on receipt of notice of your said office decision reinstating the Hanley entry, he appealed to the Department.

It will be observed that Gates has not claimed that he did not have notice of the proceedings for the cancellation of the Hanley entry. He makes no showing that the judgment rendered was in any way erroneous, or that there was any defense to the charge. (*Manitoba Mortgage Company*, 10 L. D., 566.)

The only thing that is charged is that the mortgagee did not have notice of the proceedings. The abstract shows, however, that satisfaction of the mortgage was entered of record August 9, 1882, which was almost two years before the hearing was ordered or the investigation and report of the special agent was made. So that it is difficult to understand any necessity for notice to the mortgagee.

Again, he was guilty of great laches in prosecuting his case, and in the meantime adverse rights have intervened. He certainly knew of this judgment when he presented his first affidavit in August, 1886. He did not seek any relief then; his attorney simply filed his appearance and Gates' affidavit setting forth his interest. Thus the matter rested for six years, until July, 1892, when the present proceedings were instituted. In the meantime there have been two or three different entries and filings on the land, and one contest prosecuted to a successful termination, this appellant thereby earning a preference right of entry.

Your judgment is therefore reversed, and Gates' proceeding dismissed.

RAILROAD GRANT—MINERAL LAND.

BARDEN ET AL. v. NORTHERN PAC. R. R. Co.

Though the mineral character of a tract is admitted by the railroad company, in a judicial proceeding instituted for the possession thereof by the company, yet the Department, in the administration of the law, is required to determine the actual character of the land in question.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (F. W. C. (J. I. H.)

I have considered the appeal by the Northern Pacific R. R. Co., from your office decision of November 28, 1891, holding that the lands embraced in the following lode mineral locations were excepted from the operation of its grant, namely, Vanderbilt, Four Jacks, Chauncey Depew, New York Central and Hudson River lode mining claims, being officially designated as lots numbered 68, 72, 73, 74 and 75.

The lands embraced in said locations form a compact body of land nearly square, comprising the greater part of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 27, T. 10 N., R. 4 W., Helena land district, Montana.

Said section is within the primary limits of the grant for said company as adjusted to the map of definite location filed July 6, 1882, and were listed by the company on account of its grant November 8, 1886, per list No. 13.

It appears that said lode claims were located and the location notices recorded in 1888 and 1889.

On October 19, 1889, Richard P. Barden, on behalf of himself, Wm. Muth, Jas. R. Boyce and Ada F. Boyce made application for patent on said lode mining claims and on December 21, following, submitted an affidavit alleging that the lands embraced in said lode claims were mineral in character and for that reason excepted from the company's grant.

Thereupon hearing was ordered at which both the lode claimants and the company were represented and testimony was offered by both parties.

From a consideration of the evidence at said hearing the local officers were of the opinion that the land embraced in the Hudson River, Four Jacks, Chauncey Depew and New York Central lode claims are not shown to be mineral in character and application for patent as to them was therefore rejected, but

that the Vanderbilt is so far shown to be mineral as to come within the meaning of the term mineral lands as used in the granting act, and that the application for patent for said claim or lode should be allowed and R. R. selection list No. 13, be canceled to that extent.

Upon appeal your office decision, upon a consideration of the evidence, held the same to be sufficient to warrant the finding that all of

the land involved in this controversy is mineral land within the meaning of that term, as used in the act granting land to the Northern Pacific Railroad Company.

From said decision the company appealed to this Department.

In its appeal it urges: first, that there has not been such a discovery of mineral on the lands embraced in these locations as would warrant bringing the same within the exception from its grant and second, that if deemed to be mineral lands within the meaning of the grant to the said company, that the discoveries were made after its right attached, by the filing of its map of location, and can not therefore affect its rights to the same under said grant.

It appears that during the pendency of the case under consideration, the company brought an action against these defendants, who have applied for patents, for the possession of the lands in question, urging its right thereto under its grant made by the act of July 2, 1864 (13 Stat., 365).

Said case has been continuously prosecuted, resulting in a decision of the United States supreme court under date of May 26 last (152 U. S., 288), in which the demurrer to the company's bill was sustained, with directions that judgment be entered in favor of the mineral locators.

In the opinion of the court, delivered by Mr. Justice Field, in said case, it is stated:

The lots are there conceded to be mineral land and the grant of the government applies in terms only to lands other than mineral.

Again, it is stated in said opinion:

The action being for the possession of lands *conceded* to be mineral under the act of July 2, 1864, it would seem that the simple reading of the granting clause and its proviso and the joint resolution mentioned, would be a sufficient answer to the complainant and a sufficient reason to sustain the demurrer without further consideration, but the plaintiff's counsel appears to find in the fact which they allege, that the lands were not known to be mineral at the time the plaintiff, by the definite location of the line of its road, was enabled to identify the sections granted, a sufficient ground to avoid the limitations of the grant and the provisions of the proviso and joint resolution.

It would seem, therefore, that in said proceedings it was admitted by the company that the lands in question were mineral in character, but it was sought to defeat these applicants' right to develop the property upon the ground that the discovery of mineral was not made until after the definite location of its road.

The testimony taken at the hearing before the local officers in the case under consideration, shows that the only improvements made by the mineral claimants upon the Four Jacks, Chauncey Depew, New York Central and Hudson river lode claims, consist of a discovery shaft in each, four feet deep, valued at about \$10. Upon the Vanderbilt claim the improvements made have been extensive, but the local officers, after a personal examination of the premises, were of the opin-

ion that the workings on the said Vanderbilt claim could be of no possible aid in the development of the other claims.

Upon this question their opinion states:—

An examination and inspection of the land by the Reg. and Rec. April 17, 1891, after due notice to and accompanied by representatives of both parties, discloses that the "Vanderbilt" lies upon a high hill, sloping from tunnel No. 5, east and west to the end lines, and north to the side line. The "Four Jacks" on the west of a line drawn from cor. No. 1, diagonally to corner No. 4, also lies on the slope of a hill, facing north and east. The "N. Y. Central" east of a line drawn from cor. No. 1, diagonally to cor. No. 3, also lies on a hill sloping north and west. The remainder of the two claims last named and the "Chauncey Depew" and "Hudson River" lie on comparatively smooth or level ground sloping north, opening into the adjacent valley and forming a small cove or valley, containing 55 or 60 acres, surrounded and sheltered by the hills mentioned. Since the hearing, each of the claims had been further developed by shafts or cuts, to the extent of from 12 to 16 feet. The workings on the "Vanderbilt" alleged to be for the common benefit of all the claims lie high up on the hill, above all the other claims, consisting of tunnels which lead directly away from all the other claims, and by no possibility could they aid in the development of the other claims.

Upon the record before me, made at said hearing, it can not be held that the lands embraced in all of said locations are mineral lands within the meaning of the act making the grant to said company, and while it appears that, in the action brought for possession of the lands, the company admitted that they were mineral in character, yet it remains for this Department, in the administration of the laws, to determine the character of the land, and to see that the requirements are complied with.

In the case before the court, before referred to, it was held that the grant for this company does not pass title to mineral lands, even though the discovery of mineral be made after the definite location of the road, and in the absence of a patent it can not maintain an action brought for possession as against those engaged in mining the land.

The land officers report that the locators had made further improvements at the time they examined the land, which was subsequent to the hearing, and while the proof offered is not deemed sufficient to warrant the issuing of patent upon said lode claims, yet, in view of all the circumstances, I have to direct that further opportunity be afforded them to make a supplemental showing, due notice of which should, however, be given the company. At this hearing the character of the land embraced in each location should be inquired into.

Your office decision is accordingly modified.

SETTLEMENT RIGHTS—ACT OF JUNE 20, 1890.

DANIELS v. JOSSART ET AL.

The disqualifications imposed upon settlers within the limits of the reservoir lands opened to entry and settlement by the act of June 20, 1890, who enter and occupy said lands within the prohibited period, extend to one who during said period exercises rights of ownership and possession over a dwelling house previously erected on said land, and visits the same during said period.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (G. C. R.)

On December 20, 1890, at the Wausau land office, Wisconsin, David Jossart made homestead entry, No. 5892, for lot 8, Sec. 15, and lots 1 and 4 and E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 22, T. 39 N., R. 6 E.

On December 22, 1890, John Parent made homestead entry, No. 6034, for lot 6, Sec. 15, of the same township.

On January 7, 1891, John Radcliffe applied to enter lot 7, Sec. 14, lots 6 and 8 of Sec. 15, lots 1 and 4 of Sec. 22, and lot 3 of Sec. 23, same township, and on the same day, Eliza Reagan applied to enter the same lots, as did also Mrs. Camilla A. Daniels on January 13th following.

On January 19, 1891, George W. Guhns applied to enter same lots, except as to lot 3, Sec. 23.

On January 16, 1891, Henry W. Boyer applied to enter lots 1, 2 and 3 of Sec. 23, same township.

On January 16, 1891, M. E. Monsel applied to enter lot 8 of Sec. 15; lot 7 of Sec. 14; and lots 1 and 4 of Sec. 22, same township.

On February 19, 1891, Camilla A. Daniels filed an affidavit of contest against the homestead entry of David Jossart.

It appears that these lands were included among others which were withdrawn from market by executive orders for the purpose of "creating and maintaining" reservoirs at the head waters of the Mississippi, Saint Croix, and other rivers in Wisconsin and Minnesota.

The act of June 20, 1890 (26 Stat., 169), authorized the President to restore to the public domain the lands so reserved, and, when restored, to be "subject to homestead entry only."

Section 3 of the act provides:

That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement, no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

Hearing was duly had upon the contest of Mrs. Daniels, and on April 15, 1891, the register and receiver, in their decision, made the following recommendations:

That Mrs. Daniels' application should be rejected because of her entering upon and occupying the lands before December 20, 1890, thus violating the provisions of the third section of the act above cited.

That the application of John Radcliffe and Eliza Reagan should be rejected for the same reason, each of these applicants having resided upon and occupied the lands for a year or more prior to the time at which they became subject to entry, and such residence and occupation continuing until the morning of December 20, 1890.

That the application of George Guhns should be rejected because of insufficient acts of settlement and immediate abandonment of the land.

That Monsel "made a good and valid settlement" upon the lands he applied to enter, "which settlement has been continuous up to the time of the taking of testimony in the case," and that the entry of Jossart, in so far as it conflicts with Monsel's settlement (i. e., lot 8 of Sec. 15 and lots 1 and 4 of Sec. 22), should be canceled and the latter allowed to enter these lots.

That Boyer made a good and valid settlement upon the NW. $\frac{1}{4}$ of Sec. 23, comprising lots 1, 2 and 3 of that section, and that in so far as his settlement conflicts with the alleged settlements of Mrs. Daniels, Radcliffe and Eliza Reagan (i. e., as to lot 3), Boyer is entitled to take precedence.

That as to Boyer's right to said lot 1, the same is undetermined in another case.

That the rejection of the claims of Radcliffe, Reagan, Daniels and Guhns leaves John Parent's entry for lot 6 Sec. 15, unquestioned.

From this judgment Mrs. Daniels and David Jossart appealed; Eliza Reagan, Radcliffe and Guhns did not appeal, and on such failure the facts found by the local officers as to their connection with the land became final, and their applications were properly rejected by your office decision of August 10, 1892.

Your office affirmed the action of the register and receiver as to Boyer's claim, and awarded to Monsel lot 8, Sec. 15, and lots 1 and 4 of Sec. 22, and awarded to Mrs. Daniels lot 7 of Sec. 14, and lot 6 of Sec. 15. From this judgment John Parent and David Jossart have appealed to this Department.

Since these appeals have been filed, Monsel has duly acknowledged and filed a written release to the United States of the lands awarded to and claimed by him (being lot 8, Sec. 15, and lots 1 and 4, Sec. 22). Mrs. Daniels not only did not appeal from the action of your office, which awarded to her lot 6 of Sec. 15 and lot 7 of Sec. 14, and rejected her claim to the other lots she applied for, but she, through her attorneys, has withdrawn all her claim to any of the lots, except as to those awarded to her by your office. This, apparently, leaves Jossart's claim to lot 8, Sec. 15, and lots 1 and 4 of Sec. 22, without contest, and it is unnecessary to consider his appeal.

The remaining question relates to Parent's appeal, which involves lot 6 of Sec. 15, of which he made entry December 22, 1890.

If, as alleged, Mrs. Daniels was qualified to make entry and settle on this lot after midnight of December 19, 1890, being the very beginning of the day (December 20, 1890), and thereafter maintained a bona fide residence thereon, she would under the act of May 14, 1880 (21 Stat., 140), be allowed to put her claim of record within three months thereafter, the right relating back to date of settlement, and such settlement would defeat the claim of Parent, who, subsequent thereto and on the same day, made entry of the lot. *Johnson v. Crawford*, 15 L. D., 302.

It sufficiently appears that Mrs. Daniels maintained a continuous residence on the land after her settlement, and the only question to be determined is as to her qualifications to make entry, in view of section 3 of the act of 1890, above quoted. She testifies that she commenced to reside on the land immediately after twelve o'clock on the morning of December 20, 1890; that she first went to the land on May 30, 1887, with her husband; that they took a stock of goods with them, erected a tent, and lived in and sold goods from it; that they lived in the tent until November, 1887, when they moved into a cottage, which they built close by on the land. This cottage was built of logs, is eighteen by twenty-six feet, two doors, four windows, one story and a half high. They purchased the material used in its construction. They continued to sell goods from the tent until March, 1888, when they built a store house on railroad land, on the opposite side of the lake, distant from the cottage about one-half mile. While living in the cottage, and on May 2, 1889, Mr. Daniels died; thereafter Mrs. Daniels lived alone in the cottage, until November 4, 1889, when on account of poor health she had rooms added to her store building, then and now in the new village of Minocqua, and lived there until December 20, 1890. Her business during all this time was that of selling goods. After moving back into the cottage, on December 20, 1890, she still continued the business, going from her cottage to the village, and at the same time having additional clearing done on the land. She claimed ownership of the cottage all the time, but, as above seen, did not live in it from November 4, 1889, to December 20, 1890, during which period she lived in rooms attached to her store-building, in Minocqua. When she moved to the village in November, 1889, she left some of her household goods in the cottage; and in the summer of 1890 (date not given) she rented the cottage for a few days on the request of excursionists from Chicago. She never claimed to own the land while it was in a state of reservation, but while living there in 1888 and 1889 she cultivated a few vegetables planted near the house. She states that the cottage was built there because they had no other land on which to build. She admits that it was her intention to hold the land when it came into market, and she also admits that she may have said that the reason

she left her household goods in the house when she moved to Minocqua was because she intended holding the land.

While it is true that she did not live on the land during the prohibited period (from June 20, to December 20, 1890), still her goods were there in her cottage, and she exercised ownership over it, renting it a part of the time and visiting it—at least once, in July, 1890, with some friends who with her took luncheon there.

While building on the land and living there before the prohibited period began did not of itself disqualify her, yet her acts in renting the cottage, and going there with her friends during the prohibited period, must be regarded as the entering upon and occupancy which are expressly prohibited by section 3 (above quoted). *Dereg v. McDonald*, 17 L. D., 364.

I do not think Mrs. Daniels is qualified to make entry. It follows that the entry of Parent for the lot in question will remain intact, subject to his compliance with law.

The decision appealed from is accordingly reversed.

FINAL PROOF—AMENDED RULE OF PRACTICE 53.

McCLURE *v.* SULLIVAN'S HEIRS.

Rule of Practice 53, as amended March 15, 1892, makes the submission of final proof, during a contest and after trial has taken place, optional.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (G. C. R.)

On July 24, 1885, Jerry Sullivan made homestead entry for lots 2, 3, 4 and N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 33, T. 41 N., R. 4 E., Seattle, Washington. He died on or about April 24, 1890, and on November 25, 1890, Richard McClure filed his affidavit of contest against the entry, charging that Sullivan's heirs had wholly abandoned the land, and had neither cultivated nor improved the same.

This contest was held subject to a contest making practically the same charges, filed November 5, 1890, by Adam A. Searl, which, on the latter's appeal, reached the Department where it was held, August 11, 1892 (15 L. D., 182), that a charge of failure to improve and cultivate the land will not lie against the heirs of a deceased homesteader where the death of the entryman occurs within less than six months of the expiration of the statutory period of residence, required of the homesteader. Searl's contest was accordingly dismissed.

On September 20, 1892, McClure filed his supplemental or amended complaint, practically repeating his former charges.

On the day set for hearing, the register and receiver, on the motion of the attorneys for defendant, dismissed the contest, and, on appeal,

your office, by decision dated March 25, 1893, affirmed that action, and a further appeal brings the case here.

It is very clear that the departmental decision above cited in the Searl case is directly applicable to this case, and controls the questions raised herein on the contest affidavit.

It is insisted, however, that the heirs are in default in having failed to submit final proof within seven years from the date of the deceased's entry, and that this fact being shown, proof of abandonment is apparent, and that the contest for that reason should be sustained.

This entry has been practically under contest since November 5, 1890; there has been no time, therefore, in which proof could have been submitted by the heirs, except during a pending contest against the entry, and proof could not have been submitted during much of such period, under the then existing rule. *Bailey v. Townsend*, 5 L. D., 176; *Laffoon v. Artis*, 9 L. D., 279; *Scott v. King*, Idem., 299; *Eastlake Land Company v. Brown*, Idem., 332. Practice Rule 53, however, as amended March 15, 1892, makes the submission of final proof, during a contest and after trial has taken place, optional.

The decision appealed from is affirmed.

Notify the heirs of Sullivan that a reasonable time will now be given them in which to submit final proof.

NOTICE OF DECISION—APPEAL.

DREESEN *v.* PORTER.

A party is not entitled to be heard on the ground that he did not receive notice of adverse action on his application to enter, where the notice of such action was sent to the post-office address furnished by him, and adverse rights have intervened.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (J. W. T.)

The appeal of Nicholas Dreesen, in the above entitled cause, from your office decision of April 3, 1893, wherein the ruling of the local office was sustained, rejecting Dreesen's application to make homestead entry for the NE. $\frac{1}{4}$ of Sec. 34, T. 12 N., R. 8 W., in the Oklahoma City land district, Oklahoma, has been considered by me.

On June 9, 1892, said Dreesen made said application, which was suspended to allow him to make proof of naturalization.

After waiting over three months for the required evidence of naturalization, on September 15, 1892, the local office rejected the application and sent said Dreesen notice thereof to the post office address he had named in making the application, viz: El Reno, Oklahoma.

This notice said Dreesen alleges never reached him, because his residence and post office address was not El Reno, Oklahoma, the place

given and recorded at the date of said application, but at Dysart in the State of Iowa. After the expiration of the usual time for appeal, upon service of notice of the decision of the local office, said Dreesen appeals, or rather, asks to be heard on the ground that the time therefor, has not expired by reason of the fact that no notice of the determination aforesaid was ever received by him.

As a general rule it is true that the party cannot be expected to appeal until he has had notice of an adverse ruling, and therefore his right of appeal is made to date from the service of the same.

But this is not such a case. The main reason for requiring the post office address of an applicant for entry, to be stated in said application and made a matter of record, is that the notice which Dreesen claims he did not receive, may be given him. It is for his benefit. If he chooses for any reason to give a wrong address, it is his own neglect or laches and he will not be heard to complain of it. In an affidavit, which has since been furnished by said Dreesen, he states that his actual post office address was Dysart, Iowa, but he does not deny that he furnished the local office with El Reno, Oklahoma, as the place to which all matter should be mailed to him.

It comes then within the rule laid down in *John P. Drake* (11 L. D., 574); *Smith v. Fitts* (13 L.D., 670). More especially will this rule be invoked and adhered to under the circumstances of this case, wherein it appears that an entry has been made of said land by one Samuel C. Porter, who has innocently gained rights in said tract by homestead entry allowed for said tract October 24, 1892.

It is unnecessary to consider the claim of said Porter, for it stands upon its own foundation, and although the case comes here entitled like a contest or trial *inter partes*, it is not really of such a character.

Your office decision is correct, and it is therefore affirmed.

CONFIRMATION—MISSION CLAIM—ACT OF MARCH 2, 1853.

NORTHERN PACIFIC R. R. CO. ET AL. v. ST. JOSEPH'S ROMAN CATHOLIC MISSION.

Under the act of March 2, 1853, providing for the confirmation of mission claims, the Roman Catholic Church is a proper beneficiary as a religious society. The confirmation made by said act, on account of mission claims, is limited to the land actually used and occupied in the maintenance of the mission at the date of the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (F. W. C.)

I have considered the appeals by the Northern Pacific Railroad Company, Chas. Kinne and Willis Smith from your office decision of April 4, 1893, in which it is held that the Roman Catholic church is the legal

owner of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lots 1 and 2, Sec. 18, T. 12 N., R. 17 E.; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$, and lots 1, 2, 3, and 4, Sec. 13, T. 12 N., R. 16 E., W. M., North Yakima land district, Washington, and that patent embracing said land may be legally issued to the Bishop of Nesqually, in trust for the said church.

The claim of the church is based upon the act of March 2, 1853 (10 Stat., 172), entitled "An act to establish the territorial government of Washington," which act contains a proviso in the first section as follows:

That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the Territorial government of Oregon, together with the improvements thereon, be, and is hereby confirmed and established to the several religious societies to which said missionary stations respectively belong.

Township 12 N., R. 17 E., was surveyed between June 24, and July 4, 1867, and the plat of survey was approved by the surveyor-general October 27, following, and your office decision states that the mission claim is not laid down upon the plat nor mentioned in the field notes pertaining to said survey.

Township 12 N., R. 16 E., was surveyed between November 2 and 6, 1872, and the plat of survey was approved by the surveyor-general July 16, 1873.

Your office decision states that the mission improvements are mentioned in the field notes of this survey as being on the south side of section 13, and are shown by the plat to be on lot 1, of said section.

On November 15, 1878, the right Rev. A. M. A. Blanchett, bishop of Nesqually, filed an application on behalf of the Roman Catholic church for the issuance of patent to him, as trustee for the church, for lands embraced in the St. Joseph Catholic Mission Station, the same being described by metes and bounds, evidently intended to embrace about six hundred and forty acres, including the land covered by the mission buildings.

This application was supported by affidavits alleging that the mission was established prior to and existing at the date of the passage of the act of March 2, 1853 (*supra*).

Prior to the filing of this application claims had been filed under the homestead and pre-emption laws embracing nearly the entire tract covered by the church's application. On some of these claims proof had been made and final entries allowed.

On August 20, 1883, Aegidius Junger, the then bishop of Nesqually, relinquished the claim of the church to certain lands covered by its application which lands were embraced in the entries of one Timothy Lynch and Antony Herke. Acting upon said relinquishment patents issued upon said entries.

The claim of the Northern Pacific Railroad company to the portion of the land covered by the church's application, designated by odd numbers, is based upon the fact that said lands are within the primary limits of its grant, as shown by the map of general route of the branch line filed June 11, 1879, and the definite location shown upon the map filed May 24, 1884.

On January 23, 1887, the company listed on account of its grant, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, T. 12 N., R. 17 E.; the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 13, T. 12 N., R. 16 E.

On October 1, 1878, Jean Baptiste Raiberti, a Catholic priest, made homestead entry for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2, Sec. 18, T. 12 N., R. 17 E., against which Charles Kinne filed affidavit of contest on September 19, 1887, alleging abandonment, upon which trial was had October 27, 1887, the decision of the local officers being in favor of the contestant.

The papers were forwarded to your office January 27, 1888, but before any action was taken thereon, to wit, on October 26, 1888, Raiberti relinquished his entry and the same was canceled upon the records. It is by reason of said contest that Kinne on July 18, 1889, applied to make homestead entry of said land claiming the rights accorded a successful contestant.

On June 27, 1878, Joseph M. Caruana filed a pre-emption declaratory statement embracing lots 1, 2, 3, and 4, Sec. 13, T. 12 N., R. 16 E. and August 29, 1879, he made proof and payment for the land.

On October 26, 1888, he relinquished his claim to the land, not wishing to antagonize the claim of the church, with which he appears to have been connected, and upon said relinquishment your office decision cancels his entry.

On June 11, 1889, Smith applied to enter said land and it is on account of said application that he claims the right now urged before this Department.

It is clear that the claim of the church, if entitled to the benefits of the act of March 2, 1853, is superior to the claim asserted by the other parties, and it is first necessary to determine the rights of the church under its application.

On March 26, 1889, Bishop Junger made formal application for the issuance of patent for the lands embraced in the mission application and gave notice, by publication, of his intention to submit proof to establish the validity of the mission's claim.

At the appointed time all parties appeared, the only testimony offered being that on behalf of the mission's claim, which consisted largely of the depositions of persons in distant places, taken under commissions duly issued.

The testimony is extremely meager and being generally of persons connected with the church is presumed to be the most favorable that could be offered in support of its claim.

It appears that two priests, acting under the direction of the bishop of Nesqually, in April, 1852, at the request of the Yakima Indians, established a mission upon the land in question, which seems to have been regularly maintained for the purposes intended from that time until 1855, when an Indian war occurred and the mission buildings were burned.

It was not until about 1866 that the mission was again established, when new buildings were erected upon the site of those destroyed in 1855 and the place seems to have since been continuously used as a mission station to the date of the hearing.

There does not appear to have ever been any survey of the mission claim approved by the surveyor general, but the church claim was duly filed with the register and receiver and the surveyor general as early as June, 1868, and in 1871 the register of the district land office issued a certificate setting forth "that all necessary papers to complete the title of the St. Joseph Mission on the Attanum river, had been filed in this office, and all that is wanting is the survey of the land," etc.

In 1872, prior to the survey of the township, the bishop of Nesqually had a survey made of the mission claim, and prior to the approval of the official plat of survey filed a copy of the same accompanied by the field notes in the office of the surveyor general, with a request that the case be delineated upon the official plat of survey when filed. Said papers seem to have been mislaid in the office of the surveyor general, and were not discovered until after the presentation of the application for patent in 1878 by Bishop Blancheet.

It would seem from the showing made that the church has, with all diligence, pressed its claim, and that it has not lost its rights through laches.

It is urged by the appellants that said church is not entitled to the benefits of said act for the reason that it is not a society within the meaning of said act.

From a review of the matter, however, I am clearly of the opinion that the church is a proper beneficiary under said act, and it is but necessary to determine the extent of the claim intended to be confirmed by the act referred to.

It seems to have been the purpose of the church to claim originally about six hundred and forty acres, being the limit named in the act, and your office decision is of the opinion that the act was intended to confirm to the religious societies that amount of land, if free from other claim, without regard to the actual occupancy of the whole of the same, and in support thereof refers to the decision of the district court in the case of *Dalles City v. The Mission Society of the Methodist Episcopal church* (6 Fed. Rept. page 356).

I have carefully examined said opinion, and while it is true that the court therein expressed the opinion that the grant made to the mission

society ought to be construed to embrace six hundred and forty acres at each mission station occupied by them, yet the same was pure *obiter* as the decision of the court was against the mission upon the ground that it was not occupying any portion of the land claimed at the time of the passage of the act of August 14, 1848 (10 Stat. 323), under which it made claim.

The act of August 14, 1848, *supra*, provided for a territorial form of government for Oregon, out of which the Territory of Washington was carved, and the language confirming the religious societies for mission purposes to lands occupied by them in both acts, is identical.

The extent of the grant made by the act of 1848 has before been considered by your office in the matter of the claim of the St. James Catholic Mission of Vancouver, Washington, in which it was held that the area for which the mission can claim title depends upon the extent of its occupancy, and as it was shown in that case that the occupancy only included the church and the land upon which it stood, the survey representing that area was approved (2 L. D., 452).

From a careful consideration of the matter, I am of the opinion that this latter view of the law is correct and that it was only intended to confirm to the religious societies on account of their mission claims, such lands as were shown to have been actually occupied by them in the maintenance of such missions.

In the case under consideration the testimony shows that in 1883 the church had a log house or chapel used for worship; a log house used as a residence for the priests, and a granary; that there was an enclosure maintained, the extent of which is not clearly shown, though one witness swears that he can point out the place of the old fence, and that it embraced about seventy-five acres, thirty or forty of which were cultivated to vegetables and grain.

The testimony of the priests is to the effect that the Indians granted them many hundred acres to the north of the river but that there were no boundaries at the time actually established.

As before stated, your office decision expresses the opinion that the church is entitled to claim to the full extent of the six hundred and forty acres embracing the mission lands, provided the same were free at that time from other adverse claim, and although no survey was ever approved of said claim by the surveyor general, yet your office decision adjusted the case to the lines of the public survey, limiting the claim as set forth in the opening recitation of this opinion.

From a careful review of the entire matter, I must reverse your office decision and hold that the confirmation made by the act of 1853 on account of mission claims, must be restricted to the land actually used and occupied in the maintenance of the same at the time of the passage of said act.

You will therefore cause an inquiry to be made in the best proper manner, to ascertain the lands actually occupied by the St. Joseph

Roman Catholic Mission on March 2, 1853, of which survey should be regularly made, and upon the approval of the same by the surveyor general, patent may issue thereon to the bishop, in trust for the church.

It is unnecessary to refer to the rights of the other parties to this controversy further than the direction that their claims, so far as in conflict with the award herein made on account of the Mission claim, must be canceled.

Herewith are returned the papers in the case for your further action in accordance with the directions herein given.

PRIVATE LAND CLAIM—SURVEY.

RANCHO BUENA VISTA.

Quantity must control in the survey of a grant of quantity, even though all the monuments designating the boundaries thereof are not found in such survey.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (J. I. P.)*

On June 14, 1893, by letter of that date, your office transmitted to this Department a copy of Deputy Surveyor Treadwell's report to the surveyor general of California, with diagram, a copy of that officer's supplemental instructions to said deputy, together with a copy of his letter to your office, relative to the survey of the Rancho Buena Vista, in San Diego county, California. And the inquiry is made, whether it would be proper for your office to approve the supplemental instructions of the surveyor general for the closing of the lines of survey as indicated, to wit: "by a direct line from said red hill to your point of beginning."

Also on September 15, 1893, by letter of that date, your office transmitted for the consideration of this Department in connection with the matter of said survey, and the supplemental instructions to Deputy Treadwell, a letter, addressed to the Hon. W. W. Bowers, House of Representatives, and by him referred to your office; said letter being without date and signed by one J. W. Strickler.

In addition to your said office letters, and enclosures transmitted therewith, there have been filed in the case numerous letters, advisory and otherwise, from parties interested in the location of the lines of said grant, and on the part of the grant claimants a carefully prepared and voluminous printed brief, replied to by a brief prepared with equal care by the attorneys for numerous settlers, whose ideas as to where the lines of said grant should be located differ very materially, it might be said radically, from those of the grant claimants on the subject.

Some of the letters filed are very severe in their strictures upon the conduct of the surveyor-general during the progress of said survey, so

much so, in fact, that they called forth a vigorous reply from that officer in defense of his conduct and further explanation of said survey, which was transmitted by your office letter of the 6th instant. It is proper to remark, in passing, in reference to that part of the surveyor-general's letter in defense of his conduct, that the statements of alleged misconduct on his part are regarded as wholly irrelevant and impertinent to the matter involved, and have received no consideration in arriving at the conclusion reached; and concerning that part of said letter in further explanation of said survey, reference will be made further on.

The letters and briefs above referred to have been filed under the mistaken idea that this is a controversy between adverse parties, and that the questions adjudicated by this Department, with reference to this grant, in its decision of July 24, 1891 (13 L. D., 84), and of March 17, 1892 (14 L. D., 259), were reopened, and were again before it for consideration and review.

As stated, that idea is a mistaken one. The decision of March 17, 1892, *supra*, was on a motion to review that of July 24, 1891, *supra*. The motion was denied and said decision adhered to.

The matter submitted is not before the Department on appeal or on motion to review, and a reconsideration, review, or criticism of that decision would be unwarranted by the rules of practice of this Department; and without further reference to or comment on the excess of zeal, error of judgment and misconception of issues that prompted the filing of the letters and briefs mentioned, the conclusion reached, on the matter referred by your office for the consideration of this Department, is herewith submitted.

The history of this case, contained in volumes 1, 2, 5, 6, 13 and 14 of the published land decisions, reveals the fact that it has engaged the attention of the various officers of the land department for almost half a century; that for a number of years it has haunted the files of this Department with tireless persistency, and clung to its records with a tenacity indicative of exhaustless vitality. Every feature of the case has been discussed, and every argument worn threadbare. With this knowledge before it, the Department intended its decision of July 24, 1891, and of March 17, 1892, to be, and they were, a resume of all the features and arguments theretofore presented. It was endeavored to make the conclusions reached, and the directions therein contained, so clear and explicit that one, so to speak, might read as he ran, and that any reader of English might comprehend their import.

In that decision the grant in question was treated as one of quantity, which is evidently and eminently correct.

The decision of May 27, 1884 (2 L. D., 366), with reference to this grant, holding that monuments and boundaries named, control mention of quantity, seems to have been rendered under a misapprehension

of the matters here involved, and in so far as that decision is in conflict with that of July 24, 1891, and of March 17, 1892, *supra*, holding said grant to be one of quantity, and that quantity should control in the measurement thereof, it is overruled.

In the decisions of July 24, and March 17, *supra*, it is shown that by commencing at the starting point,—the northwest corner of the Indian Felipe's garden,—and running thence 2500 varas east, thence the same distance south, thence a like distance west, thence to the place of beginning, an area of one-fourth a square league, or half a league square, containing approximately 1109.67 acres, would be embraced, which was all that was intended to be conveyed by the grant, and the survey was directed to be made in that way.

Indeed, such a survey the surveyor-general in his letter of August 25, 1890, declared "would be in accordance with the decree of the court, the original grant, and the translation of the record of juridical possession."

The report of Deputy Treadwell and the letters of the surveyor-general show that the starting point, northeast corner, and southeast corner of said grant have been located by said survey substantially as directed, but it is stated that in order to find the monument designated as the southwest corner, viz: a "small red hill," the line had to be run from the southeast corner as established, a distance of 4791 varas. Recognizing this as overrunning the length of the south line more than "a limited extent," Deputy Treadwell paused in his survey and called for instructions from the surveyor-general, who proposes to instruct him to close the survey, as stated.

On the question of the location of the four corners the decision of July 24, 1891, at p. 86, 13 L. D., says—

The fact that nearly all of the previous surveys established the four corners at different points, which are described, by each deputy, as answering the descriptions of the juridical possessions, show plausibly that in that locality there is nothing very remarkable or unusual in the described points. In fact, there is a large amount of testimony in the record tending to the identification of several other points, as the true corners of the juridical survey. In the experimental and private survey of the grant, made by Dexter at the instance of the settlers, who contest the present survey, points similar in character and answering fully the description of the juridical survey are said to be found at each corner of his survey, which only embraces an area of 1,111.01 acres, or approximately the one-fourth of a square league, the amount petitioned for and confirmed.

And the directions for making said survey are given as follows—

The area of the survey now ordered must approximate closely to the one-fourth of a square league; the northwest corner thereof and the point of beginning must be established at the northwest corner of the old garden of the Indian Felipe, as ordered by the decree—a point, which the record shows, can be readily ascertained. Thence, the course of the juridical survey must be followed, running to the east; to the south; to the west; thence in as straight a line as may be, to the place of beginning.

A survey on these lines, and for the approximate quantity, will be approved, and none other.

In his letter of August 25, 1890, *supra*, Surveyor-General Pratt says—

It scarcely seems possible that a grant covering only a half a league square of land, or one-quarter of a square league, under the decree of the court and the departmental decisions, and the instructions from this office, could or should be so surveyed as to embrace four times that quantity of land, and I can see nothing in those decisions that could possibly justify any greater quantity being included in the survey, unless possibly it might overrun the distance, *to a limited extent*, in order to find the calls mentioned in the decree.

If Deputy Treadwell were to close his survey by running a line from where he has located the southwest corner of said grant to the place of beginning, the area of the grant would be augmented from one-third to one-half of itself.

The distance from the southeast to the southwest corner, as located, is nearly twice that of the south line required by the original grant, the juridical survey, the decree of the court, and the decision of this Department, and the distance from the southwest corner as established to the place of beginning would be almost as great. This would be an unwarranted extension of the grant, and I am of the opinion that it would not be proper for your office to approve the supplemental instructions of the surveyor-general to Deputy Treadwell, as submitted.

In his letter of the 23d ultimo, the surveyor-general says, in reference to this survey,—

I accordingly accompanied Deputy Treadwell to the field, and watched him carefully as he made his preliminary surveys, then followed his survey from the point of beginning east to the original boundary line of Lorenzo Soto, thence south to the small peak, where stand two rocks, joined together. So far the instructions could be carried out with no difficulty. But in running from the last established point to the "small red hill," the measurement and call cannot be made to agree.

In the closing paragraph he recommends that a hearing be given the parties in interest before the Secretary.

From the above and foregoing it is manifest, that in following the instructions contained in the decision of July 24, *supra*, the starting point, northeast corner and southeast corner of said grant, as located, are substantially correct, and that the location of the southwest corner of said grant is now the only disturbing feature remaining.

As stated, this grant is for a half a league square. The directions for its survey are clear and explicit. The history of this case shows that in the previous surveys of this grant, monuments answering the description of its boundary calls have been found at its respective corners, and distant from each other approximately 2500 varas.

It is believed that the taking of testimony for the purpose of ascertaining the southwest corner of this grant, in view of the unsatisfactory results attending similar proceedings in its history, would only make confusion worse confounded, and tend to prolong indefinitely the adjustment of this grant.

You will therefore direct the surveyor-general of California that if

he cannot find the southwest boundary call of said grant, designated as a small red hill, at a distance approximating 2500 varas from the southeast corner, as now established, and the same relative distance from the place of beginning, he shall, nevertheless, locate and establish the southwest corner of said grant at a distance approximating 2500 varas from the southeast corner as now established, and approximating 2500 varas from the place of beginning, and from the southwest corner thus established, he shall close said survey by as straight a line as may be to the place of beginning.

ABANDONED MILITARY RESERVATION—HOMESTEAD.

WILLIAM H. CARSON.

The right to make a homestead entry within an abandoned military reservation, accorded to actual settlers by the act of July 5, 1884, cannot be exercised in the absence of residence established prior to said act and maintained to the date of the application to make entry.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (J. W. T.)*

On January 14, 1893, William H. Carson, Sr., made application to enter, under the homestead law, 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. 32, T. 6 S., of R. 2 W., in Salt Lake City land district, Utah.

The application was rejected by the local officers on the same day, for the reason that the tract was subject to the provisions of the act of Congress of July 5, 1884 (23 U. S. Stat., 103), which requires a showing of actual residence on the tract in question, and that in the above application no such residence is shown, but only some considerable cultivation, and that cultivation without residence is not sufficient to warrant an entry, under the act above referred to.

On April 6, 1893, your office decision affirmed the foregoing rejection of the application, made by the local officers, and I have considered the appeal to this Department from your said office decision.

The tract in question was part of what was known as the Fort Crittenden military reservation, which was abandoned and transferred to the Interior Department for disposal under the act hereinbefore mentioned, and under such conditions as are provided for therein. In that part of the said act, providing for the sale of such lands, there occurs the following proviso:

Provided, that any settler that was in actual occupation of any portion of any such reservation, prior to the location of such reservation, or settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home, and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, etc.

It is contended upon the part of the applicant, that the intention of the act of July 5, 1884, was to allow applicants to make homestead entries, that homestead entries under the general laws may be made without a showing of previous residence upon the lands, and that it was not the design of the above mentioned act to impose any extra burdens upon applicants. In this view, it is contended that the words, "actual occupation" and "settler", used in the proviso, hereinbefore set forth, are not intended to be, and are not, synonymous with actual residence—it being admitted that the aforesaid applicant has not actually resided on the land in question.

It appears, however, that applicants to make homestead entries under the act of July 5, 1884, are required to make such extra proof thereon, as is not required under the general homestead laws, even giving the said act the construction desired by the applicant herein, viz: that the words, "settler" and "actual occupation" mean only that the lands shall be put to use, cultivation and improvement.

But I have no doubt that the statute, in using the foregoing words, intended to require residence upon the land applied for, and that such residence should begin prior to January 1, 1884, and continue to the date of the application to make entry. This would seem to accord with *Reynolds v. Cole* (5 L. D., 555); *Connelly v. Boyd* (7 L. D., 369 and 10 L. D., 489); *John W. Imes* (12 L. D., 288).

The real object of the proviso hereinbefore set forth, was to save the rights of *actual settlers*, and it has uniformly received such construction.

The words "actual occupation" may sometimes mean the possession of land for cultivation merely, but the word "settler" defines the character of the occupancy, under the act of July 5, 1884, as that of inhabitancy of, or residence on, the land in question.

Your office decision is therefore affirmed.

SCHOOL LAND—INDEMNITY SELECTIONS.

ALBERT WILLIAMS ET AL.

In States where two sections of land to each township are granted for school purposes, twice the amount specified in section 2276 R. S., will be allowed for deficiencies in fractional townships.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (J. I. H.) (W. F. M.)

On January 24, 1893, Albert Williams applied to make homestead entry of the NW. $\frac{1}{4}$ of section 15, township 3 N., range 1 E., within the land district of Vancouver, Washington, and on the same day a similar application was made by James Hanson to enter the NE. $\frac{1}{4}$ of the same section.

Both applications were rejected by the register and receiver because of conflict with indemnity school selection of the Territory, now State, of Washington, being list No. 1.

The matter is now before this Department on appeal from the decision of your office sustaining the action of the local office.

The appellants urge that the then Territory of Washington had no "sufficient basis for the selection of a tract of land in amount equal to that selected," and that "the act of Congress approved February 22, 1891, amending section 2276 of the Revised Statutes, does not apply in this case."

"The records show," as stated in your office decision, that township 2 N., range 1 W., W. M., in the State of Washington, is a fractional township, containing a greater quantity of land than one entire section, and not more than one quarter of a township, and that both sections sixteen and thirty-six are entirely wanting therein; (also,) that 320 acres in the N. $\frac{1}{4}$ of section 15, township 3 N., range 1 E., have been selected on behalf of the State to compensate the deficiency for school purposes in township 2 N., range 1 W., W. M.

The contention of the appellants, plainly stated, is that the State, then a Territory, could select only one hundred and sixty acres in compensation for the sections sixteen and thirty-six, wanting in place; that the selection of a greater quantity, to wit, three hundred and twenty acres, is void, and that the proviso of section 2276, as amended by the act of February 28, 1891, 26 Statutes, p. 796, can not be invoked to cure the void selection.

As far back as 1888, in the case of *O'Donald v. The State of California*, 6 L. D., p. 696, the rule was adopted by this Department that "in States where two sections of land to each township are granted for school purposes, twice the amount specified in section 2276 R. S., will be allowed for deficiencies in fractional townships," and the rule has been followed in the later case of *William Galloway*, reported in 12 L. D., p. 80.

It appears, therefore, that the State does not need to call to its aid the provision of the later act.

The decision of your office is affirmed.

EVIDENCE—RECORDS—HOMESTEAD—SECTION 2, ACT OF MARCH 2, 1889.

KIME *v.* SMITH.

The records in the local office, when offered in evidence, should be accepted as competent evidence of the facts therein stated.

Parol testimony identifying an entryman as the one named in the records of the local office is properly admissible.

The right to make a second homestead entry under section 2, act of March 2, 1889, cannot be exercised by one who since the passage of said act has perfected title to a tract under either the pre-emption or homestead law, the right to which was initiated prior to said act.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (P. J. C.)*

The land involved in this appeal is the NE. $\frac{1}{4}$ of Sec. 17, T. 29, R. 30, Valentine, Nebraska, land district.

The record shows that Jefferson R. Smith made homestead entry of said tract November 6, 1890, under section 2289 of the Revised Statutes. On October 21, 1891, Henry F. Kime filed an affidavit of contest, alleging that the claimant "has had a homestead entry before, and made proof on a pre-emption since March 2, 1889, which said pre-emption was initiated prior to March 2, 1889."

On the day set for trial both parties appeared before the local officers, in person and by attorneys, whereupon claimant filed a motion to dismiss, on account of defective affidavit of contest. Thereupon contestant filed a supplemental affidavit, in which he alleged that the claimant had

heretofore made H. E. No. 53 July 5, 1883, on the NE. $\frac{1}{4}$ Sec. 7, 34—20, and also made final proof on pre-emption initiated April 10, 1887, and proof made on same No. 4992, July 12, 1889, upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 15, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 10, T. 29, R. 30.

After several continuances a hearing was finally had before the local officers August 10, 1892. The register was sworn as a witness, and testified that the tract books of his office showed—

Homestead, the northeast quarter, Sec. 7, township 34, range 20 west, 160 acres, \$1.25, \$10. Purchaser, Russell Smith, date of sale, July 11, 1883. Homestead entry No. 58, notation in red ink, canceled by letter C of November 27, 1885. Township plat contains said homestead entry marked "canceled." Register of homestead entries contains said described entry.

From the tract book of the original pre-emption he testified that

Tract book describes declaratory statement 9594 as covering the south half and the northwest of the southwest Sec. 10 and the northwest of the northwest of Sec. 15 in township 29, range 30, made by Jefferson R. Smith April 10th, 26th, 1887. Also that on July 12, 1889, Jefferson R. Smith made cash entry No. 4992 covering the land described in said declaratory statement No. 9594, and that patent covering the same was issued by the G. L. O. Aug. 4, 1891.

After this testimony had been given the claimant moved to strike out all the testimony of this witness, for the reason that it was incompetent and immaterial, and not the best testimony. This motion was sustained, and both parties rested.

At a later hour on the same day contestant moved to re-open the case, on the ground of newly discovered evidence, which was granted, whereupon one Sears was placed upon the stand, and testified that he had known the defendant, Jefferson R. Smith for several years, and that J. Russell Smith, Jefferson R. Smith, and Russell Smith were one and the same person; that he had known him to sign his name as Jefferson R. and J. Russell Smith. Thereupon claimant moved to strike out all of this testimony, for the reason that it is a part of contestant's main case, which motion was sustained.

The local officers decided that his entry should remain intact and the contest be dismissed.

The contestant appealed, and your office, by letter of April 14, 1893, affirmed their decision, and decided that

Section 2, act of March 2, 1889 (25 Stat., 854), gave this defendant the right to make a second homestead entry; therefore no cause of action was stated by the complainant, and you erred in ordering a hearing.

The contestant has appealed from your decision, assigning errors of law and fact.

The entry under consideration was not made under the act of March 2, 1889, but, as heretofore stated, under section 2289 of the Revised Statutes. It is not necessary to decide, from my view of this case, whether he might be permitted to amend his application so as to bring it within the provisions of that statute or not. Although it was error on the part of both your office and the local office to reject the testimony that was offered, it was not absolutely necessary for the contestant to offer the records of the local office in evidence, because the Department will take judicial notice of its own records in deciding cases. But if the contestant saw fit, in the presentation of his case, to offer these records, they should have been accepted as competent evidence of the facts therein stated. It was also error to exclude the testimony of Sears. His testimony, in view of the record evidence offered, was material, in that it identified the entryman Smith by the several names under which he seems to have appeared in making his entries. This testimony was thoroughly competent for this purpose. I am unable to see any reason why it should not have been considered.

The real question in this case is whether or not the making of final proof and final entry after the passage of this act of the pre-emption claim, the right to which had been initiated prior thereto, disqualified Smith from making the subsequent homestead entry, admitting, for the sake of argument, that he should have the right to amend his application so as to bring him within the purview of said act. The act reads as follows—

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated.

From the plain reading of this statute it is clear to my mind that any person who has perfected title to lands under either the pre-emption or homestead laws subsequent to its passage, the right to which was initiated prior thereto is prohibited from availing himself of the privileges of the act. The language of the law is plain and unambiguous, and there is no room for construction. (Cherokee Tobacco case 11 Wall., 616.)

The record and testimony show that this claimant's pre-emption comes within this rule; hence the entry in controversy should be canceled.

It is so ordered, and your judgment reversed.

AFFIDAVIT OF CONTEST—RESIDENCE.

YOUNG v. MALKA.

A clerical error in dating an affidavit of contest, by which the contest is made to appear premature, affords no ground for the dismissal of the contest.

The defense of "necessary absences" cannot be considered until the fact of residence at some time has been established.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (J. W. T.)

The above entitled contest is before me on appeal from your office decision of January 26, 1893, in favor of John A. Young, involving the SE. $\frac{1}{4}$ of Sec. 4 T. 125 N., R. 64 W., in the Aberdeen land district, South Dakota, for which William Malka made homestead entry February 5, 1891.

Contest was initiated by John A. Young the 26th day of March, 1892, alleging in his affidavit of contest the abandonment of said tract, and that the contestee, William Malka, has changed his residence therefrom for more than six months since making said entry, and that said tract is not settled upon and cultivated by said party, as required by law.

On the hearing, which was fixed for the 28th day of May, 1892, before the register and receiver, a preliminary motion to dismiss was made by Malka's attorneys, on the ground that the affidavit of contest, and the jurat affixed thereto, did not show affirmatively, that at the time of making said affidavit and jurat, "sufficient time had elapsed to render said entry contestable on the grounds set up therein, and in the notice of contest alleged."

That was not necessary. *Seitz v. Wallace* (6 L. D., 299).

But it is evident from the corroborating affidavit made by David Armstrong, that the principal affidavit of contest was made on March 26, 1892, for it recites the fact that at the *same time and place* David Armstrong was sworn, and the jurat to Armstrong's affidavit fixes the date as the 26th of March, 1892.

Where the date of a corroborating affidavit of contest is fixed in the jurat affixed thereto, and the body thereof contains the statement on the same paper containing the affidavit of contest, and referring thereto, that the affiant named in the sworn corroborating declaration, appeared at the same time and place—referring to the contestant—and it also appears that the contestant was sworn, it fixes the date of his affidavit with sufficient certainty, and especially after notice of contest.

But as the date given—March 26, 1891—is evidently a merely clerical error, the most that can be said is that the affidavit bears no date. None was necessary. *Gebhard v. Conlon* (11 L. D., 346), in effect overruling *Parker v. Castle* (4 L. D., 84). This objection to the affidavit

was repeated in various forms during the taking of the testimony with a pertinacity that suggests a desire to dispose of the contest upon a technicality, rather than upon the evidence, and when I come to consider the testimony, I think I discover the reason for it.

There is no evidence that the contestee ever resided on the tract in controversy, from the time of his entry until the day after the initiation of the contest, a period of nearly a year.

It appears that thirty acres had been cultivated thereon, but it was done by some one else, and before said Malka made entry for it. Indeed, it must have been the theory upon which the contestee himself made his defense, that proper residence had not been shown, for a considerable portion of his testimony was given with the evident purpose of furnishing excuses for his absence from the land in controversy.

It would be sufficient to dispose of the defense of "necessary absence," that it will never be considered until residence at some time has been established. William A. Thompson (6 L. D., 576).

However, giving it full force as a defense, it is entirely unsatisfactory upon the testimony. Absence on account of financial inability could hardly be averred in good faith, when it appears, as in this record, that contestant was at the same time working two other farms, and absence on account of sickness, the only other defense offered, is not supported by the evidence.

I am satisfied that your office decision is correct. It is therefore affirmed.

ATTORNEY—AUTHORITY TO DISMISS PROCEEDINGS.

PEACOCK v. SHEARER'S HEIRS.

The action of an attorney of record in the dismissal of proceedings will be held conclusive upon the party he represents, where his appearance is general in character and no showing of fraud or collusion is made.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (P. J. C.)*

The land involved in this appeal is the NE. $\frac{1}{4}$ of Sec. 35, T. 15 N., R. 7 W., Kingfisher, Oklahoma, land district.

The record shows that Michael Shearer presented his application to make homestead entry of said tract July 29, 1889, which was endorsed by the register, "Suspended—Allowed 30 days to procure evidence of naturalization." The applicant, on August 23 following, filed his certificate of naturalization, showing his admission to citizenship in 1868, and his application was again endorsed, "Allowed August 23, 1889."

On August 29 following Albert S. Peacock filed his affidavit of contest, alleging that Shearer had not settled upon and improved said tract; that the tract was settled on and improved by the contestant July 2, 1889. At the same time apparently there was filed authority

for the appearance of the attorney, signed by contestant, as follows, after the venue and description of the land,—

I hereby authorize and empower N. Campbell to appear before the Hon. register and receiver of said land office and represent said cause for me.

Hearing was had before the local officers, with the exception of one deposition, and as a result they recommended the dismissal of the contest, and that the entry should remain intact. The contestant appealed. T. G. Cutlip prepared and filed the appeal and brief in support thereof, as attorney for Peacock. On consideration of the case, your office, by letter of March 24, 1892, reversed the action of the local office, and held Shearer's entry for cancellation. On receipt of notice of your said office judgment, on March 29, 1892, the defendant filed in the local office a motion for a rehearing, and the same was transmitted to your office. On April 16, 1892, there was filed in your office a dismissal of said contest as follows (omitting the caption)—

We, the undersigned attorneys of record for the above entitled plaintiff in the above entitled cause, do hereby dismiss said contest No. 346, involving title to H. E. No. 3850 for NE. $\frac{1}{4}$ of Sec. 35, Twp. 15 N. of range 7 West, I. M.

(Signed)

T. G. Cutlip,
N. Campbell.

On May 4, 1892, your office, by letter of that date, declared "the case is therefore dismissed and closed, leaving said entry intact as against the claim of said Peacock." In said letter the presentation of the motion for a rehearing was mentioned, but was not passed upon, presumably because of the dismissal.

On April 25, 1892, Peacock presented a motion for the reinstatement of his contest, alleging that the attorneys had no authority for dismissing the same. This motion was supported by his own affidavit; and on May 3, following additional affidavits were filed in support of said motion; but inasmuch as the motion had not been served on the opposite party, the same was returned, with directions to do so. He again presented his motion and corroborative affidavits September 24, 1892. It is claimed by the contestant that the attorney Campbell was only employed to try the case before the local office, and that immediately thereafter Peacock discharged him, but did not settle with him in full, and that Cutlip was employed simply to prepare the appeal, and for no other purpose. His brother Charles swears that he was present in Campbell's office when Albert settled with him (Campbell), and revoked his authority to appear for him, and demanded of Campbell the return of the "power of attorney;" that Campbell did not return it, for the reason, as he said, that it was locked in the desk, and his partner, who was then out, had the key, and he requested Albert to come in again and he would give it up. He says he knows that Campbell was discharged, and that he (Campbell) was informed that Cutlip had been employed to prepare the appeal; "that he (Charles) was present when said Cutlip was engaged to prepare said appeal, and that he was

engaged for no other purpose, and had no further authority in the matter." C. G. King corroborates these statements in full, and details at length the occurrences.

The affidavit of Cutlip is also presented, in which he swears that Peacock engaged him "to draw the appeal in said case, for and by said Peacock, and nothing further;" that he was not attorney for Peacock for any other purpose. He also says that Campbell came to his office about this time and told him he had been discharged by Peacock. He does not say anything about signing the dismissal of the case.

On October 1, 1892, the death of Michael Shearer was suggested in your office, and his widow substituted. The affidavits of Campbell and the contest clerk of the local office were presented by the defendant. The former swears that his employment by Peacock was for the purpose of looking after, managing and conducting said case; "that said employment continued from the time the same was made as aforesaid until the 16th day of April, 1892, when said contest was finally dismissed; that said Peacock never at any time revoked or attempted to revoke the authority of affiant to act as such attorney in said contest." The contest clerk swears that up to the date of his affidavit—September 24, 1892—the authority of Campbell to appear for Peacock has never been revoked, and that he has been recognized as the attorney of record in said contest, upon whom notices have been served.

On consideration of the matter, your office, by letter of December 5, 1892, reinstated said case, and refused the motion for a rehearing filed by the defendant, whereupon the defendant prosecutes this appeal, assigning as error the reinstatement of Peacock's contest, and substantially that your office judgment of March 24, 1892, is against the evidence.

It is a well settled rule in all judicial tribunals and in this Department that where an attorney enters his appearance in a case he is the representative of his client for all purposes connected with the action then pending, and that any and all acts done by him within the scope of his authority, and in the absence of fraud, is binding upon the client. If Peacock in this case discharged Campbell, as alleged, it was his further duty to cause the withdrawal of his appearance in the local office, and until that was done any act of his as attorney was binding on Peacock. The mere demanding of the return of the power of attorney from Campbell personally was an idle ceremony, for the reason that it had been filed in the local office, and thus became a part of the records in the case. He therefore could not return it. It is fair to assume that Peacock knew this, as I take it, from the fact that he appears here as his own attorney, and from his briefs that he is an attorney at law himself.

But admitting, for the sake of argument, that Campbell's appearance should be construed by its terms to be limited to the trial before the local office, there is no explanation as to Cutlip's authority, or lack

of authority, to join in the dismissal that can be accepted. His appearance is a general one. The record shows that in addition to simply preparing the appeal, his name appears to a twenty page brief. In any event he cannot now be heard to say that his appearance was a limited one. He was not required, under the rules, to file a written authority for appearance in the appeal. (*Dober v. Campbell et al.*, 18 L. D., 88.)

It is to be noticed that Peacock does not allege fraud or collusion between any persons in this dismissal. He simply says the contest was dismissed without his knowledge; that no person was authorized to act as his attorney "since said appeal was taken, and dismiss said contest case." In one of his affidavits he says he called at Campbell's office about April 17, 1892, which was the day after the dismissal, to see him about it, when Campbell said to him, "Burt, if you had been a little sooner, you would have been \$2,000 better off, because he, Campbell, thought I was away and he could not find me, Peacock, and he had to get what he could out of the claim; affiant asked Campbell, 'out of what claim;' he answered, 'out of your claim; I dismissed your contest case and got \$50 for doing so, and gave you credit for \$25, and gave \$15 to Cutlip and \$10 to the man who worked it up.' Notwithstanding this alleged conversation, there is no complaint upon any other ground than that stated above.

In view of what has been said as to the authority of an attorney to act for his client, it seems to me that in a case where the litigant is seeking redress at the hands of the Department, he should allege and show such fraud and collusion, or such unjustifiable conduct to his prejudice as will warrant the action of the Department in granting him relief. By the presentation here the Department is left in the uncertain realm of conjecture, and is, apparently, expected to assume fraud in the conduct of those who are officers of the Department in the same sense that attorneys are officers of the court. These attorneys were duly qualified, presumably, to appear and represent litigants before the tribunal provided by law for the trial of this class of cases; the contestant, by his employment of them, held them out to the world as his representatives for that purpose, and he cannot be heard to dispute their acts as his attorneys, simply by alleging that they exceeded their authority, or were employed for a specific purpose only in connection with the litigation.

It would be a fruitless undertaking in the Department to attempt to relieve litigants before it of all the errors, real or imaginary, that they might conclude their attorneys had been guilty of, and in the absence of specific charges of fraud it cannot do so.

The distinction between the case at bar and that of *Jones et al. v. Inholder* (14 L. D., 373), is clearly definable. In that case it was apparent that the conduct of the attorney was fraudulent, in that after having brought the first contest, and fee and expenses for conducting

the same having been paid him, he dismissed that contest and instituted another for a different person. The fraud here was so apparent on the face of the transaction that the Department was justified in giving the preference right of entry to the first contestant. The second contestant in that case was charged with notice of the pendency of the first; hence it was fair to assume that there was collusion between him and the attorney.

I think your office judgment reinstating Peacock's case should be reversed, and that of May 4, 1892, dismissing the case, should stand. It is so ordered.

RAILROAD GRANT—ACT OF JULY 4, 1866.

HASTINGS AND DAKOTA R. R. CO. v. GRINNELL ET AL.

The ruling of the Supreme Court in the case of *Barden v. Northern Pacific R. R. Co.*, to the effect that lands covered by an entry at the date of the grant are excepted therefrom, though said entry is canceled prior to definite location, is equally applicable to the grant made by the act of July 4, 1866.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (F. W. C.)

I have considered the appeal by the Hastings and Dakota Railroad company from your office decision of January 6, 1893, holding that said company has no legal right to the SE. $\frac{1}{4}$, Sec. 13, T. 115 N., R. 31 W., Marshall land district, Minnesota, which appeal is forwarded in accordance with departmental directions of June 7, 1893, granting the company's application for *certiorari*.

The matter of the company's right to this land has several times before been the subject of decision by this Department and to a proper understanding of the matter the following recitation is necessary.

On January 19, 1883, one Chas. McClintock applied to make homestead entry for this land, his application being rejected by the local officers for conflict with the grant, from which action he appealed.

This land is within the primary limits of the company's grant, made by the act of July 4, 1866 (14 Stat., 87).

The records show that on April 15, 1865, one Philip Shaw made homestead entry of this tract which entry was canceled by relinquishment on August 4, 1866, subsequent to the date of the act making the grant to said company, but prior to the definite location of its road June 26, 1867.

Your office decision of October 8, 1883, upon McClintock's appeal, held that the land in question was excepted from the company's grant by the existence of Shaw's entry at the date of the act making the same, under the authority of the decision in the case of *White v. Hastings and Dakota Railway Company* (6 C. L. O., 54).

Upon appeal by the company from said decision, the same was reversed by departmental decision of August 15, 1888 (7 L. D., 207),

wherein it was held that the right of the company under its grant attached to lands that were disengaged at the date of the definite location, notwithstanding such lands were reserved at the date of the grant.

It appears, however, that during the pendency of the case upon McClintock's application, the local officers had permitted George D. Grinnell to make homestead entry of the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 13, and Calvin N. Perkins to make homestead entry of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the same section.

Acting under the decision of the Department of August 15, 1888, *supra*, your office decision of September 15, 1888, held the homestead entries of Grinnell and Perkins for cancellation for conflict with the rights of the company under its grant, and upon appeal, said decision was affirmed by departmental decision of September 13, 1890, with the modification that the entries might be permitted to remain of record for the purpose of affording the entrymen an opportunity to secure relinquishments from the company under the provisions of the act of June 22, 1874 (18 Stat., 194).

During the suspension of said entries to await the action of the parties in the matter of securing the company's relinquishments, to wit, on May 16, 1892, the supreme court of the United States rendered a decision in the case of *Barden v. Northern Pacific Railroad Company* (145 U. S., 535), in which it was held that lands covered by an entry at the date of the passage of the act making the grant, did not pass to the company, even though such entries were canceled prior to the definite location of the road.

By your office letter of October 29, 1892, the attention of this Department was called to the decision of the court in the Barden case just referred to, and its probable effect upon the cases of Perkins and Grinnell, with a request for instructions respecting further proceedings by your office in said cases. Said letter was considered in departmental communication of November 15, 1892 (15 L. D., 431), wherein it was held that lands embraced within a subsisting homestead entry at the date of the grant of July 4, 1866, are excepted therefrom, although said entries may be canceled prior to the definite location of the road, and you were directed to apply said decision to the cases in question "and, if in your judgment the parties are protected thereunder, you will re-adjudicate the case. In that event, however, due notice should be given the company of its right of appeal as in all other cases made and provided."

It appears that the company executed relinquishments in favor of these parties, which, although appearing to have been executed May 18, 1892, were not filed in the local office until November 5th, of that year.

Acting under departmental decision of November 15, 1892, your office decision of January 6, 1893, re-adjudicated the cases of said company against Grinnell and Perkins, and held that the company had no legal

right to the land and that their relinquishments were unnecessary, and added nothing to the strength of the claims of Grinnell and Perkins.

From this decision the company filed its appeal, which your office refused to receive, and upon its application, certiorari was granted by departmental letter of July 7, 1893, as before stated.

The sole question for consideration raised in said appeal is as to whether the decision of the supreme court in the case of *Barden v. Northern Pacific Railroad company*, (*supra*), has any application to the grant made by the act of July 4, 1866, under which the Hastings and Dakota Railroad company claims.

In departmental communication of November 15, 1892, (*supra*), in considering this question it was said:

"While the construction made in that case is of a different grant from that now in question, yet both grants are *in praesenti*, and there is no material difference in their language in so far as it affects the attachment of rights thereunder, hence said decision would apply with equal force to the grant under consideration, and in its adjustment said decision should be followed."

From a careful review of the matter I concur in the conclusions therein reached.

In this connection it might be noted that as this company has executed relinquishments in favor of these parties, under the act of June 22, 1874 (*supra*), it can have no interest in the present controversy, for to admit that the lands pass under the grant, the company's interest therein was terminated by its relinquishment.

As to the correlative right of selection of other land under the provisions of the act of June 22, 1874, it has been repeatedly held by this Department that the right to such selection will not be considered in the absence of an application in due form made thereunder.

The company's appeal is therefore dismissed and the record is herewith returned for your further action upon the proof submitted by Grinnell and Perkins under their entries before described.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

McILROY *v.* TOWLE.

The preferred right to make a homestead entry under section 2 of the forfeiture act of September 29, 1890, is dependent upon actual settlement in good faith existing at the date of the passage of said act.

Persons who at the date of the passage of said act were not in possession of lands opened to entry thereby, or had not settled thereon, secured no rights under section 3 of said act.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (J. L.)

I have considered the case of William N. McIlroy *v.* Hugh P. Towle, upon the appeal of the former from your office decision of May 20, 1893,

reversing the decision of the local officers, dismissing McIlroy's protest, and holding intact Towle's homestead entry, No. 8011, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 1, T. 15 S., R. 7 E., M. D. M., San Francisco land district, California.

On January 26, 1886, Towle filed an application to make homestead entry of said land, alleging settlement on September 15, 1883, and filed therewith the affidavits of George W. Towle, Samuel Ockley and Wm. F. Burnett; all of which were forwarded by the local officers on February 12, 1886, to your office. On August 7, 1886, your office (after notifying the resident attorney of the Southern Pacific Railroad Company of the application, and receiving his verbal assurance that the company would make no objection to the entry), instructed the local officers to permit Towle to make homestead entry of said land. And the resident attorney of the company was notified thereof by your office.

Whereupon, on August 24, 1886, Towle filed a new application alleging settlement on December 15, 1885, and was allowed to make homestead entry of said land.

On May 25, 1891, after due notice, Towle made his final proof before a United States Commissioner. William N. McIlroy appeared and filed a written protest, alleging the following reasons:

1. For the reason that said land is within the limits of the grant of the Southern Pacific Railroad Company, and is of the land that passed to said company by operation of said grant.
2. That the contestant, William N. McIlroy, is in the actual occupation and possession of part of said land, to wit: the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said Sec. 1, T. 15 S., R. 7 E., M. D. M., and has been for the past fifteen years; and had, prior to the year 1888, applied to the said Southern Pacific Railroad Company for said land, and has at all of said time occupied the same, with the bona fide intention of purchasing the same of said Company whenever they could give title to the same.

The final proof witnesses were cross-examined, and other testimony introduced by both parties; and briefs were filed by counsel.

On September 11, 1891, the local officers jointly recommended that Towle's homestead entry be cancelled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 1, and allowed only as to the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 1.

Towle appealed, and on May 20, 1893, your office reversed the decision of the local officers, and directed that Towle's homestead entry remain intact.

McIlroy has appealed to this Department.

The plat of the survey of said township, with subdivisions, was filed in the local office on June 27, 1884.

Your office decision calls special attention to the fact that Towle, in his final proof, says: "I was on the land when I settled in August, 1885, at which time I established my actual residence on the land." An examination of all the other testimony shows plainly, that "*August*" was named by mistake, instead of "*December*," 1885, as stated in Towle's homestead affidavit.

The claimant's objections to so much of the cross examination of the witness George W. Towle, as sought to impeach him upon the assumption that in an affidavit made by him in support of his brother's homestead application, he had made a statement inconsistent with his testimony on the stand, were well taken, and they are hereby sustained. Inspection of the affidavit referred to, which is now before me, shows that the statements of the witness on both occasions are consistent.

It is proved, and not disputed, that since the 15th day of December, 1885, the entryman, with his wife and four children, have continuously resided upon the land; that his improvements, consisting of a large dwelling house, two barns, wire fences, three wells with pumps worked by wind-mills, and an orchard, are worth \$2000; and that he has cultivated to crops every year, about twenty-five acres, and used the remainder of the land for grazing; all in good faith.

Towle's final proof is therefore approved for all the land described in his homestead entry of August 24, 1886; it not appearing that the protestant has shown a better right to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 1, which is all he claimed.

Previous to the year 1872, R. N. McIlroy, the father of the protestant, and George W. Towle, a brother of the entryman, were settled upon the land which is now the NW. $\frac{1}{4}$ of section 1, aforesaid. The crest of a ridge, which ran nearly north and south between their settlements, was assumed and respected by both as the dividing line between them; McIlroy occupying and using the western slope, and Towle the eastern. The protestant lived with his father on the place, until the year 1877, when he went to the town of Gilroy to live with his mother and to work. During the year 1877, R. N. McIlroy and George W. Towle agreed to establish and mark their dividing line by building at joint expense, a fence along the middle line, as near as they could fix it, running north and south between the east half and the west half of said quarter section. The fence was built according to the agreement, each party contributing one-half of the expense thereof; and McIlroy thereafter claimed and occupied the land west, and Towle the land east of said division fence.

This fact is proved by the testimony of George W. Towle, who is not discredited; and he is corroborated by the fact that until the initiation of this protest, Towle's exclusive possession of said eastern half, was never questioned, by claim, request, notice or objection of any kind; and by the further fact that said R. N. McIlroy, the father, who made the agreement for, and built half the fence, and had personal knowledge of the transaction, was not called as a witness to contradict or correct George W. Towle's testimony.

Upon the return of the protestant to his father's house, in 1878, he saw the fence, and made no objection to it. And never afterwards did he occupy, or use, or seek to get possession of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 1, or any part thereof.

On September 29, 1890, (the date of the act forfeiting certain lands granted for railroad purposes, 26 Statutes, 496), the protestant, William N. McIlroy, was not an actual settler in good faith, on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 1; while the entryman, Hugh P. Towle, was. Wherefore, Towle had, and McIlroy had not, a preference right to make homestead entry of said tract, under the second section of said act.

So also, under the third section of said act, McIlroy, who, at the time of its passage, was not in possession of, and had not settled upon said tract, acquired no rights in respect thereof.

Your office decision is hereby affirmed.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

HILTON *v.* KOEPCKE.

A slight error in the spelling of claimant's name, occurring in the service of notice, will not defeat said service, where the rule of *idem sonans* is applicable.

In making service of notice by publication it is not material who deposits the registered letter in the post-office, so that in fact such letter is sent as required by rule 14, of Practice.

An error in the description of the land, occurring in the proof of posting, is not material, where it is apparent that the posting was duly made on the land in question.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (G. C. R.)

On August 2, 1887, Carl Koepcke made timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 33, T. 101 N., R. 68 W., Chamberlain, South Dakota.

On February 15, 1892, George J. Hilton filed his affidavit of contest against the entry, alleging that claimant

wholly failed to plant or cause to be planted any trees or cuttings on said land in the year 1891, and has up to this date failed and neglected to plant or cause to be planted to trees, seeds, or cuttings any part of said land, except five acres in the year 1890; and has failed to cultivate or cause to be cultivated any part of said land since the year 1890.

Notice was issued, and hearing set for April 6, 1892.

Application for service of notice by publication, duly supported by affidavit, was filed April 6, 1892, the same was allowed, and new notice was issued, fixing May 26, 1892, for the hearing, at which time contestant appeared, with his attorney, and claimant's attorneys appeared specially and filed a motion to dismiss the contest for want of proper service. The motion was overruled by the receiver, and testimony was taken before that officer, claimant's attorney participating therein by cross-examining contestant's witnesses, and introducing testimony to support the claim. The receiver decided (May 28, 1892,) that the entryman had not complied with the law, either in letter or spirit; that the service was sufficient, and accordingly recommended that the entry be canceled.

The register decided (June 22, 1892,) that the contest should be dismissed for want of jurisdiction, because:

1. There is no proof that a copy of the notice was posted on the land.
2. That the registered letter containing the notice was not sent to claimant's known post-office address.
3. That the notice was not served on the defendant in his own proper name.

Appeals were regularly filed from these disagreeing opinions, and your office, on January 11, 1893, sustained the action of the receiver as to the validity of the service and failure on claimant's part to comply with the timber-culture laws, and accordingly held the entry for cancellation.

The issue in this case is one of jurisdiction. It is not claimed on the part of appellant that the evidence taken at the hearing does not substantially prove the allegations set out in the contest affidavit; but it is insisted that there was no legal service, and that the decision appealed from deprives the entryman of his rights without due process of law.

The affidavit in support of the motion for service by publication has been examined, and the showing therein made is sufficient.

Appellant insists that, since the affidavit disclosed the address of the defendant to be Milwaukee, Wisconsin, he was entitled to personal service. The affidavit does not state that Milwaukee was the address of defendant, but that

affiant was informed that said Kopcke lived at 1728 Brown street, Milwaukee, last fall; that the notice of contest in this cause was mailed to a resident of that place for service, but was returned with a letter stating that said Kopcke does not live there, nor did any one in that neighborhood know anything of him; that since said notice was returned affiant has made inquiry for said Kopcke, but has been unable to find any trace of him.

Wherefore, he asked service by publication, &c.

If, as alleged, the defendant's address had in fact been given as Milwaukee, Wisconsin, then personal service was not required, and publication was authorized, because in that case it would be evident that he was not a resident in the State or Territory where the land is situated, and the allegation as to due diligence to get service was not required. *Jones v. De Haan*, 11 L. D., 261.

It appears that publication was made for the required time, but appellant contends that claimant's name was not properly spelled; that it was printed "Carl Kopcke," when the proper spelling is "Carl Koepcke." By an examination of the receiver's receipt, it appears that he accepted the same in a spelling still different, being "Carl Koepecke." It is manifest that this objection is too technical to receive serious consideration.

It is insisted, again, that the registered letter to the claimant containing the copy of the notice of contest was misdirected. Contestant's affidavit states that, on April 18, 1892 (more than a month before the hearing), he deposited in the post office at Coyle, South Dakota, "a

copy of the notice of contest, addressed to Carl Kopcke, at 1728 Brown street, Milwaukee, Wisconsin, the last known address of claimant, and prepaid the postage and registry fee; that the receipt for the letter is hereto attached."

An examination of the postmaster's receipt for the letter shows that the same was received on the date sworn to by contestant, but the postmaster's receipt shows the letter to have been received from John Hilton, in place of George J. Hilton, and it further shows the same to have been addressed to "Caryl Kopeke."

It makes no difference who deposits the registered letter in the post office; the material thing required by Practice Rule 14 is that "a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing." There can be no doubt that this was done; attorneys for contestant refer to an affidavit on file from John Hilton, showing that this letter was mailed. This affidavit can not be found, but it makes little difference, so long as the proof is satisfactory that the letter containing the notice was in fact sent. Nor does the postmaster's receipt containing yet a different spelling of claimant's name make any difference; it was near enough to the correct spelling, and, under the doctrine of *idem sonans*, it must be held sufficient.

Moreover, the notice appears to have served its purpose, for two weeks before the hearing claimant appointed an attorney "for the purpose of defending my claim to said land (describing it) against the contest of George J. Hilton, and authorize my said attorney to do everything necessary to be done to maintain my rights."

Finally, it is said that there is no sufficient proof that a copy of the notice was posted in a conspicuous place on the land.

In making affidavit of such posting, contestant says that on April 19, 1892, he "posted on a conspicuous place on the land involved in this cause a copy," etc. But in describing the land he inadvertently wrote Sec. 30, instead of Sec. 33, the true one, the rest of the description being correct. Accompanying the affidavit, and as exhibit thereto, was a copy of the notice sent to the claimant, which correctly described the land.

It is amply shown that a copy of the notice was in fact posted on the land for the requisite time, and this met the requirement. Actual notice was obtained, and proof thereof sufficiently given; jurisdiction thus being obtained, and the evidence showing that claimant had failed to comply with the law, the entry should be canceled.

It is so ordered, and the decision appealed from is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—TRANSFER.

CHARLES D. CRUGGS.

One who admits the "transfer of his right for a valuable consideration" can not be allowed to make a soldier's additional homestead entry in his own person.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (W. F. M.)

On December 7, 1892, Charles D. Cruggs applied to make additional soldier's homestead entry of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 13, township 22 S., Range 63 W., of the land district of Pueblo, Colorado.

On the same day the application was transmitted to your office where it was held that the applicant, having admitted the "transfer of his right for a valuable consideration," can not now be allowed "to make additional entry in his own person."

The applicant, Cruggs, has brought the matter, on appeal, to this Department, and alleges as error, substantially, that the decision of your office is contrary to the law of the case.

I concur in the conclusions of the decision appealed from, which contains an exhaustive statement of the reasons therefor, and the same is, therefore, affirmed.

SWAMP LANDS—FIELD NOTES OF SURVEY.

STATE OF MICHIGAN v. POWER'S HEIRS.

If the field notes of the original survey, made prior to the swamp land grant, fail to disclose the real character of land, and a resurvey, made after said grant, and with reference thereto, shows said land to be in fact swamp, the State, relying on the government survey, is entitled to file its supplemental list, with assurance of approval.

The act of March 3, 1857, confirmed selections of swamp and overflowed lands theretofore made and reported to the General Land Office so far as the same were vacant and unappropriated.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1884. (G. C. R.)

The State of Michigan, by its attorneys, Messrs. Britton and Gray, of this city, has appealed from your office decision of April 22, 1893 holding for cancellation its claim to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 26, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 35, T. 36 N., R. 2 E., Grayling, Michigan, under the swamp land grant of September 28, 1850 (9 Stat., 519).

The lands above described were embraced in supplemental list "D" of swamp land selections, which upon examination appears to have been filed in your office February 24, 1857.

It appears that the original surveys in Michigan were found defective in many of the townships, and new surveys were ordered. Prior to the second surveys, swamp land selections were made from the field

notes of the first surveys, and after the re-surveys were made, and from the plats thereof different selections of swamp lands in the same townships were reported.

Prior to the reception of the selections under the re-surveys, your office, in many instances, had approved and patented to the State the selections made under the old or defective surveys.

It is manifest that new selections could not be admitted in the same townships when selections were made, approved and patented for the same lands under the old surveys.

Michigan is one of the States which elected to take the field notes of the government survey as the basis upon which to make its swamp land selections, and in the appeal of the State from your said office decision, it is alleged that these field notes show the land in controversy to be swamp land. If that be true, the lands should be certified to the State, unless the same were embraced in a former approved list under the old surveys.

The mere fact that there were two lists from the same township, one made from the old and one from a re-survey, is not a sufficient reason for rejecting a selection in a supplemental list made from the re-survey, if in fact the land was of the character contemplated in the swamp land act, and had not been disposed of.

Said township (36 N., R. 2 E.) was first surveyed in 1841, the survey being approved March 11, of that year; the second or re-survey was approved September 23, 1856. The reasons given in your office decision for rejecting the selection in said supplemental list "D" are:

1. Because of certain instructions issued by your office June 18, 1864, to the land office at Detroit, to the effect that your office could not recognize two lists of swamp lands, for the same townships, made from different and conflicting surveys, and having acted upon one, the other must necessarily be ignored.

2. The State has presented no other evidence in support of its claim.

Admitting that selections from the township were made and approved under the old surveys, such action on the part of the State did not debar it from making supplemental selections from that township, if the first selections did not embrace all the swamp lands which passed under the act.

Again, if the field notes of the old or imperfect survey failed to disclose the real nature of the land, and the more perfect re-survey, made after the passage of the swamp land act and with reference thereto, shows the land to be in fact swamp, the State, relying on the government surveys, is entitled to file its supplemental list, with assurances of approval.

The act of March 3, 1857 (11 Stat., 251), confirmed to the several states the [selections of] swamp and overflowed lands,

Heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States.

Scrip No. K, 25, was on February 24, 1876, issued to Thompson Smith for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 25; the SE. $\frac{1}{4}$ of Sec. 26; the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35, and the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 36, in said township, under a decree rendered December 16, 1873, by the supreme court of the United States for the claim of the heirs of Thomas Power, deceased, or his legal representatives, and in the decision appealed from your office suspended the same for conflict with "an apparent claim of the State of Michigan under the swamp land grant," etc.

This conflict relates to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 26, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said Sec. 35, which lands are embraced both in the scrip location and the State's selection under the swamp land grant.

If the land passed to the State under the grant, it will necessarily result in the cancellation of so much of the scrip location as is in conflict therewith.

The case is herewith returned, with directions that an examination of the records of your office may be made. If the State's selection was made prior to March 3, 1857, and if, at that time, the land was vacant and unappropriated, and not interfered with by an actual settlement under existing law, the selection is confirmed. If the selection was made and filed subsequent to that date, and it still appears from the field notes of your office that the land is of the character contemplated in the swamp land act, and that the same has not been finally disposed of, it belongs to the State. If upon examination it should appear from your records, in either case, that the land belongs to the State, you will call upon the scrip claimant to show cause why his location should not be canceled for conflict with the prior claim of the State.

The decision appealed from is modified.

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. Co. v. CHASE.

The expiration of a pre-emption filing without final proof and payment will not alone be accepted as proof of abandonment of the settlement claim at such time, so as to relieve a railroad grant therefrom.

The residence upon, occupancy and cultivation of a tract at the date of a railroad grant, by a qualified pre-emptor, will except the land covered thereby from the operation of said grant.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (P. J. C.)*

The land involved in this appeal are lots 5 and 6 of Sec. 3, T. 2 N., R. 1 E., Vancouver, Washington, land district, and is within the primary limits of the grant to the Northern Pacific Railroad Company under joint resolution of May 31, 1870 (16 Stat., 378), as indicated by map of general route filed August 13, 1870, and as fixed by map of definite location filed September 22, 1882.

It appears that Irwin E. Chase filed his pre-emption declaratory statement for said tract October 16, 1886, and made final proof and cash entry of the same August 19, 1887, without objection on the part of any one.

Your office, by letter of March 23, 1893, considered the matter, at whose instigation or suggestion it is not shown. It is stated in said letter that one Frederick Miller filed pre-emption declaratory statement for said land December 16, 1868, (offered series); that he also filed another declaratory statement for the same land July 25, 1870, upon which he made cash entry April 21, 1871. It seems that this entry was canceled December 11, 1872,

because of his failure to make proof and pay for the land within one year from date of settlement alleged in his original declaratory statement, it being held that the adverse right of the railroad company had attached to the land after the expiration of the period for making proof and payment, and that the second filing was illegal.

It is stated in your said office letter that—

Miller's pre-emption proof shows that he was fully qualified to enter lands under the pre-emption laws; that he had resided upon, cultivated and improved the land from December 15, 1868 to the date of said proof, April 21, 1871.

It was therefore decided that the land, being actually occupied by a qualified pre-emption entryman at the date of the grant, was excepted from its operation, and held Chase's entry intact.

Your said office decision was based on the theory of the continued occupancy by the pre-emptor, and that the railroad company would not be heard to plead against a settler that he had not performed his obligations to the government, following the doctrine announced in *Schetka v. Northern Pacific Railroad Co.* (5 L. D., 473), and others on that line.

I am unable, however, to find any evidence whatever of Miller's continued residence and cultivation of the land during the period mentioned. His final proof is confined solely to his acts from and after July 25, 1870, the date of his second filing. His presence or absence from the land prior to that date is not in any wise suggested, either by the proof or any allegation by Chase.

This being the fact, what is the status of the land in reference to Miller's settlement? At the date of the grant—May 31, 1870,—the pre-emption filing had expired. It having been made on offered land, proof and payment should have been made within one year from date of settlement, to wit: December 15, 1869. This filing never ripened into an entry. Neither was it formally canceled. The mere fact that the pre-emptor's filing had lapsed is not sufficient evidence of the abandonment of his claim (*Allen v. Northern Pacific Railroad Co.*, 6 L. D., 520). By reason of the fact that Miller made a second filing and entry thereunder, it might be fair to assume that he did not abandon the land; but I do not think in the absence of any showing on this

point the Department would be justified in declaring that he left the premises.

It seems to me that under the ruling in the case of *Emmerson v. Central Pacific Railroad Co.* (3 L. D., 271), and those cited above, a hearing should be ordered for the purpose of ascertaining whether or not Miller did reside upon, cultivate, and improve the tract at the date of the grant, and if this can be shown, the land should be excepted from the grant.

Without discussing the legal effect of Miller's second filing, and, admitting for the sake of argument that it was properly received, it is only necessary to say that this of itself would not except it from the grant. His filing was made after the passage of the joint resolution, and before the definite location of the road the entry had been canceled. The land was therefore free from *this* claim at the time when the grant became effective.

Your said office judgment is therefore modified, and you will order a hearing as herein directed.

RAILROAD GRANT—SCRIP LOCATION—ESTOPPEL.

FLOOD ET AL. v. NORTHERN PACIFIC R. R. CO.

The inadvertent notation of a scrip location will not except the land covered thereby from the operation of a railroad grant that takes effect prior to the discovery of the error.

Where a railroad company makes an indemnity selection in lieu of land apparently excepted from the grant, and, in consequence of such action, the basis of said selection is subsequently entered under the homestead law, the company is estopped from claiming the land so entered, even though it was not in fact excepted from the grant.

The company in such case may relinquish the tracts so entered under the act of June 22, 1874, and select other lands in lieu thereof.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894.* (E. F. B.)

I have considered the case of *John Flood and John T. Salmon v. Northern Pacific Railroad Company*, involving the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 11, T. 51 N., R. 14 W., Duluth land district, State of Minnesota, on appeal by Flood and Salmon from your decision of January 25, 1892, holding their entries for cancellation for conflict with the grant for said company.

These tracts are within the primary limits of the grant made by the act of July 2, 1864 (13 Stat., 365), and the resolution of May 31, 1870 (16 Stat., 378), to aid in the construction of the Northern Pacific Railroad, as shown by the map of definite location filed July 6, 1882. At this date the lands in question were, as far as shown by the records of your office, free from adverse claim. Pre-emption filings had been made

therefor in 1870 and 1871, but had long since expired at the date of the definite location of the road.

From a transcript of the records of the local office, it appears that, at the date of the definite location of the road, the records of that office showed these lands to be covered by surveyor general's scrip No. 179 D., 179 E., and 179 F., located on March 10, 1873, the locations being numbered 132, 133, and 134. As to such locations, your decision states as follows:

These alleged locations were not reported to this office in the returns for the month in which they purport to have been made, and the first information received here respecting them was that contained in your office letter of May 10, 1889, written in response to an inquiry from this office, dated May 6, 1889.

The register and receiver's certificates numbered 132, 133, and 134, on file in this office, relate to locations of scrip of the same class as that referred to above, numbered 186 B., 186 C., and 186 D., made May 17, 1873, covering the W. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 4, W. $\frac{1}{4}$ SE. $\frac{1}{4}$ and S. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 5, T. 63 N., R. 3 E., 4th p. m., upon which patents were issued February 10, 1874.

The scrip numbered 179 D., 179 E., and 179 F., issued in the name of W. Johnson, is on file in this office, having been located September 3, 1873, by David J. Wedge, legal representative of the scrippee, on the S. $\frac{1}{4}$ NE. $\frac{1}{4}$, and E. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 6, and S. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, T. 52 N., R. 16 W., 4 p. m. The certificates relating to these locations are numbered 197, 198, and 199, and patents issued on them February 10, 1874.

It is therefore apparent that, if such locations were actually tendered, they were soon thereafter and before the regular monthly return by the local officers withdrawn, and afterwards located, as shown in your decision.

The notation upon the local office records was therefore a mere inadvertence, and, as held in the case of *McAndrew v. Chicago, Milwaukee and St. Paul Railway Company* (5 L. D., 202), did not constitute an appropriation or reservation of the land so as to except it from a rail-road grant attaching prior to the discovery of the error.

It must be admitted, therefore, that the land was of the character contemplated by the grant, but it is urged that the subsequent action on the part of the company was in effect a relinquishment of its right to the land, and, as the appellants were misled by such action, the company is estopped from now asserting an adverse right as against the claimed rights of such parties.

The action of the company consisted in its selection on October 15, 1883, of other lands in lieu of those involved, which selection is still of record, uncancelled. Such selection was made within the second indemnity belt, together with other selections made at the same time, in all aggregating 24,264.25 acres of land.

On June 24, 1889, John Flood was permitted to make homestead entry No. 4438, for the W. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, and on July 1st following, John T. Salmon made homestead entry No. 4448 for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, same section. Both parties made commutation proof and payment on July 7, 1890, and cash entries Nos. 10,990 and 10,991 issued thereon.

The company believing that it could not acquire title to the land in question by reason of the alleged locations appearing of record at the date of definite location, satisfied their grant to this extent by making selection of other lands in lieu thereof, which selections are now pending in your office for approval. It is evident that the entrymen Flood and Salmon, in making entries of their respective tracts, were misled by the action of the company disclaiming all interest and title to the tract in controversy by the selection of other lands in lieu thereof. They evidently acted upon the implied acknowledgment of the company that the lands were excepted from the operation of its grant, and having made final proof and payment upon said entries, the company should now be estopped from claiming the land as against them.

It is immaterial whether said locations, appearing of record at date of definite location, were sufficient to except these lands from the operation of the grant or not. It is sufficient that all parties acted upon this belief, and the company will not now be heard to insist that the lands were not excepted. So far as the rights of the parties are concerned, it will be considered as if the locations constituted a sufficient claim to except the lands from the operation of the grant.

The company may be, however, permitted to file a relinquishment of the tracts under the act of June 22, 1874 (18 Stat., 194), and to select other lands in lieu thereof under the provisions of said act. If the company so elect, within ninety days from notice of said decision, you will accept said relinquishment, and approve its selection of lieu lands, if otherwise valid, and cancel its pending indemnity selection. If the company refuses to make such selection, you will consider the respective entries of John Flood and John T. Salmon, with a view to the patenting of the same.

The decision of your office is reversed.

RAILROAD GRANT—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. v. BENZ ET AL.

The possession and occupancy of a tract by a qualified settler, at definite location of a railroad grant, serve to except the land covered thereby from the operation of the grant, even though the settler at such time supposed the land belonged to the railroad company.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 9, 1894. (W. F. M.)*

This controversy involves the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 11, township 3 S., range 5 E., of the land district of Bozeman, Montana. The map of definite location of the line of the Northern Pacific Railroad Company, filed July 6, 1882, discloses that the land is within the limits of the grant to that company, and it is also covered by the statutory with

drawal which took effect February 21, 1872. It is also embraced in list No. 7, of the company, of date the 20th July, 1885.

On May 21, 1886, Andrew Benz offered his declaratory statement for the land, which was rejected for conflict with the grant, and for the further reason that he had exhausted his right of pre-emption. On May 24, 1886, he applied to make a desert land entry for the same land and this was also rejected for the reason that a similar entry by Charles E. Hoy stood of record.

A hearing having been held, pursuant to an order from your office, "for the purpose of ascertaining the status of the land February 21, 1872, and July 6, 1882," your office, by decision of February 1, 1889, held that the tract was excepted from the withdrawal by a valid subsisting pre-emption claim at the date thereof, and from the grant upon definite location by the occupation and claim of Hoy.

The case came to this Department on appeal by the company, and on August 11, 1891, a decision was rendered from which the following material paragraph is quoted:

The present contest is between the railroad company on one part, and Hoy and Benz on the other. If it can be made to appear affirmatively, by good and sufficient testimony, that either of these parties, Hoy or Benz, was in possession of said land July 6, 1882, when the line of the road opposite thereto was definitely fixed, and, at the same time, had the right to perfect title to the same under the pre-emption or homestead laws, such possession excepted the land from the grant to the railroad company and reduced the contest to one between Hoy and Benz; or, rather, to one between Hoy and the legal representatives of Benz, he having died since entering his appeal.

The decision of your office was modified in accordance with the foregoing views, the decree being as follows:

The cause is hereby remanded, and your office will order a hearing, directing the local officers to give due notice of the time and place of trial to all the parties in interest. When the testimony is taken and the local officers have submitted their report, you will re-adjudicate the case. L. & R., No. 224, p. 293.

A hearing was accordingly had upon the issues thus directed on October 26, 1891, and the register and receiver recommended the rejection of the claims of Hoy and Benz.

On appeal to your office it was held that Hoy's possession and occupation were such, on July 6, 1882, as to except the land from the operation of the grant, and that his desert entry, being the first legal one, should be permitted to stand.

From this decision both the company and the legal representatives of Benz have prosecuted appeals to this Department.

The errors assigned are:

1. In holding that the use of the land by Hoy for pasturage was such an occupancy of it as to except it from the grant.

2. In not holding that whatever possession or claim Hoy made to the land on July 6, 1882, was under the agreement elicited by him from the company to sell to him when the land was opened for sale.

3. Not to have held that mere possession without settlement does not constitute occupancy and that the party must under the decisions of the Department show actual settlement on the land.

4. In holding that mere occupancy without filing or entry at the date of definite location is sufficient to except land from the grant.

All the propositions of law thus urged have been settled adversely to the contention of the appellants. Northern Pacific R. R. Co. v. McCrimmon, 12 L. D., 554; Northern Pacific R. R. Co. v. Plumb, 16 L. D., 80; Id. v. Patterson, id., p. 343; Id. v. Kranich *et al.*, 17 L. D., 40.

The undisputed facts of the case are that Hoy took possession of the land in the spring of 1881, and within a year had fenced the entire tract and was using it for pasture. It is shown that at this time and for several years thereafter he thought the land belonged to the company, and had had some correspondence with the company looking to its purchase when it should be offered for sale. His occupation in the manner indicated continued until 1886, when he made application to enter the land under the desert land laws. This was the first legal entry offered to be made. It is shown, also, that on July 6, 1882, Hoy was a competent entryman under the homestead laws.

The testimony discloses no right in Benz whatever. He has no filing of record, and asserts no claim arising under the settlement laws.

Under the rulings of the Department contained in the decisions heretofore cited, it is clear that the land in controversy was excepted from the grant by the claim of Hoy, and since he was the first legal applicant to enter, the decision of your office will stand affirmed.

DESERT LAND CONTEST—ACT OF MARCH 3, 1891.

POYNTZ v. KINGSBURY.

The right of an entryman under the desert land act of 1877, who is in default thereunder, to take advantage of the additional time granted by the amendatory act of March 3, 1891, cannot be recognized, if his intention to take such action is not formally asserted prior to the intervention of adverse rights.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (W. F. M.)

On December 1, 1888, John T. Kingsbury made desert land entry of the W. $\frac{1}{2}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (fractional) of section 2, township 9 N., range 23 E., of the land district of Walla Walla, Washington.

On January 23, 1892, Cyrus C. Poyntz filed an affidavit of contest charging failure by the entryman to comply with the law.

At the hearing it was admitted that reclamation had not been accomplished within the three years allowed by the statute, but the register and receiver found that Kingsbury had until December 1, 1892, under the amendatory act of March 3, 1891, within which "to show that

he has complied with said law as to expenditure, reclamation and cultivation prescribed in section 5 of said act."

On appeal to your office it was held that the said fifth section, however, provides that the expenditure, reclamation, etc., shall be made within three years, and that evidence of the expenditure made each year, must be filed at the end of the year. This was not done in this case, and under the proviso of amended section 7, the entry was clearly subject to contest and cancellation.

The case is now pending, on further appeal, in this Department.

The several specifications of error are reducible to the two following,

1. In holding that the contestee, John T. Kingsbury, was not entitled to the full four years given by the act of March 3, 1891.
2. That the contestee acted upon the advice contained in a letter from the General Land Office construing the act of March 3, 1891.

Section 6 of the act referred to, *supra*, 26 Statutes, 1095, provides that this act shall not affect any valid rights heretofore accrued under said act of March 3, 1877, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

This Department has held that an entryman under the act of March 3, 1877, in order to avail himself of the provisions of the later legislation

will be required to file in the local office a sworn statement of his intention to proceed under said act, showing what has been done by him in regard to the land, and that since he determined to take advantage of the act in question, he has complied with the provisions thereof as far as possible. John W. Herbert, 17 L. D., 398.

In that case, however, it was said, further, that if the entryman complies with the law and files with his final proof satisfactory evidence of having complied with the law, with a map showing the character and extent of his improvements, there being no protest or adverse claim, his proof will be considered as under the act of March 3, 1891.

Applying the rules thus laid down to the case at bar, it will be seen that Kingsbury did not file any sworn statement of his intention to proceed under the act of March 3, 1891, but that, on the contrary, he permitted the contest of Poyntz to intervene before satisfying the demands of the old law, or taking any single step to proceed under the new.

As indicated by the decision just cited, above, which is, in so far as applicable, followed by the later case of *Forsythe v. McClurken*, 18 L. D., 532, this Department will exercise great liberality in giving effect to the provisions of the amendatory act in cases where good faith is clearly apparent, and where no intervening adverse claim, by way of protest or contest, has arisen. On the other hand, however, it is in strict harmony with the jurisprudence of this Department as established by a line of cases unbroken in its consistency and con-

tinuity, to hold, as it is here now held, that a valid adverse claim will defeat the right of an entryman under the desert land act of March 3, 1877, to take advantage of and proceed under the act of March 3, 1891, unless his election to do so be seasonably and formally made known. He will not, in the face of a contest, be permitted to allow his right to make proof, under the earlier act, to lapse before manifesting a purpose to avail himself of the additional year of the later act.

There appears to be no merit in the contention that Kingsbury was misled by a letter from your office wherein it was undertaken to give construction to the remedial provisions of the act of March 3, 1891. That letter was written on January 13, 1892, in answer to one from H. J. Snively of date the 10th of December, 1891, just ten days after the expiration of the life of Kingsbury's entry, and the following paragraph, taken therefrom, is invoked for his protection:

You are advised that if you elect to make proof under the new law on a desert land entry made December 12, 1888, you have until December 12, 1892, within which to do so, but this proof must show the expenditure, reclamation and cultivation prescribed in section 5 of the amendment of March 3, 1891, to the act of March 3, 1877, the expenditure to have been made for the purpose of reclaiming the land.

This is a fair statement of the attitude that the United States chooses to occupy with respect to the citizen who is striving to acquire lands under the desert land laws as they now exist; but in other cases, where still another citizen, equally entitled to the consideration of the government, asserts an adverse right, the law, as it is written, between these two, must be executed.

The rights of Kingsbury had been forfeited, under the old, and no steps had been taken to perpetuate them under the new law, before Poyutz came in with his contest.

The decision of your office is, therefore, affirmed.

RAILROAD GRANT-INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO. v. LARSON.

An indemnity selection within the second indemnity belt is not permissible where the loss does not occur subsequent to the act of July 2, 1864, and where it can be satisfied within the first indemnity belt.

Where the company waives the privilege conferred by the order of May 28, 1883, dispensing with the specification of losses for which indemnity is sought, and designates a basis that proves to be invalid, it is not entitled to plead the protection of said order.

The substitution of an amended list of indemnity selections on a specification of losses different from that assigned at first, must be treated as an abandonment of the first.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (F. W. C.)

I have considered the appeal by the Northern Pacific R. R. Company, from your office decision of April 27, 1893, sustaining the rejection of

said company's indemnity list No. 19, as to the SE. $\frac{1}{4}$, Sec. 33, T. 146 N., R. 48 W., Crookston land district, Minnesota, embraced in the homestead entry of Jacob Larson.

This tract was included in the limits of the withdrawal upon the filing of the map showing the line of general route of said Northern Pacific Railroad, to wit, on August 13, 1870.

As adjusted to the map showing the line of definite location of the road opposite this land filed November 20, 1871, this tract falls within the second indemnity belt, provision for which is found in the joint resolution of May 31, 1870 (16 Stat., 378).

This land is also within the primary limits of the grant made by the act of March 3, 1871 (16 Stat., 588), to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, but said company's claim to this land was denied in your said office decision and said company has failed to appeal therefrom.

The only question therefore before this Department is as to the rights of the Northern Pacific Railroad company.

On December 19, 1878, Larson was permitted by the local officers to file pre-emption declaratory statement No. 3281 for this land which he transmuted to homestead entry No. 4934 on March 16, 1881.

In accordance with published notice he tendered proof upon said entry on January 23, 1885, against the acceptance of which both railroad companies, before mentioned, protested, urging prior appropriation under its grant. Notwithstanding said protests the local officers accepted Larson's proof and issued final certificate No. 2377 on the same day upon his homestead entry.

On June 20, 1885, the Northern Pacific Railroad company filed its list No. 19, including this land, which list was, for reasons assigned but not given in your opinion, rejected; from which action the company appealed.

Referring to said list your office decision states:—

In the list (No. 19) filed by the company in 1885, there are 159 descriptions of tracts selected, embracing 88,799.10 acres; and 164 descriptions of tracts designated as lost lands, representing 88,987.14 acres. Ten of the descriptions of lost lands (1 to 10 inclusive) embrace 930.20 acres disposed of after the date of the act July 2, 1864, and therefore, afford a good basis for the selection of an equal quantity, within the 40-miles limits. The remaining 154 descriptions of lost lands embrace 88,056.94 acres, all of which are within the primary and indemnity limits of the grant by act of March 3, 1857 (11 Stat., 195), to the State of Minnesota to aid in the construction of a branch line railroad "via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North," the line of which railroad was definitely located December 5, 1857, and the indemnity lands pertaining to it were ordered withdrawn March 25, 1858. All of said lands were, therefore, disposed of, or in a state of reservation, prior to and at the date (July 2, 1864), when the Northern Pacific grant was made, and do not afford a basis for the selection of indemnity, within the 40-miles limits.

* * * * *

I am therefore of the opinion that the said list No. 19, should have been rejected, for the reasons herein stated, and, with the necessary modification, the decision of the district land officers rejecting the same is hereby affirmed.

It may, and perhaps will, be contended that the application to select the lands described, in the said list No. 19, was protected by the departmental order of May 28, 1883 (See Darland v. Northern Pacific Railroad company, 12 L. D., 195), and that the company, having designated an unsatisfactory basis, is in no worse plight than it would have been had it failed to make any specification of losses. Waiving all question as to whether said order is applicable to lands in the second indemnity (40-miles) limits, but not admitting that it is, I am of the opinion that the company, by attempting to make a specification of losses, waived the exemption provided by that order, and its claim must stand or fall upon the facts respecting the condition, at the date of application, of the lands applied for, and the character of the basis specified.

June 16, 1892, the Northern Pacific Railroad company filed in the local office a relinquishment or waiver of claim to a number of the tracts, described as selected in list No. 19, embracing 17,281.58 acres, and at the same time presented four lists marked and numbered 19 A, 19 B, 19 C, and 19 D, purporting to be a re-arrangement of list No. 19, omitting the relinquished tracts, and arranging the lands selected and the lands lost in such manner as to show the special basis for each selection "tract for tract."

An examination of these so-called "re-arranged" lists discloses the fact that the tracts therein described as selected correspond with the selected lands in the original list No. 19, the lands described as "lost" with the exception of a very few tracts (embracing 838.37 acres) are entirely different from the lands specified as lost in the original list.

The company claims the right to file these "re-arranged" lists without "waiving or abandoning any rights or claims heretofore acquired by virtue of its selections heretofore made." Had these actually been "re-arranged" lists, the claims of the company might be a reasonable one; but they are, in fact, new selection lists. The bases alleged in 1885 for the indemnity selections are abandoned, except so far as relates to the 838.37 acres mentioned above, and these tracts are used as bases for the selection of other lands than those appearing in juxtaposition with them in the original list No. 19.

The substitution of these "re-arranged" lists for list 19, with relation back to the date of filing said original list, will not be permitted. The filing of these lists will be treated as a new application to select the lands described therein.

It will be noticed that at the time of Larson's filing no selection had been made of this land, the only bar to the allowance of the same being the withdrawal for indemnity purposes.

Admitting for this case, that there was authority to make such withdrawal, yet all indemnity withdrawals made on account of this grant were revoked on August 15, 1887, and all lands not embraced in pending selections were ordered to be restored to entry.

Prior to this time, the company had sought to select this land but if its selections were ineffectual to reserve the land, no subsequent selection could defeat Larson's rights in the premises under his entry made as before described.

It is urged by the company: first, that its selection list of June 20, 1885, was protected by the order of May 28, 1883, and that the re-arranged lists filed in 1892 have relation as of the date the first list was filed, viz., June 20, 1885.

Even if it be admitted that the order of May 28, 1883, was intended to embrace selections within the second indemnity belt, yet said order cannot benefit the company in the consideration of this list.

The purpose of said order was merely to facilitate the adjustment and to secure the early restoration of lands not needed within the indemnity lists of the grant for said company, by permitting the company to make indemnity selections without specifying the lost lands depended upon as a basis for such selections, leaving the same to be supplied by your office, but it was not its purpose to protect illegal selections made by the company.

In the case of selections within the second indemnity belt, only certain losses would support the same, viz., the loss must have occurred subsequent to the passage of the act of July 2, 1864.

This loss could also be satisfied within the first indemnity belt, but where in any State or Territory the full grant could not be satisfied within the limits prescribed by the act of July 2, 1864 (13 Stat., 365), within its boundaries, the additional, or second indemnity belt, might be resorted to, to satisfy losses occurring after the passage of the act of July 2, 1864.

The company in making its selection of June 20, 1885, waived its privilege of leaving the ascertainment of its losses to your office as the basis for said list, and in the list as filed specified the losses on which it depended as a basis for the same.

It is admitted that it specified an imperfect basis for nearly the entire list and that amended lists containing a proper basis were not filed until 1892.

In the case of *La Bar v. said company* (17 L. D., 406), it was held that the substitution of an amended list of indemnity selections on a specification of losses different from that assigned at first, must be treated as an abandonment of the first.

It must, therefore, be held that the company was without proper selection of this land on August 15, 1887, the date of the revocation of the orders of withdrawal for indemnity purposes on account of said grant, and whatever bar formerly existed against the allowance of Larson's entry was thereby removed, and no subsequent selection made on account of the grant could defeat his rights in the premises.

The amended lists filed in 1892 were subject to intervening adverse rights, and your office decision denying to the company the right to select the land included in Larson's entry is affirmed.

SETTLEMENT RIGHTS—JOINT ENTRY.

DA CAMBRA v. ROGERS' HEIRS ET AL.

A joint entry can not be allowed where there is but one residence and set of improvements maintained and occupied in common by the parties, with the intention to take separate tracts when the land is open to entry.

The purchase of the possessory right of a settler does not make his date of settlement available to the purchaser as against adverse claimants.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 9, 1894. (P. J. C.)

The land involved in this appeal is lots 3 and 4 and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ (being the technical SW. $\frac{1}{4}$) of Sec. 31, T. 1 S., R. 2 W., M. D. M., San Francisco, California, land district.

The township plat was filed July 30, 1878. October 28, 1878, the township was suspended, and the suspension revoked April 16, 1883.

The land was embraced within the limits of the grant of July 1, 1862 (12 Stat., 489), to the Western Pacific Railroad Company, and was withdrawn for the benefit of said company July 30, 1865.

The record shows that Manuel S. Da Cambra filed pre-emption declaratory statement for said tract December 29, 1883, alleging settlement October 27, 1867; that the heirs of Enos J. Rogers filed pre-emption declaratory statement January 21, 1884, alleging settlement in July, 1871; that Jose C. Fontes made homestead entry of lot 4, in said section, together with other land, December 13, 1883.

Da Cambra gave notice that he would offer final proof before the local office on February 25, 1884. It seems, however, that he did not offer his proof at that time, and not until April 14, 1884.

Hannah Rogers, the widow of Enos J. Rogers, deceased, for his heirs, made application February 25, 1884, to make final proof before the local office on April 14, 1884. The order was granted, and publication ordered; but from a note by the register, it seems that this order was not published. Nevertheless, on April 14, 1884, she submitted her final proof. Thus both pre-emption claimants submitted their final proof at the same time.

The declaratory statements presented by these parties are not in the record.

For some reason not explained by the record a hearing was had before the local officers, at which the parties appeared with their counsel, and voluminous testimony was taken on behalf of Da Cambra, Rogers and Fontes, and as a result of this hearing the local officers, on December 4, 1884, decided that the land was not subject to settlement, but had passed to the railroad company by its grant.

It seems that the claimants asked for a rehearing, but this was denied by the local officers. They appealed, and your office, by letter of June 15, 1889, reversed their decision, and held that the testimony of one Hewitt Steele seemed "most important and material in deciding whether or not the land in question passed to the company under its grant," and a rehearing was therefore ordered to take the testimony of this witness. As a result of this hearing the local officers reversed their former decision, and held that the company was not entitled to the land, and awarded the same to Rogers' heirs.

Da Cambra and Fontes appealed, and your office, by letter of August 19, 1892, held that Fontes was entitled to said lot 4, and that Da Cambra and Rogers' heirs should be permitted to make joint entry under section 2274, Revised Statutes, of the remainder of said technical SW. $\frac{1}{4}$.

From this decision Da Cambra appealed November 5, 1892, and Rogers' heirs filed their appeal in your office March 27, 1893.

Counsel for Da Cambra have filed a motion to dismiss the appeal of Rogers' heirs, on the ground that it was not filed within the time fixed by the rules of practice.

It seems that the local officers sent to one J. W. Shanklin, who is described as being the attorney for the heirs of Enos J. Rogers, a notice of said decision, dated October 27, 1892. From a letter of his dated November 3, 1892, at Addington, California, it seems that he mailed this notice to Mrs. Rogers, requesting information from her as to what she desired in the premises. This letter did not reach Mrs. Rogers, and after being advertised by the local post-office, and remaining uncalled for, it was forwarded to the Dead Letter Office in this city, and again remailed to Mr. Shanklin December 7, 1892.

Mr. Shanklin, under date of January 14, 1893, addressed your office, asking permission for local counsel to file an appeal for Mrs. Rogers, stating that he was not her authorized attorney; that Mr. Hall, whom the record shows appeared for Mrs. Rogers in the local office, was dead; that he being Hall's brother-in-law, and having charge of his affairs, the local officers had sent him the notice of the decision in that capacity only; that he did not even know Mrs. Rogers' address at the time he sent the letter to her from Addington. It seems to me that under these circumstances this appeal should be allowed, especially in view of the further fact that a copy of the decision did not accompany the notice from the local office. The motion is therefore denied.

It appears from the testimony that Da Cambra, in 1867, purchased the possessory right of the prior occupants to about 360 acres of land, presumably situated in what is now section 31, and entered into possession. The house and the larger part of the cultivation and other improvements was on the SW. $\frac{1}{4}$ of said section, the land now in controversy. In 1870 Rogers purchased an undivided half interest in Da Cambra's possessions, and moved his family onto the land and occupied a part of the residence that was on this SW. $\frac{1}{4}$. It may be said at this time that this is the only house for residence purposes that there is upon this tract, or any other claimed by them, and is the house in which both Da Cambra and Rogers have lived continuously from that time to this. In 1871 Da Cambra transferred to Rogers his remaining interest in the land, and in 1875 Rogers re-conveyed to Da Cambra an undivided half interest in the land and in the improvements. It is claimed on behalf of the Rogers heirs that there was an agreement or understanding between him and Da Cambra as to the division of this land, and that Da Cambra was to take the NE. $\frac{1}{4}$ of the

section, while Rogers was to retain the SW. $\frac{1}{4}$. It is this dispute between these parties that has brought about this contest. The testimony upon this point is conflicting. Very much of it is entirely incompetent to establish the contract between them, by reason of the fact that the witnesses detail conversations had with Rogers in his lifetime as to what they claim to be his understanding of the agreement with Da Cambra, but it seems to me that there is enough in the record competent for this purpose, without the consideration of the other testimony to show that Da Cambra did not claim the SW. $\frac{1}{4}$ until after the death of Rogers, and that prior thereto it was his intention to take the NE. $\frac{1}{4}$ when the same should be subject to settlement and entry.

I think it may be said with certainty that the cultivated land that was jointly held by the parties was nearly, if not quite, all in the SW. $\frac{1}{4}$ and that the NE. $\frac{1}{4}$ was used exclusively for pasturage.

In March, 1877, Rogers leased to Da Cambra "all the tillable land in Brooklyn, and this is not to cover the land now and formerly used as pasture land, with the use of the horses for farming purposes." This lease was to run until October, 1878. This agreement seems to have been carried out in good faith for the period mentioned, and it seems further that there was a similar agreement under which Da Cambra cultivated and used the SW. $\frac{1}{4}$ down to the time that they made their filings in 1883; at least, it is certain that Da Cambra cultivated the land, and that he gave Mrs. Rogers, who had at all times lived on the land, her husband being absent much of the time working in the mines a part of the crops that were raised thereon.

It is also shown that Rogers, in 1878, after the plat had been filed, offered to file on the SW. $\frac{1}{4}$, and the testimony tends to show that at that time Da Cambra also offered to file on the NE. $\frac{1}{4}$. It is not clear just why these applications were rejected, but presumably because the local officers considered that the land had passed to the railroad company by the terms of its grant.

Again, tax receipts from 1880 to 1884 inclusive were introduced in evidence, showing that E. J. Rogers and the Rogers estate had paid the taxes on this SW. $\frac{1}{4}$, and it is testified to by the assessor that the NE. $\frac{1}{4}$ had been assessed to Da Cambra.

It is also shown that Rogers assisted Da Cambra, probably in 1879 or 1880, in moving a shanty onto the NE. $\frac{1}{4}$, and that Da Cambra personally occupied the shanty a few nights at least, and it is said in the testimony that this was done for the purpose of preventing jumpers from taking that tract.

It will thus be seen that there seems to have been a well understood compact between these parties as to the land that each was to take when it came into the market, and I think it is shown by a fair preponderance of the testimony that notwithstanding the continuous residence of Da Cambra upon the land in controversy, yet it was the intention that he should take the NE. $\frac{1}{4}$, and that the SW. $\frac{1}{4}$ should be taken

by Rogers. It will be observed that there was but one residence; that there was but one set of improvements, all these being held in common between the parties; that Da Cambra paid Rogers or his estate a rental in the shape of a portion of the crops raised on the SW. $\frac{1}{4}$.

Hence I do not think that the provisions of sections 2274 of the Revised Statutes, under which your office held that a joint entry should be made, is applicable in this case. That section reads as follows—

When settlements have been made upon agricultural public lands of the United States prior to the survey thereof, and it has been or shall be ascertained after the public surveys have been extended over such lands, that two or more settlers have improvements upon the same legal subdivision, it shall be lawful for such settlers to make joint entry of their lands at the local office.

In all of the adjudicated cases that I have been able to find where a joint entry has been permitted, it has been where there have been separate and distinct settlements and improvements upon the same legal subdivision, where the parties have supposed they had improved or settled upon the land they would have been entitled to after the survey had been made. This is not the situation in the case at bar. Here everything was held in common. There could not have been, and it is not claimed that there was, any misunderstanding as to the lands settled upon by each conflicting with the other after the survey, and no loss or inconvenience resulted to them or either of them by reason thereof.

As to the Fontes claim, the testimony shows that he purchased of one Alveys his possessory right to a certain tract of land adjoining the SW. $\frac{1}{4}$ of section 31 on the west; that a small part of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, being lot 4, was included in Alveys' improvements to the extent of five or six acres. Fontes bases his right to this lot 4 only by reason of Alveys' settlement and occupation. This he cannot do. His right to the land dates from the time of his settlement so far as this controversy is concerned. He is presumed to have knowledge of the occupation and possession of the SW. $\frac{1}{4}$ by Rogers and others, and it is needless to say that this possession and occupancy was long prior to his claim upon said lot.

For these reasons I think your office judgment should be reversed; that the entry of Fontes of lot 4 should be canceled and that the heirs of Rogers should be decreed to have the prior and better right to the land claimed by them.

In view of the fact that the notice to make final proof by Mrs. Rogers was not published, as required by the rules, it will be necessary for her to advertise to make final proof in accordance with the rules. However, if after making publication notice there is no adverse claim filed, the proof heretofore submitted, if found to be sufficient in all respects, may be accepted by the local officers, and entry made thereon. Otherwise, she will be required to submit new proof. It is so ordered.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

PICKARD v. COOLEY.

The right of a homesteader, who files a soldiers' declaratory statement, to make entry dates from such filing, and he cannot thereafter, as against an intervening adverse claimant, take advantage of a settlement made prior to said filing.

Secretary Smith to the Commissioner of the General Land Office, October 9, 1894. (W. M. B.)

I have examined the record in the case of Nicholas Pickard v. Franklin Cooley on appeal by Pickard from your office decision, dated April 26, 1892, reversing the action of the local officers whereby they recommended that Cooley's homestead entry for the SW. $\frac{1}{4}$ of Sec. 25, T. 18 N., R. 3 W., be canceled and the entry of Pickard held intact.

The record shows that on April 26, 1889, the defendant, Cooley, filed in person, his soldiers' declaratory statement for the tract involved, after having previously located the same by commencing of settlement and improvements. That on July 19, 1889, the plaintiff, Pickard, made homestead entry of said tract.

On October 17, 1889, the defendant made actual entry, in person, of the land, and established residence thereon at the time.

On November 23, 1889, the plaintiff filed an affidavit of contest against the defendant's entry, alleging prior settlement upon the land. At the time Cooley entered the Territory of Oklahoma he had the choice of two different methods by which to initiate and perfect a homestead claim. One could be exercised under the provisions of the regular and ordinary homestead law; the other under what is known as the soldiers' homestead law, as prescribed in sections 2304 and 2306 Revised Statutes.

The evidence furnished by the record in this case shows that Cooley went upon and commenced settlement on the tract in dispute at 1:15 o'clock, p. m., April 22, 1889, and prior to the hour, of the same day, on which Pickard went on the land and commenced settlement and residence.

If the defendant Cooley had desired to initiate his claim by actual settlement and residence, with right of claim to date from time of such settlement and residence, he should have filed entry upon the tract within ninety days from time of location and settlement, in order to avail himself of such right; but by locating homestead and filing soldiers' declaratory statement, as stated, on April 26, 1889, and making entry on October 17, 1889 (nearly six months thereafter), under provision of sections of the Revised Statutes above referred to, his inceptive right of entry dated from the day on which he filed his said declaration and not from the date of locating his homestead by settlement at 1:15 o'clock, p. m., on April 22, 1889.

The filing of said soldiers' declaratory statement constituted the

initial step in defendant's claim or right of entry upon or to the land, which act being subsequent to the date of the plaintiff's location and settlement, gave him (Pickard) a prior and superior claim to the tract involved.

Since the evidence shows that the contestant, as stated, made actual settlement upon the land and commenced residence thereon on April 22, 1889, making entry thereof on July 19, 1889, and that he complied thereafter with the requirements of the homestead law, and since the contestant's inceptive right of entry was prior to that of the claimant, your decision of April 26, 1892, is reversed and that of the local officers affirmed, and it is therefore ordered that the entry of the defendant, Cooley, be canceled and that of the contestant, Pickard, be held intact.

HOMESTEAD ENTRY—DESERTED WIFE.

MAGGIE ADAMS.

A deserted wife may make a homestead entry, with credit for previous residence on the land, where her husband's entry thereof is canceled for failure to make final proof within the statutory period.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (P. J. C.)*

The record in this case shows that Nathan B. Adams made homestead entry September 7, 1885, of the NE. $\frac{1}{4}$ of Sec. 8, Tp. 24 S., R. 32 W., Garden City, Kansas, land district. On March 31, 1892, Maggie Adams, as the deserted wife of the entryman, made application to make final proof of said entry. This was allowed, the proof submitted, accepted, and final certificate issued by the local officers, with the recommendation that it be "referred to the Board of Equitable Adjudication." When the matter came up in the course of business, your office, by letter of February 17, 1893, reversed their action, under the ruling in the case of *Bray v. Colby* (2 L. D., 78), and she was given the privilege of contesting her husband's entry, when she could make entry and proof in her own name and be credited with her residence on the tract, or she might appeal. She adopted the latter course.

There can be no question as to the correctness of your office decision. The case of *Bray v. Colby* is conclusive of this question, and your judgment rejecting her proof must be affirmed.

But it seems to me that there is a more expeditious and less expensive way for the appellant to secure this land than that prescribed by your office decision. The time within which the entryman is required to make final proof—seven years—has long since lapsed, and, so far as shown in this record, he has made no effort in that direction. It is shown by the proof submitted that the appellant has lived on the land continuously since the entry, and has substantial improvements thereon. Also that her husband abandoned her and the land in 1889.

I think therefore, in view of his failure to make proof within seven years, that notice should be given the entryman under the circular of December 20, 1873 (1 C. L. O., 13), to show cause why his entry should not be canceled, and when the entry shall have been canceled, Mrs. Adams may make entry as a deserted wife, and be given credit in her final proof for the time she has resided upon the land.

It is so ordered, and your office judgment thus modified.

REPAYMENT—ACT OF JUNE 16, 1880.

FRANK SMITH.

Repayment of fees and commissions may be allowed where the entryman, to avoid conflict resulting from an error in the local office, in good faith relinquishes his entry and takes another tract.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (C. W. P.)

On the 25th of July, 1893, you transmitted the appeal of Frank Smith from the decision of your office of June 9, 1893, denying his application for re-payment of fees and commissions paid by him on his homestead entry, No. 6772, for the SE. $\frac{1}{4}$ of Sec. 27, T. 17 N., R. 8 W., Kingfisher land district, Oklahoma Territory.

The record shows these facts—That April 27, 1892, Frank Smith made homestead entry for the above described land; that April 28, 1892, Charles B. Young made homestead entry for the same land; that Smith's entry was erroneously placed of record in the local land office, for the NE. $\frac{1}{4}$ of said section; that, upon discovering the mistake, the local officers changed the record of Smith's entry from the NE. $\frac{1}{4}$ to the SE. $\frac{1}{4}$ of said section, to make it agree with his application—and thus a conflict arose between Smith's and Young's entries; that your office directed the local officers to advise Young that he would be allowed thirty days within which to show cause why his entry should not be held for cancellation; that a hearing was thereupon ordered for October 20, 1892, but that no hearing was had; that Smith relinquished said entry, and on September 23, 1892, filed an application for restoration of his homestead right, accompanied by an application to enter the SE. $\frac{1}{4}$ of Sec. 2, T. 14 N., R. 12 W., and Young appeared as one of the corroborating witnesses on Smith's application; that, in his affidavit for restoration, Smith alleges that he selected in good faith, the SE. $\frac{1}{4}$ of said section 27, on April 19, 1892, and on April 22, 1892, he found the description of his land, and on April 27, 1892, made entry for it; that when he returned to the land on April 28, 1892, he found thereon one Charles B. Young, who claimed to be the first actual settler, and had made homestead entry therefor April 28, 1892; that he (the petitioner) has not sold, or in any way incumbered the land, but has acted in good faith.

throughout, and to save expense, he asks that he may be allowed, with or without fees, as may seem just, to make entry for the said SE. $\frac{1}{4}$ of Sec. 2.

It further appears, that by your office letter of April 21, 1893, this application of Smith was granted, and the local officers were directed to allow him to make entry for said land, in accordance with his application, upon payment of the legal fees and commissions, should no other objection appear.

Your office rejected Smith's application for repayment of fees and commissions paid on his entry of the SE. $\frac{1}{4}$ of section 27, on the ground that the law does not provide for the re-payment when the relinquishment or abandonment is voluntary.

The act of June 16, 1880, (21 Stat., 287) is remedial, and should be construed liberally. The claimant in this case appears to have acted ignorantly, but innocently, and I think his claim comes within the scope and intent of the act.

I reverse the judgment of your office, and direct the re-payment of the fees and commissions in the case.

SCHOOL INDEMNITY—FOREST RESERVATION.

STATE OF CALIFORNIA.

School indemnity selections may be properly allowed in lieu of unsurveyed sections in place that fall within a forest reservation.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (G. C. R.)

On July 7, 1893, L. and R. No. 269, p. 379, the Department affirmed the action of your office rejecting the application of the State of California to select the NW. $\frac{1}{4}$ of Sec. 2, T. 7 N., R. 11 W., in lieu of land in Sec. 16, T. 2 S., R. 2 E., S. B. M., Los Angeles, California.

The action thus taken by the Department was based upon the ruling made July 7, 1893 (17 L. D., 71), which denied to the State the right to make indemnity school selections, where the lands in place (i. e. the 16th or 36th sections) were by the executive order creating an Indian reservation expressly excepted therefrom, notwithstanding the fact that the school sections are within the boundaries of such Indian reservation.

The State filed a motion for review, which the Department considered on April 16, 1894 (L. and R. No. 285, p. 498), while declining to consider the motion for "the reasons heretofore submitted," yet the State having alleged an additional reason for allowing the selection, namely, that "said Sec. 16 is unsurveyed and within the exterior lines of the San Bernardino forest reservation, and a portion thereof by executive proclamation, dated April 29, 1893, and therefore good and valid

basis for indemnity," the Department in considering the motion suspended further action and remanded the case to your office, "for examination and consideration . . . pending the determination of this question," i. e., the truth of the State's new averment, above set out.

I am now in receipt of your office letter of May 3, 1894, stating that the entire section 16, T. 2 S., R. 2 E., S. B. M.,

is unsurveyed and within the exterior lines of the said forest reservation created by executive proclamation, dated April 29, 1893 (evidently February 25, 1893). The selection referred to appears therefore to be upon a valid basis.

Said Sec. 16, in T. 2 S., R. 2 E., is not only a part of the Mission Indian reservation, set apart by executive order of September 27, 1877, but it also appears to be a part of the forest reservation made by the President's proclamation dated February 25, 1893 (27 Stat., 1068), by virtue of the provisions of section 24 of the act of March 3, 1891 (26 Stat. 1095). This proclamation "reserved from entry or settlement and set apart as a public reservation" the lands therein described, covering in all 733,600 acres. There were excepted from the force and effect of this proclamation only those lands

which may have been prior to the date hereof embraced in any legal entry or covered by any lawful filing duly of record . . . or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws, etc.

The land not having been surveyed, the title of the State to the granted sections has not yet attached.

The school sections not having been excepted in the proclamation making the reservation, the State has the right, under the provisions of the act of February 28, 1891 (26 Stat., 796), and in the clause

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or included within any Indian, military, or other reservation,

to make a selection of lands in lieu of those lost by reason of the forest reservation.

The basis of the proposed selection, appearing upon the facts now presented to be a valid one, I see no reason why the selection may not be allowed. It is so ordered, and the decision review of which is asked is, by reason of new facts appearing in the record, set aside and annulled.

MINING CLAIM—NOTICE—ADVERSE CLAIM.

WHITMAN ET AL. v. HALTENHOFF ET AL.

The published notice of application for mineral patent will not be deemed insufficient on account of failure to give the names of adjoining claims, where the numbers of said claims are furnished thereby.

Failure of the original locator to adverse an application based on a junior location authorizes the assumption that the claimant under the junior location is entitled to a patent as against the claim of the prior locator.

The dismissal of judicial proceedings instituted on an adverse claim constitutes a waiver of said claim.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (J. W. T.)

I have considered the protest of Frank V. Whitman and Will L. Clark, claiming to be owners of the Bluff lode claim, on appeal from your office decision of February 14, 1893, dismissing their protest against the issuance of a patent on mineral entry No. 2725, made September 16, 1892, by George Haltenhoff, William Haltenhoff and Conrad Schafer in the Helena land district, Montana, upon the Martha lode claim.

The said protest, made on the 23d day of January, 1893, alleges:

1. That the defendants did not post, in a conspicuous place on said Martha lode claim, a copy of the plat of survey.
2. That there was no accompanying notice of intention to apply for patent therefor.
3. That if said plat and notice were posted at all, they did not remain posted during the statutory time.
4. That not more than \$275 of labor has been expended on improvements made thereon.
5. That the published notice does not give the names of the adjoining claims.
6. That the location is invalid for the reason that discovery thereof was made upon ground already held under location by the Bluff lode claim, and also by the Little George Nessly lode mining claim.

Will L. Clark further states that

having heard that the defendants intended applying for a patent to said Martha lode, he, during the month of September, 1892, inquired of them, and was informed that they did not intend to so apply, as they had not performed sufficient work, and that contestants were thus deceived and prevented from commencing adverse proceedings, which they would have done had they known that defendants intended to make entry.

As to the first of these allegations, it appears very clear from the evidence afforded by the case, that defendants did post in a conspicuous place on said claim, a copy of the plat of survey. Indeed, the first three grounds of protest are fully covered by the evidence of disinterested witnesses, who say that the notice of application for patent, and the plat were not only posted in a conspicuous place on said claim, but remained conspicuously posted from May 25, 1891, to January 1, 1892.

The fourth allegation of protest is equally disposed of by the evidence on file. Two witnesses, who so far as appears, have no interest in the matter whatever, state the improvements to be worth \$540, and give the items of expenditure; and the surveyor-general certified to this as a proper estimate.

As to the fifth ground of protest, it may be answered that it is true that the published notice does not give the names of adjoining claims. It seems, however, that it furnished the *numbers* of them, which is

practically as satisfactory for the purposes of notice, unless there is some requirement, statutory or otherwise, to the contrary. I have been able to find none as to unsurveyed and conflicting claims, where the applicant, as your office decision has said "claims the area in conflict."

As to the sixth matter of protest, your office decision properly says:

When the owner of the original location fails to adverse the application for patent on the junior location, it will be assumed under section 2325, Revised Statutes, that the claimant under the junior location is entitled to a patent as against the claims of the prior locator (2 L. D., 744).

As to the Little George Nessly lode claim, which, together with the Bluff lode claim, the protestants aver is overlapped and crossed by the said claim of defendants—covering an area of 7.75 acres of said Nessly lode claim—it seems that one Edward D. Quinn, claiming to be the owner of the latter lode, on January 23, 1891, filed an adverse against issuing a patent for the Martha lode, and on August 17, 1891, commenced action for the possessory right to the portion in alleged conflict, but on August 28, 1892, on motion of his counsel, said cause was dismissed with costs to said Quinn.

These being the facts as regards the Little George Nessly lode, they establish, under the rulings of this Department, a waiver of any further claim against defendants as respects said right.

As to the Bluff Lode, represented by the protestants Whitman and Clark, it appears that said Clark was, during the pendency of said Quinn's suit, clerk of the district court of the second judicial district of the State of Montana, in which said suit was brought. Clark could hardly complain of being deceived and kept by the fraud of defendants from commencing adverse proceedings, because the period of publication expired in August, 1891, and the time for adverse proceeding had passed.

Under the circumstances I am clear that your office decision is correct. It is therefore affirmed.

DESERT LAND ENTRY—ACTS OF 1875 AND 1877.

SIMEON D. WYATT (On Review).

The regulations adopted by the Land Department after the passage of the desert land act of 1877, were formulated on a construction of said act, in connection with the Lassen county act of 1875, and held that the right of entry could not be exercised by the same person under both acts, and no different construction of said acts, in that particular, has at any time been recognized in the Department.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (G. C. R.)*

Simeon D. Wyatt has filed a motion for a review of departmental decision of February 12, 1894 (18 L. D., 99), involving his desert-land entry, made July 16, 1890, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ of Sec. 20; N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 29, T. 29 N., R. 14 E., M. D. M., Susanville, California.

Said decision affirmed the action of your office of January 16, 1892, which held for cancellation said entry, because he had exhausted his rights under the desert land laws by his desert entry made May 1, 1890, for four hundred and eighty acres, under the Lassen county (California) land act of March 3, 1875 (18 Stat., 497).

When the departmental decision was rendered the ruling therein announced was reached after very careful consideration, and I do not deem it necessary to further discuss the question or to reiterate the reasons from which the conclusions were reached.

It is insisted that the Lassen county act (*supra*) and the general desert land act of March 3, 1877 (19 Stat., 377), were "read, compared and interpreted, and both given effect from March 3, 1877, to January 16, 1892 (date of your office decision), and that during that time "entries were made under both (laws) by the same persons," and patents issued under both to the same persons, and that never until this case was any suggestion made that the act of 1877 was intended as a substitute for the act of 1875; that Wyatt acted upon the interpretation given to the two acts by your office, and, relying upon that interpretation, he was thereby induced to expend large sums in the reclamation of the land, which he would not otherwise have done, etc.

The equitable considerations thus presented for sustaining the entry are very strong, and, if true, would be very potent under the copious citations given in securing favorable action on the motion.

An examination of the records of your office, however, does not as a matter of fact sustain the assumptions set up in the appeal and repeated in this motion, to the effect that one person has been knowingly allowed by your office to make two desert land entries, one under the Lassen county act, and one under the act of March 3, 1877.

In a number of cases two such entries by the same person or by the same name, one under each act, were discovered; but final certificate having issued, and more than two years having elapsed, the entries went to patent under the confirmatory provisions of the act of March 3, 1891 (26 Stat., 1095).

Again, two desert entries to the same person, of the kinds described, may have been allowed, where the local office or your office remained in ignorance of the first entry, by reason of false statements on the part of the claimant.

To illustrate: When Wyatt filed his declaration (July 16, 1890,) to make entry of the land under the act of 1877, he made the following sworn statement, "I further depose and declare that I have made no other declaration for desert lands, nor any entry under the provisions of said act."

This statement was made less than four months after he had filed his sworn declaration to make a desert entry for four hundred and eighty acres under the desert land act of 1875.

The 17th question in the final proof blanks (form 4-372) reads as follows:

Have you made any other desert-land entry, or have you become the assignee of any other such entry, or have you any interest, direct or indirect, in any other entry under the desert-land act?

To avoid the full force and effect of this direct question, and, apparently, to prevent a repetition of the erroneous statement made in his declaration (above referred to), the words "under this act" were without authority interpolated into the question. His final proof in both entries having been made and transmitted at the same time, it was then discovered that he had made the two desert entries.

The regulations of the land department since the passage of the act of 1877, as shown by the forms for making desert entries, and the forms used for making final proof, show that but one entry could be allowed; and so far as I have been able to discover, your office, for the first time, denied the validity of two such desert entries to one person in the Wyatt case; not, as before seen, that your office then announced a new rule, but because no such question had ever before been raised. The very affidavits required of the entryman precluded the erroneous "interpretation" which the claimant in his motion alleges was employed by your office.

It is therefore seen that the equitable considerations urged in behalf of the entryman are founded upon an erroneous understanding of the practice and rulings of your office.

Assuming that the register and receiver knowingly allowed two desert entries to one person of the kinds described, such action on their part does not preclude your office or this Department from correcting the error on its discovery.

The motion is denied.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT.

TITAMORE *v.* SOUTHERN PACIFIC R. R. Co. (On Review.)

The settlement claim of a qualified pre-emptor excludes the lands covered thereby from indemnity selection, if said lands are not protected by a prior authorized withdrawal.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (F. W. C.)

I have considered the motion filed by Herbert E. Titamore for review of departmental decision of April 16, 1890 (10 L. D., 463), in the case of Herbert E. Titamore *v.* Southern Pacific R. R. Co., involving the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, T. 15 S., R. 3 E., M. D. M., San Francisco, California.

Said tract is within the indemnity limits of the grant under which said company claims, and selection was made thereof October 18, 1884.

Titamore filed pre-emption declaratory statement for this land June 10, 1886, alleging settlement July 1, 1883, and offered proof thereon March 30, 1888, at which time the company appeared and protested against the acceptance of the same.

The local officers rejected the proof for conflict with the company's selection, but your office decision reversed the action of the local officers, it being shown that Titamore was a settler at the date of selection, and held that his proof should be approved and the company's selection canceled.

Upon appeal, your office decision was reversed by departmental decision of April 16, 1890 (*supra*), for the reason that the copy of his declaration of intention to become a citizen of the United States filed in the case, showed that the same was made "June 28, 1885," subsequent to the selection of the land by the company.

In support of the motion for review it is alleged that a mistake was made in the copy of the declaration of intention, as the same should have shown that the declaration was made "June 28, 1884," and a second certified copy is filed showing the latter date. It is also shown in further evidence of the fact that the declaration was made in 1884, that he was adjudged to be a citizen of the United States on July 27, 1886, and in the judgment of naturalization it is stated and it also appearing to the court, by competent evidence, that the said applicant has heretofore, and more than two years since, and in due form of law, declared his intention to become a citizen of the United States.

It must therefore be held that the previous decision of this Department was predicated upon an erroneous statement of facts and the same is recalled and revoked.

Under the recent decision of this Department in the case of *Jennie L. Davis v. Northern Pacific R. R. Co.* (19 L. D., 87), it must be held that the lands within the indemnity limits of the grant under consideration, were subject to appropriation as other public lands, until duly selected on account of the grant.

As Titamore had settled upon the land in question prior to selection by the company, I must affirm your office decision and direct that he be permitted to complete entry of the tract upon the proof already made, and that the company's selection be canceled.

MILLER *v.* BOWE ET AL.

Motion for the review of departmental decision of February 3, 1894, 18 L. D., 44, denied by Secretary Smith, October 10, 1894.

SWAMP LANDS—THE EVERGLADES.

STATE OF FLORIDA.

It appearing that the unsurveyed body of lands lying within the State of Florida, known as the "Everglades" is in fact swamp land, and that a survey thereof is not practicable, patent may issue to the State under the swamp grant, upon an estimated area designated by metes and bounds, the State to furnish a meander survey of said "Everglades," accompanied by satisfactory proof that said meander line does not include within its limits lands not of the character granted.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (E. W.)*

Your office letter of April 18, 1894, transmits to the Department the report of Mr. Frank Flint, principal clerk of surveys of your office, who was detailed to make certain examinations of swamp and overflowed lands situate within The Everglades of Florida.

On February 20, 1894, Mr. Flint left for the State of Florida under instructions from your office, and approved by the Department, which read as follows:

The Secretary of the Interior having approved my recommendation in the matter, you are hereby directed to proceed to the "Everglades" in the State of Florida, for the purpose of making a careful examination of the same, in order to determine whether a survey and segregation is practicable of such islands and water, as would not pass to the State in accordance with the provisions of the swamp land grant of September 28, 1850.

As you are familiar with the requirements of this Department in relation to the subject, and having received my verbal directions in the premises, I do not deem it necessary to issue detailed instructions for your guidance.

Pursuant to said instructions Mr. Flint on April 13, 1894, among other things, reports to your office as follows:

While in Tallahassee, I saw Gov. Mitchell and Commissioner of Agriculture Wombwell, who also has charge of the lands belonging to the State of Florida. I was informed by Gov. Mitchell and Commissioner Wombwell that two expeditions had penetrated the Everglades; one under the auspices of the New Orleans Times Democrat in the winter of 1882, and the other under the direction of the South Florida Railroad in the spring of 1892.

It was suggested by Gov. Mitchell that perhaps it would be well to see the men who were in charge of these expeditions before attempting anything in that line myself, as their experience would be of benefit to me.

I acted upon his suggestion, and proceeded at once to see the parties who had charge of those expeditions, viz: Col. C. F. Hopkins who was in charge of the "Times Democrat" expedition, and Capt. J. W. Newman, who had charge of the expeditions sent out by the South Florida Railroad.

After seeing these gentlemen and receiving a detailed statement of those two expeditions, the only expeditions (of recent date at least) that have ever attempted to explore that vast unknown region designated as "The Everglades" I decided that it would serve the interest of the Department better, to have their reports in the form of affidavits, than for me to attempt to explore the region myself, especially so as I was informed by Col. Hopkins and Capt. Newman that it would cost, at the least

calculation, twenty-five hundred (\$2,500) to fit out an expedition for the purpose of personally obtaining the information desired by the Department.

I then proceeded to take the affidavits of Col. Hopkins, Capt. Newman, and of three other parties, viz: William Mickler, V. P. Keller, and Col. J. F. Kraemer, who were familiar with the "Everglade country."

A copy of the affidavits I have attached, and made a part of this report. You will see by reading these affidavits that there is but one opinion expressed, and that is, that all the "Everglade country" is swamp land in the true acceptation of the term. Another fact is made plain, that in the "Everglades" proper, there are no well defined bodies of water, while the greater portion of the country is covered with water, on account of the nature of the soil, and the deposits caused from the rank growth of saw grass that has accumulated from year to year, instead of well defined bodies of water, there is a thick mud, causing the greater part of the "Everglades" to be swampy and marshy with a few small islands on both the western and eastern extremities of the "Everglades," and quite a number in the southern portion. The concensus of opinion is, that while it would be possible to survey the "Everglades," that it is not practical to do so.

The maximum rate allowed for surveys in the State of Florida, is \$15, per mile for township lines, and \$12 per mile for section lines.

Capt. Newman in his affidavit estimates what the cost would be to survey that portion that is unsurveyed of the "Everglades," and puts it at \$30 per mile. This estimate is based upon the actual cost per mile in running the line that he surveyed across the "Everglades," starting in at Fort Shackleford on the west, and coming out at Miami on the east, and this cost did not include corner posts as would necessarily have to be done if the lands were surveyed by the government.

The affidavits also set out the fact that if the lands were surveyed, that the only way to successfully mark the corners would be by stone or iron corner posts, and in order to set them so that they would be of service, would be to have them of sufficient length to go through the muck formation that varies from five to twenty-five feet in depth, and let the post rest upon, or what would be better still, to drill a hole and imbed them into the rock foundation that underlies the whole country.

As to the surveying and segregating of such islands and bodies of water as would not pass to the State in accordance with the provisions of the swamp land grant of September 28, 1850, I think the affidavits show that an erroneous idea has existed as to the nature of the surface of the "Everglades," so far as there being *distinct bodies of water*, and islands of sufficient area to segregate.

It is estimated from the best information in possession of the surveying division of the General Land Office, that the unsurveyed portion of the "Everglades" embraces about 100 townships; in addition to these, there are about fifty townships on the borders and in the neighborhood of the "Everglades," that have been surveyed, so far as running the township lines.

From the best information I could gather, these are all swamp lands, but as my instructions covered only the unsurveyed portion, I did not take any affidavits as to their nature.

To sum up in a few words, the information gathered from the only source that is at all trustworthy (in a case of this kind), that is, from the men who have been through the country and are familiar with the conditions existing, I find that the "Everglades" are embraced in that class of lands known as swamp and overflowed lands; that while it would be possible to survey the lands, it is not practicable, and that no bodies of water or islands exist of sufficient area to segregate.

The act of September 28, 1850, 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 lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

In addition to the affidavits attached, I also present a few photographs which were taken in different places as the expedition of the South Florida Railroad progressed through the "Everglades."

The examination above mentioned was deemed proper by your office in view of the suggestions contained in departmental letter of January 30, 1894 (18 L. D., 26), which said letter was written in response to your office letter of a previous date transmitting a letter of S. I. Wailes, agent and attorney for the State of Florida, asking that the Department give immediate attention to the claim of said State under the swamp land act of September 28, 1850.

In said letter the opinion is expressed by the Department that patent under the grant of swamp lands may issue to the State of Florida, covering the Everglades, upon an estimated area and designated by metes and bounds excepting therefrom all islands and bodies of water not subject to the terms of the grant.

In order to make such exception operative it will be necessary to have each of said islands and bodies of water so excepted, segregated by survey so that they may be specifically identified by appropriate descriptions in the patent.

It is further said in departmental letter, *supra*,

The practical difficulty in the way can be obviated only by the segregation of such islands and bodies of water as would not pass to the State in accordance with the provisions of the act under consideration. The title to that portion of the Everglades which was swamp lands in 1850, has been in the State of Florida ever since the date of the swamp land act and a proper segregation of such lands therein as are not swamp land within the meaning of that act, will render such title perfect whether patent issues or not.

The segregation might be accomplished either by the State in the manner just mentioned or by the government or by both jointly, if a survey is practicable, if not, then the intervention of Congress must be sought in order to adjust the claims of said State.

In view of the report made by the principal clerk of surveys of your office, sent to make the examination hereinbefore mentioned, setting forth the fact that almost the entire body of lands within the "Everglades" is swamp land within the meaning of the act of 1850, and that there are no islands therein of any considerable area which should be segregated and reserved by the government, you are hereby directed to cause patent to issue to the State of Florida, covering the "Everglades," upon an estimated area designated by metes and bounds. You are further directed to give notice to the proper officers representing the State of Florida, to furnish your office with a meander survey giving the exterior metes and bounds of the "Everglades," accompanied by satisfactory proof that said meander line does not include within the marginal limits thereof any lands which do not fall within the description of swamp lands under the act of 1850, above mentioned.

When said State shall have complied with this last mentioned requirement you will cause patent to issue as above indicated.

MORROW ET AL., v. STATE OF OREGON ET AL.

Motion for review of departmental decision of December 19, 1893, 17 L. D., 571, and application for rehearing denied by Secretary Smith, October 10, 1894.

RAILROAD GRANT—ADJUSTMENT—TERMINAL.

WISCONSIN CENTRAL R. R. CO.

The proviso to the act of March 3, 1875, which authorized the company to straighten its road between Portage City and Stevens' Point, treats the grant as an entirety, and provides that no land shall pass to the company, under its grant, south of Stevens' Point which may be outside of the ten mile limits measured from the modified line; and to determine what lands should be thus excluded can only be ascertained by continuing the terminal heretofore established at Stevens' Point until it meets the twenty mile limits of the grant as originally established.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (F. W. C.)

I am in receipt of your letter of June 23, 1894, in which it is stated that the grant for the Wisconsin Central Railroad company is in process of adjustment in your office, and requesting instructions in the matter of the establishment of a terminal for the purpose of giving effect to the proviso to the act of March 3, 1875 (18 Stat., 511), which authorized the company to straighten its grant between Portage City and Stevens' Point in the State of Wisconsin.

The act of May 5, 1864 (13 Stat., 66), made a grant to the State of Wisconsin to aid in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond-du-Lac as the State may determine, in a north westerly direction to Bayfield and thence to Superior, on Lake Superior.

By the act of June 21, 1866 (14 Stat., 360), it was provided that the words "in a north-westerly direction" be construed to authorize the location of said road from the city of Portage by the way of the city of Ripon, and the city of Berlin to Stevens' Point, and thence to Bayfield and Superior, on Lake Superior.

The location was duly made in accordance with said act, upon which the limits of the grant were duly adjusted and the land withdrawn. The company, being desirous of shortening its line between Portage City and Stevens' Point, sought the consent of Congress for that purpose, which was granted by the act of March 3, 1875, *supra*, in which the following proviso occurs:

Provided, that no portion of the lands belonging to said grant situated south of Stevens Point and which may be found outside of the ten-mile limits, measured from the modified line of said road, shall pass to said company under its grant, but such lands shall revert to the United States, and become a part of the public domain, to be disposed of as other public lands, and the acceptance of the provisions of this act by said company shall be held to be a relinquishment of the same; and provided

further, that this act shall not be construed as increasing said grant, or as granting to said company any lands whatever.

Following the modified line in connection with the original location north-west of Stevens' Point, there is an entire change of direction at the last mentioned point, the road proceeding on the modified line in nearly a due north and south direction to Stevens' Point, where the old line proceeds in nearly an east and west direction.

For the purpose of carrying into effect the provisions in the act of March 3, 1875, above quoted, it appears that a terminal was established at Stevens' Point on the modified line south of that point, but it was carried only ten miles on each side of said point.

Your letter expresses the opinion that such terminal should have been continued to the twenty-mile limits established upon the old location, or that a terminal should also have been established at this point, upon the portion of the road north-west of Stevens' Point. By the latter course a wedge would have been formed which would exclude from the grant the lands north-east of Stevens' Point.

From a careful consideration of the matter, I am clearly of the opinion that the latter suggestion can not be adopted, for the reason that the grant provides for a continuous line, and the course suggested would in effect, be treating it as two grants; one from Portage City to Stevens' Point, and the other from the latter point north-westerly.

The language of the proviso seems to be plain. It treats the grant as an entirety and provides that no land shall pass to the company under said grant, south of Stevens' Point which may be outside of the ten-mile limits measured from the modified line.

To determine what lands are south of Stevens' Point and outside of the ten-mile limits upon said modified line, can only be ascertained by continuing the terminal heretofore established at Stevens' Point until it meets the twenty-mile limits of the grant as originally established.

It will be noted that such terminal will exclude from the grant, lands south-west of Stevens' Point, which would be embraced within the primary limits of the grant as adjusted to the portion of the road north-west of that point, but the language of the proviso is plain and such lands are clearly within the exclusion provided for by said proviso.

It might be noted that the company is permitted to acquire lands north-east of Stevens' Point by this adjustment, which are not coterminous with the road built north-west of said point, but would properly appertain to the portion of the grant south of Stevens' Point.

It might have been considered, therefore, that the lands excluded to the south-west of Stevens' Point were a partial exchange for those permitted to be acquired north-west of that point.

Whatever the purpose, the language of the proviso is plain, and can be carried into effect only by continuing the terminal heretofore established upon the modified line at Stevens' Point in the manner hereinbefore directed, and in the adjustment of this grant, you will be governed accordingly.

OWENS v. GAUGER.

Motion for review of departmental decision of January 10, 1894, 18 L. D., 6, denied by Secretary Smith, October 10, 1894.

RESERVOIR SITE—ACT OF MARCH 3, 1891.

RIO GRANDE DAM AND IRRIGATION CO.

In acting upon an application for the approval of a reservoir site, the General Land Office may properly insist on compliance with the circular requirement that monuments shall be placed as reference points for public survey corners that will be destroyed in the construction of the reservoir, even though such requirement may have not been in force when the maps were filed.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (F. W. C.)

I have considered the appeal by the Rio Grande Dam and Irrigation company from the action of your office taken in letter of May 18, 1894, returning certain maps of right of way, filed by said company under the provisions of the act of March 3, 1891 (26 Stat., 1095), for a reservoir site in the Las Cruces land district, New Mexico.

Said letter returns the maps and requires that certain corrections be made therein, and also that they be made to conform to paragraphs 22 and 23, of circular of February 20, 1894, 18 L. D., 168, which requires that monuments shall be placed as reference points for public survey corners to be destroyed by the construction and operation of a reservoir.

The appeal raises merely the question as to the right of your office to exact compliance with said paragraphs, such requirements not having been in force at the time of the filing of the maps.

Although no specific requirement may have existed at the time of the filing of these maps, requiring the placing of monuments, as described, yet the matter is a very important one, and in my opinion should be insisted upon.

As stated in your office letter, upon the approval of the maps the grant of the right of way became effective, and thereafter this Department might be unable to enforce compliance with the requirement in the matters stated.

The fact that no regulation existed covering this point, at the time of the filing of the maps under consideration, can in no wise influence the matter, as this Department might make any requirement deemed necessary under the peculiar circumstances in any case, prior to the approval of the map under which a right of way is claimed, and which is submitted for approval.

Your office letter states:

It would not require much time, or expense to make the required surveys and set the monuments. The number of monuments required is 13, within an extreme dis-

tance of six miles; the average length of lines of survey in order to place each of the monuments is not likely to exceed one mile. Allowing for the extreme of probable difficulty in running the lines, the work should be done in a week or ten days, while if no unusual difficulties are encountered, it could be done in two days.

Considering the importance of the requirement that these monuments be placed as reference points for public survey corners to be destroyed by the construction of a reservoir, in connection with the fact that the company would be put to but little expense and time in complying with the requirement, I sustain the action taken by your office, and direct that compliance with the same be insisted upon.

SWAMP LAND INDEMNITY CERTIFICATE—DUPLICATE.

STATE OF MICHIGAN.

A certified copy of the record of a swamp land indemnity certificate may be issued in lieu of the original, where satisfactory proof of the loss thereof is furnished.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (F. L. C.)*

In the matter of the application of the State of Michigan for a new or duplicate certificate, to replace swamp land indemnity certificate No. 7, alleged to be lost, your office was instructed by this Department on April 14, 1894, to advise the Commissioner of State Lands that the evidence of the loss of the original certificate was not regarded as sufficient to warrant the issuance of a duplicate or a certified copy of the original, and that if further action was desired by the State, more specific evidence of the loss of the certificate should be presented to your office, where it was to be first considered and then forwarded to the Department, with recommendation.

The Department is in receipt of your office letter of May 8, 1894, stating that the Commissioner of State Lands had been notified of the above departmental directions, and that the governor of the State had forwarded a statement, sworn to by the Commissioner of State Lands, and another by the chief clerk of his office, relative to the loss of said certificate.

Your office regards said statements as sufficient to show the loss of the original certificate, and recommends that a certified copy of the record of said original certificate, together with an additional certificate authorizing the local land office to accept such copy as a substitute for the original, be furnished the State.

With your said office letter are transmitted the sworn statements of the Commissioner of State Lands and the chief clerk of his office, together with such copy and certificate, for departmental consideration and approval.

After an examination, said papers are returned herewith, and authority is given your office to transmit the same to the governor of the State of Michigan to serve in lieu of the original certificate No. 7, in the manner indicated by your office certificate and order dated May 8, 1894.

TIMBER LAND ACT—CHARACTER OF LAND—SPECULATIVE ENTRIES.

UNITED STATES v. SEARLES ET AL.

The provisions of the act of June 3, 1878, contemplate the sale of land, the chief value of which is its timber, and where said timber is so extensive and dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.

In the investigation of a case where fraud is alleged against an entryman, proof of other acts of a similar nature, done contemporaneously, or about the same time, is admissible to show such intent.

Timberland entries made for speculative purposes are fraudulent and will be canceled.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (E. W.)

Edward J. Searles, and various other defendants, in cases in which the United States is plaintiff, have appealed from your office decision of June 12, 1893, in which you consolidated and tried said cases together, holding their various timber land entries for cancellation. The lands involved are located in the Vancouver land district, Washington, and will be hereinafter more specifically designated.

The case as presented by the record now before the Department is thus stated in your office decision:

In the latter part of 1892 and the early part of 1893 the following described timber land entries were made at your office, to wit:—

No. 2018, by Edward J. Searles for S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 8, T. 9 N., R. 1 W.

No. 2034, by John H. Stiffen for NE. $\frac{1}{4}$ Sec. 12, T. 9 N., R. 1 W.

No. 2035, by Alvin B. Hastings for NE. $\frac{1}{4}$, Sec. 18, T. 9 N., R. 1 E.

No. 2036, by Calvin C. Cornell for E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and lots 1 and 2, Sec. 18, T. 9 N., R. 1 E.

No. 2047, by Charles H. Harmans for E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 22, T. 9 N., R. 1 W.

No. 2048, by John Mangs for E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, T. 9 N., R. 1 W.

No. 2050, by George W. Taylor for SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 8, T. 9 N., R. 1 W.

No. 2077, Alleu A. Unekless for E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, T. 9 N., R. 1 W.

No. 2078 by James K. Misner for E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 6, T. 9 N., R. 1 W.

No. 2079 by Geo. M. Misner for W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 6, T. 9 N., R. 1 W.

No. 2148 by Mark Woods for E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 9 N., R. 1 W.

No. 2156 by William O'Reagan, for SW. $\frac{1}{4}$, Sec. 22, T. 10 N., R. 1 W.

No. 2158 by Maurice J. Gleason for NE. $\frac{1}{2}$ Sec. 34, T. 9 N., R. 1 W.

No. 2197 by M. C. Aten for lots 1 and 2 and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 18, T. 9 N., R. 5 W.

No. 2202 by Wilson Magee for NW. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 5 W.

No. 2204 by Edward W. Smith for W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 6 W.

- No. 2207 by Charles Beatner for E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 6 W.
No. 2214 by William Flinn for SE. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 5 W.
No. 2215 by George Smaldeon for SE. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 6 W.
No. 2223, by Edgar Meyers for NE. $\frac{1}{4}$, Sec. 26, T. 10 N., R. 3 W.
No. 2224 by Herman Boneisler for the SE. $\frac{1}{4}$, Sec. 12, T. 9 N., R. 6 W.
No. 2225 by W. S. Lafore for NW. $\frac{1}{4}$, Sec. 26, T. 10., R. 3 W.

June 25, 1883, the then register and receiver of your office addressed a letter to this office, in which they stated among other things, that

"we have reason to believe that one J. B. Montgomery of Portland, Oregon, has acquired title to a large quantity of timber land in this district by procuring parties to make the entries of same who do not pay for the land or have any interest in it further than to receive from said Montgomery compensation for their service in making such entries, that in fact said Montgomery pays for the land and the parties in whose names the receipts are issued at once convey the lands to him," etc.

Upon this information this office ordered investigations to be made concerning a large number of timber land entries in your district including those now under consideration. The special agent who made the investigation furnished separate reports in each of the above and other entries fully corroborating the facts and conditions, set forth in the letter from your office above referred to, and recommended the cancellation of said entries on the grounds (1) that the several tracts were agricultural in character and (2) that each of said entrymen made his entry "not for his own exclusive use and benefit" but in the interest and for the use and benefit of a person other than himself.

Thereupon said entries were held for cancellation and the usual notice and time given the entrymen to show cause why their entries should not be canceled. No response having been made to said notice by the first thirteen of the above named entrymen or their transferees their entries were canceled February 13, 1886.

March 15, 1890, J. B. Montgomery made application for a hearing concerning each of said canceled entries alleging that he had purchased said lands from the entrymen; that said entries were canceled without notice to him and that said entrymen failed to defend etc., and it appearing that said Montgomery had been entitled to notice of the proceedings against said entries in view of the suggestion in the special agent's report that Montgomery was the transferee of said lands, you were directed by this office May 16, 1890, to have a hearing as to each of said entries after due notice to all parties in interest.

It also appears that entries 2202 and 2214 of said list were canceled June 14, 1886, and August 13, 1886, respectively, and that upon the application of one W. W. Chapman an alleged transferee of the lands embraced in said entries, a hearing was ordered May 24, 1887. Both of these entries were reported to have been made in the interest of Montgomery and the lands were conveyed to his brother-in-law, T. T. Minor, although an adverse claim is asserted by said Chapman based on a conveyance from the entrymen. Inasmuch as this seeming conflict between transferees does not affect the character of the entries it is not deemed necessary to inquire into the motives or circumstances

of said transferees. The explanation of the special agent in his report may be correct, that "it was an effort to side track a fraud and reship it to a new consignee as an innocent purchaser as the other parties were near enough the factory to know that character of the goods" etc.

However, this examination being confined to the facts which relate directly to the nature of the entries the subsequent maneuvers in connection with the lands are immaterial. These two entries seem, therefore, to demand the same consideration which is to be given the other canceled entries above named.

The remaining seven entries, to wit: 2197, 2204, 2207, 2215, 2223, 2224 and 2225, were not acted upon until a later date when hearings were ordered in each of said cases.

It will be seen from the foregoing that all of said twenty-two entries were investigated under the same instructions; that they were all held for cancellation on the same charges and that hearings were ordered concerning all of them. It now appears that hearings have been held in all of said cases and that the records thereof have been received at this office. It furthermore appears from said records that these cases are very similar in all essential respects; that by stipulation between the parties the evidence in the Searles' case was largely used in the other cases and that the real party in interest is the same in all of them. In view of these facts it is deemed proper to consider all these cases in one decision without reference to the fact that some of these entries had been canceled while others remained uncanceled. A hearing being a proceeding *de novo* the same rules of practice and evidence are alike applicable in all these cases regardless of what had been done prior to said hearings.

It is observed that the bulk of the testimony submitted at the hearings, relates to the first charge made against these entries, namely, that "the land if cleared of timber would be fit for cultivation." Whether or not this charge was sustained by the evidence is not now a material question in view of the recent decision of the U. S. supreme court in the Budd case. Under that decision this charge must be dismissed for the reason that if true, it does not constitute a cause of action against a timber land entry.

It seems very clear from the evidence that these lands were subject to entry under the "timber and stone" act as the same is now understood and applied. It appears that these tracts are covered with dense forests of fir, cedar and hemlock timber and that the surface "is more or less cut up by deep gulches and ravines." These facts show the character of the land, when entered, and that the same was not only valuable for its timber, but entirely unfit for cultivation.

In the supreme court decision above referred to it was held that lands are not excluded by the scope of the act because in the future by large expenditures of money and labor they may be rendered suitable for cultivation. It is enough that at the time of purchase they were not, in their then condition, fit therefor. The statute does not refer to the possibilities of the future but to the facts of the

present. (It is further said in the decision referred to that) the chief value of the land must be its timber and that timber must be so extensive and so dense as to render the tract as a whole in its present state substantially unfit for cultivation.

The tracts in question seem to embody all these conditions. Your ruling, to the contrary, in the Searles case, was therefore erroneous while your action on the first charge in the other case was in conformity with the law as above construed.

The contention of counsel for defendants is, that the evidence introduced before the local officers, was insufficient, except in the cases in which Searles, Lafore and O'Reagan, respectively, were defendants, and that much irrelevant testimony was admitted and considered in the trial of said cases.

It seems that by agreement of the parties, certified copies of the evidence of Lafore, O'Reagan and Searles in the trial of the case of the latter, should be used in the trial of all the other cases, defendants reserving the right of objection on the ground that said evidence was incompetent, irrelevant, or immaterial.

The entries of Searles, Lafore and O'Reagan are very clearly shown to have been unlawful, but counsel for defendants contends that, under the rules laid down in the case of *United States v. Budd* (144 U. S., 154), there was not sufficient competent evidence adduced on the several other trials to justify the local officers in recommending cancellation of the entries involved therein.

Before considering the application of the rules in the Budd case, it will be proper to note the distinction between said case and that at bar. It will be remembered that patent had issued to Budd, and that he, himself, paid the purchase price of the land involved. The rules invoked and applied by the court in said case were such as are applicable in a court of equity, where it is sought "to set aside, annul, or correct a written instrument for fraud or mistake in the execution of the instrument itself." In such a case the evidence "must be clear, unequivocal and convincing." "A bare preponderance of evidence" would not be sufficient. It will be remembered also, that, in the cases now under consideration, patent has never issued; consequently, there is no written instrument assailed for fraud or mistake in its execution, and a decision therein based upon a preponderance of evidence can be maintained upon legal principles.

It is perhaps true that a portion of the evidence allowed by the local officers, was inadmissible, but the case will be considered in the light of what is regarded as competent testimony.

I note, just here, a significant circumstance, which was doubtless taken into consideration by your office, the fact that not one of the entrymen appeared to defend his entry against the charge of fraud set forth in the proceedings instituted by the government.

This circumstance, too, is another characteristic which distinguishes the case at bar from the Budd case, in that the defendant Budd,

appeared and answered, under oath, denying specifically the frauds charged.

Not having denied the charges of fraud under oath, the well-known maxim of law became applicable to the cases of the defendants, that "all evidence is to be weighed according to the proof, which it was in the power of one side to have produced, and in the power of the other side to have contradicted."

An applicant to purchase land under the act of June 3, 1878 (20 Stat., 89), must make oath "that he does not apply to purchase the same on speculation but in good faith, to appropriate it to his own exclusive use and benefit." In this connection I note the fact that not one of the entrymen appears to have appropriated the land involved in his entry to his own exclusive use and benefit, a circumstance that might properly be considered as tending to impeach the good faith of an entryman at the time of making his application.

The testimony of O'Reagan, used in the trial of the cases, is substantially as follows:

Sometime in April, about the year 1883, William A. Freeman came to my place of business and asked me if I wanted to make \$50. I said yes, and asked him how. He said George Misner is taking men over to Vancouver to take up lands for J. B. Montgomery and said you had better go round and see him about it, if you want to go over. I saw Misner and he said he was making up a party to go over the following week, I believe. I asked him if there was any thing crooked about it; if it was all straight, he said "no," a man taking an entry simply forfeits his future right in making another entry, and that the oath was simply a matter of form. We came over here. I don't remember the date; there were, I think, eight in the party; we came to the land office and were given a slip of paper with a description of the land we were expected to file on. I went to the register and told him I wanted to file on this piece of land; he asked a number of questions, I forgot just exactly what further than if I had ever been over this land; I told him no, but our agent had. That is all I remember, except in taking the oath.

Ques. Had you arranged with any agent to visit the land in your behalf?

Ans. No, I had not.

Ques. State whether the land office fees and the cost of proving up on the land were paid by you?

Ans. No.

Ques. By whom were they paid?

Ans. I don't know, but think by Mr. Misner.

Ques. Did you give your note or other obligation representing the amount of money paid?

Ans. No.

Ques. What expense, if any, in connection with filing, examining the land and final proof was paid by you?

Ans. None.

Ques. Are you acquainted with George F. White, Robert Rockwell, who were final proof witnesses in this case?

Ans. No.

Ques. Did you authorize them to appear as final proof witnesses in your case?

Ans. No.

Ques. Did you again visit the land office when final proof was made, or have you knowledge of the time at which it was made, or the circumstances under which it was made?

Ans. I have not.

Ques. What knowledge have you of others aside from the eight you have spoken of, who made entry the same day as yours, and under the same circumstances?

Ans. I know there were others here, but I do not know whether they entered or not.

Ques. I hand you a certificate from the Commissioner of the General Land Office, dated Nov. 19, 1891, showing what cases George F. White, who was a final proof witness in your case, appeared as final proof witnesses in, and ask you to state who of the parties therein named, were of this party who made entry at the time yours was made and under the same circumstances?

Ans. W. A. Freeman, Chas. Woods, Alexander Lothian, Joseph Hugh, M. J. Gleason, E. Simpson, Alexander Caderly, A. A. Uncle, J. K. Misner, G. M. Misner, and T. F. Daly.

Ques. State what sum it was agreed you should receive for making this entry, and whether the entry was made and a deed given in accordance with that agreement?

Ans. I was to receive \$50, and did receive \$50, and signed the deed as per agreement.

Ques. Was this agreement made before filing upon the land?

Ans. Yes.

The evidence of Lafore as to his own entry was about the same as that of O'Reagan.

E. J. Searles testified, in substance, as follows:

That George F. White, representing himself to be the agent of J. B. Montgomery, made an arrangement with the witness to pay him (the witness) \$125.00 to make a timber land entry; that the entry (No. 2018) was accordingly made and J. B. Montgomery took a deed from him and paid him the \$125.00 the same day final certificate was issued.

Osgood Bullock testified that Montgomery and White came to him in October, 1882, and offered him \$100 and all expenses if he would make an entry of a tract of which they had the numbers and saw him three different times on the same subject.

Basil Latham testified that he was employed by the agent of J. B. Montgomery in October, 1882, to make a timber land entry, "was given the numbers of the land, gave them to the register who made out the required papers for me, and I signed my name to them;" did not read the affidavit nor hear it read; there were ten others who made entries at the same time and under the same circumstances; could not remember all their names; was paid \$40, when he made the entry and \$10, more when he made the deed to Montgomery.

It will be observed that O'Reagan in addition to showing the unlawful character of his own entry, testified also that the entries of M. Woods, M. J. Gleason, A. A. Unckless, J. K. Misner, and G. M. Misner, were made in the same manner and under the same circumstances as that of witness. The five last mentioned entries, together with those of Searles, Lafore and O'Reagan, are shown not to have been made for the exclusive use and benefit of the applicants, but for speculative purposes.

It is insisted by counsel for defendants, that the testimony in any one of these cases is not competent in a case involving a different transaction and cites the Budd case in support of his contention.

In discussing the application of this principle in the Budd case, the court, in commenting upon the testimony of Searles in that case, says:

If it be conceded that this testimony as to another transaction be competent in this case, and there be put upon the testimony the worst possible construction against Montgomery, to the effect that he made a distinct and positive agreement with Searles for the purchase of a tract which the latter was to enter and obtain from the government, and so a transaction within the exact denunciation of the statute, still that testimony only casts suspicion on the transaction in question here, and suggests the possibility of wrong in it. Because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has done like wrong at other times and in other transactions.

It seems that the court does not repudiate the doctrine under discussion, but rather considers its effect when applied to the case then under consideration.

Mr. Justice Brown, in his dissenting opinion in the Budd case, states the principle very clearly and forcibly in these words:

But it is a familiar rule that where a particular act is equivocal in its nature, and may have been done with fraudulent intent, proof of other acts of a similar nature done contemporaneously or about the same time are admissible to show such intent. Cases of fraud are recognized exceptions to the general rule that the commission of one wrongful act has no legal tendency to prove the commission of another. Such other acts always have a bearing upon the questions of fraudulent intent or guilty knowledge where they are in issue. Thus, a single act of passing counterfeit money is very little, if any, evidence that the party knew it was counterfeit, since the innocent passing of such money is an every-day occurrence; but if it be shown that the person accused made other attempts to pass the money at or about the same time, or that he had other counterfeit money in his possession, the proof of scienter is complete. The same rule is frequently invoked in cases of alleged frauds upon the government. It was applied by this court in *Castle v. Bullard*, 23 How., 172, to a case where the defendants were charged with having fraudulently sold the goods of the plaintiff; in *Lincoln v. Claffin*, 7 Wall., 132, to an action for fraudulently obtaining property; and in *Butler v. Watkins*, 13 Wall., 456, to an action for deceit in endeavoring to prevent a patentee from using his invention. The authorities are fully reviewed in *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S., 591, a case where a policy of life insurance was alleged to have been obtained for the purpose of cheating and defrauding the insurance company, and evidence was admitted that policies in other companies had been obtained with like intent.

I make the above quotation from the dissenting opinion of Justice Brown, because it does not seem to be inconsistent with the opinion of the majority of the court, in so far as the doctrine under discussion is concerned.

I hold it to be sound principle, therefore, and not inconsistent with the rulings in the Budd case, that in the investigation of a case, where fraud is alleged against an entryman, proof of other acts of a similar nature done contemporaneously or about the same time, is admissible to show such intent.

There is still another aspect of this case, which may be properly considered, that does not exist in the Budd-Montgomery case. The statute of 1878, provides that an applicant to purchase under said act must make oath "that he does not apply to purchase the same on speculation."

In the proceedings initiated by the government against the various entries now under consideration by the Department, the investigation of fraud is not limited to the inquiry as to whether there was a prior agreement to sell to Montgomery, as soon as final certificate could be obtained. If these entries were made for purposes of speculation, it is immaterial whether there was or was not a prior agreement to sell.

This view is supported by the rulings of the Department in the case of *United States v. Bailey et al.* (17 L. D., 468). In that case the allegations of fraud are similar to the allegations in the cases now before the Department. In the Bailey case it is said:—

To entitle one to make a timber land entry and purchase he is required to make oath: First, that he does not apply to purchase on a speculation, but in good faith to appropriate the timber to his exclusive use and profit; and Second, that he has not directly or indirectly, made any agreement or contract in any way or manner, with any person or persons, by which the title which he might acquire from the United States, should inure, in whole or in part to the benefit of any person except himself.

These requirements of the oath are separate and distinct. The entryman could comply with one and violate the other, and a violation of either requirement would defeat the entry.

Counsel for defendants points out that Montgomery has no connection with certain of the entries involved in this investigation, inasmuch as they, eight in number, were sold to one T. T. Minor. His contention is, since the charges of fraud as to all the entries are predicated upon the allegation that they were each made for the benefit of Montgomery, all cases except such as Montgomery has an interest in, would be considered in a separate investigation.

This contention would be just, if the present inquiry was limited to the question of prior agreement, but as has been hereinbefore shown, if such entries were made for speculative purposes, it is not material to inquire whether they were sold to Montgomery or not.

All of the entries now under investigation by the Department, are assailed upon the common ground that they were fraudulently made for speculative purposes.

It is not improper just here to note the significant fact that not only did the entrymen in the various entries make default when called upon to answer the charge of fraud, but that both Montgomery and Miner were silent. This is doubly significant when it is considered that the transferees in most cases held warranty deeds executed by the entrymen, thus fixing the obligation upon the entrymen to defend the title of the transferees. If all the defendants, both entrymen and transferees, had appeared at the various trials and had made specific denials under oath of the various allegations of fraud, it would have been exceedingly difficult for the government to have overcome such evidence.

Fraud will not be presumed, but being subtle in its nature, slight circumstances will justify the inference of its existence.

I concur in the conclusion arrived at in your office decision, which was an affirmation of the decision of the local officers, to the effect that all the entries hereinbefore enumerated were made for speculative purposes and are therefore fraudulent.

Your decision is therefore affirmed.

ATTORNEY—COMPROMISE—TOWN LOT.

JAMES v. KOONS.

The right of an attorney to bind his client in the compromise of a case will not be recognized, in the absence of specific authority therefor.

The continuity of the occupancy of a town lot is not broken by absences caused by the illness of the claimant and the condition of his family.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (W. F. M.)

On September 9, 1890, David P. James made application to townsite board No. 2, assigned to Oklahoma City, for deed to lot 10, block 21, claiming to have entered upon and taken possession of said lot on June 28, 1889, at a time when there was no other claimant, except as will appear in the further statement of the controversy. On October 4, 1890, George W. Koons also made application for deed to the same lot, alleging himself to be the true and lawful occupant thereof, and the first and only settler thereon.

A hearing was had before the board to determine the rights of these claimants, and the lot was awarded to Koons. The cause is now before me on appeal from the decision of your office affirming that award.

Since the case has been pending here an instrument, denominated "a confession of appeal," has been filed by Ledru Guthrie, representing himself to be the attorney of George W. Koons, wherein it is set out that the parties to the controversy, having agreed to settle and compromise the matter in issue between them, have agreed that Koons shall confess the appeal of said James, and this Department is requested to instruct the townsite board to make said James a deed to said lot, and to that end and in part performance of the settlement this Department is authorized to enter a confession of the appeal taken by James and to close the case against Koons.

This is a novel proceeding, and presents a novel question, but my view of the nature of the instrument itself renders it unnecessary to discuss it. It will be observed that it does not purport to bear the signature of the party in interest, but only that of his counsel, and the preliminary question is presented whether or not the latter possesses the authority under his general employment or retainer, and, in the absence of specific authority, to bind his client for the purpose stated.

Its purpose is clearly to carry into effect a compromise, which is represented to have been compounded between the parties, but there is no evidence of that compromise or the terms thereof in the record, no record authority of the attorney to act for his client in the matter, and if he be permitted to so act at all, it must be in pursuance of his general retainer.

I do not think the general power of an attorney carries with it so great authority.

The attorney has generally, by virtue of his retainer, authority to do only those acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. Weeks on Attorneys at Law, page 382. . . . Attorneys can not waive substantial rights of the client without the latter's consent. *Ibid.*

In the federal courts an attorney can not give a release or discharge the cause of action, though he has exclusive control of the remedy, and may continue or discontinue it. Weeks on Attorneys at Law, page 386, and authorities there cited.

Early in the century the supreme court of the United States, through Chief Justice Marshall as its organ, decided that while an attorney at law, as such, has authority to submit to arbitration, he has no right, strictly speaking, to make a compromise for his client. *Holker et al. v. Parker*, 7 Cranch, 436. And this ruling has been generally followed by the courts of the several States.

My conclusion is, therefore, that in the absence of special authority to bind his client, the instrument filed by the attorney of Koons can not be given any effect. On the merits of the case I find that Koons was the first occupant of the lot in controversy, that he placed improvements on it, and that his subsequent absence and apparent abandonment are accounted for by the condition of his family and of his own health for some months subsequent to the date of his departure from Oklahoma. I am impressed that he went upon the lot in good faith, with the purpose of acquiring title thereto under the law, and that his apparent laches were brought about by circumstances over which he scarcely had control.

On the other hand, it is conclusively shown that James first took possession of the lot and the building placed thereon by Koons as the tenant of the latter, and he occupied, constructively, that relation during the entire time of his possession.

The decision of your office is, therefore, affirmed,

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

JOHNS v. JUDGE ET AL.

The sale of a soldier's additional homestead right, and attempted transfer thereof by power of attorney to locate the certificate of said right, is made good in the hands of the purchaser by the act of August 18, 1894, and such purchaser is accordingly entitled to the possession of the certificate.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (F. L. C.)*

I have considered the appeal filed in behalf of J. H. Moores, as attorney in fact for Ellen Johns, from your office decision of January 31, 1893, in the matter of her soldier's additional certificate. The case as now before the Department arises as follows:

In 1882, your office issued to Ellen Johns, as widow of a deceased soldier, a certificate of right to make an additional homestead entry of one hundred and twenty acres of land under the provisions of section 2306 of the Revised Statutes of the United States.

In 1886, Moores, under a power of attorney from Johns, applied to locate said certificate and make entry of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 23, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 25, all in T. 48, R. 41, Marquette, Michigan. This resulted in litigation because of adverse claims to the land, the details of which need not here be recited, further than to say that while proceedings were pending in this Department on appeal, Johns filed her relinquishment of all right, title and interest in and to said land as applied for under her soldier's certificate.

Acting in the light of said relinquishment, the Department, by decision of April 9, 1892, found it unnecessary to pass upon the merits of the case as between Ellen Johns and opposing claimants, but directed the cancellation of her claim to the lands covered by her application to enter.

A motion for review having been filed, the Department by decision of August 23, 1892, adhered to the action taken in the previous decision of April 9, 1892.

It appears that the relinquishment above mentioned was filed by Johns without the intervention of Moores, who had made the location as her attorney in fact, and that she at the same time discharged said Moores as her attorney.

The decision on the motion for review held, among other things, that the right of Mrs. Johns to make this entry being a personal one, she undoubtedly had the right to relinquish. Her right in the first instance to make entry, whether in person or by attorney, was pending on appeal in this Department, and had not been finally passed upon when her relinquishment was filed, and a relinquishment by her attorney, whom she appears to have discharged, was not necessary to give validity to her action.

Your office decision before me on appeal states that the departmental decision from which the above quotation is made

was promulgated by letter "H" of September 7, 1892, the case finally closed, and the attorneys of the parties in interest notified that Ellen Johns' certificate would be delivered to Messrs. Copp and Luckett, said Johns having designated said firm to act for her, unless objection was made within twenty days from receipt of notice thereof.

Mr. J. K. Redington, as representative of J. H. Moores, filed objection to the delivery as above directed.

Your office held that "the execution of a power of attorney to locate a soldier's additional entry does not convey to the attorney such a vested right in the subject-matter as to deprive the party of the right to revoke such power," citing *Johns v. Judge and Barber*, decided by the Department, on review, August 23, 1892, and overruled the objection. From this action the appeal under consideration was brought.

The certificate of right issued to Ellen Johns, under the provisions of section 2306 of the Revised Statutes, is in the record before me, it having been filed in the local office by Moores, as attorney in fact for Johns, at the date of application to enter, and comes up with the papers in the course of proceedings in the case.

The appeal sets out seven specifications of error, which need not here be recited in full. It is sufficient to say that they are embodied, substantially, in the following:

1. It was error not to hold that the power of attorney from Johns to Moores was a power coupled with an interest, and conveyed such a vested right in the subject-matter as to render the power irrevocable.
2. It was error not to hold as a corollary to the above that the certificate of the right to locate, issued in the name of Ellen Johns, should be delivered to Moores as her attorney in fact, and not to her through Copp and Luckett.

Condensed still more, these propositions resolve themselves into the single question: Who is entitled to the possession of said certificate of right?

The case has been fully argued, both orally and by brief. Since said argument there has been legislation by Congress which seems to have a bearing upon the case as presented.

The act of August 16, 1894, entitled: "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," provides, *inter alia*:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or trans-

ferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

It is admitted on the part of Mrs. Johns that her additional homestead right was sold and that she received for it \$200.

It appears that one King, who was her legal adviser, sold said right for \$300, and gave her \$200 of the proceeds, retaining as his fee \$100. Subsequently, upon further information as to the value of her right, she filed the relinquishment of all claim to the land covered by the attempted location by Moores as her attorney in fact, which relinquishment also contained words of revocation of the power to Moores to further represent her.

In view of the recent law above quoted, I find it unnecessary to pass upon the question raised by the appeal as to the character of the power, whether revocable or not, and as to the effect of the revocation.

There can be no doubt, I think, that the power given to Moores, through one Crane by substitution, was the result of attempted sale and transfer of the right, for which Johns accepted consideration. Moores being the purchaser for value, the right must, under the law above quoted, be held to be good in his hands. It follows that he is entitled to the return of the evidence of that right, to wit, the certificate which was filed by him in connection with the application to locate on the land herein described.

For the reasons given, your office decision is reversed.

RAILROAD GRANT—CITIZENSHIP—NATURALIZATION—SETTLEMENT.

JONES *v.* SOUTHERN PACIFIC R. R. CO.

Evidence of voting will raise a presumption of citizenship, as fraud on the part of the voter is not to be presumed.

Mexicans residing in California at the time of its cession to the United States, and remaining therein, became citizens of the United States under the eighth article of the treaty of cession, if they did not, within one year thereafter, declare their intention of retaining Mexican citizenship.

Land embraced within the claim of a qualified settler, at the date a railroad grant becomes effective, is excepted by such claim from the operation of the grant.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (J. L. McC.)

I have considered the case of Hugh S. Jones *v.* The Southern Pacific Railroad Company, on appeal of the latter from your office decision of October 12, 1888, awarding to the former the right to file pre-emption declaratory statement upon the N. $\frac{1}{2}$ of Lots 6 and 7, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. 12 S., R. 8 E., San Francisco, California, land district.

The land lies within the twenty miles (primary) limits of the grant of July 27, 1866 (14 Stat., 292), to the Southern Pacific Railroad Company, as shown by the map of designated route, filed January 3, 1867.

On October 19, 1887, Hugh S. Jones applied to file declaratory statement for said tracts, alleging settlement September 21, 1887, and at the same time filed affidavits alleging that said tract was settled upon and occupied prior to the date of the filing of map of definite location, by one Juan Lopez. Upon this application your office, by letter of November 5, 1887, ordered a hearing, and directed that inquiry be made as to the date of Lopez' settlement, the duration of his residence, the nature and extent of the cultivation and improvements made by him, and his entire connection with the land, for the purpose of determining its status at said date of definite location.

Pursuant to said instructions, a hearing was had before the local officers, who found that the land was at the date of definite location occupied and improved by said Lopez, *bona fide* settler, whose improvements amounted to \$1,000. Your office, by letter of October 12, 1888, affirmed the ruling of the local officers, and held that said land was excepted from the operation of the grant to the Southern Pacific Railroad Company.

From the evidence in the case, there can be no question that the tract in controversy was occupied by Lopez long prior to the time when the right of the company attached, and that he had to some extent cultivated the same (using it principally, however, for grazing purposes), and made valuable improvements.

If Lopez was qualified as an entryman, the tract in question would have been excepted from the grant; but when occupancy, cultivation and improvements are relied upon as the ground of such exception, it must affirmatively appear that the settler was qualified to make entry of the same. (*Northern Pacific R. R. Co. v. McCrimmon*, 12 L. D., 554; *Irvine v. Northern Pacific R. R. Co.*, 14 L. D., 362.)

There is no direct evidence relative to his naturalization. The testimony shows that he voted at several elections in California, after its admission as a State. If he was not a citizen, such voting would be in fraud of the law; and as fraud is never to be presumed, the presumption is that he was a citizen. In addition to this presumption, the testimony affords explicit evidence that he was "a native Californian;" born in California about 1828, before that region was ceded to the United States. He therefore comes within the provisions of the eighth article of the treaty of Guadalupe Hidalgo, which deals with the status of persons residing within the ceded limits (9 Stat., 922-929), which reads as follows:

Those who shall prefer to remain within the said territory may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from

the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

The question arises whether the provision that they "shall be considered to have elected to become citizens," is equivalent to saying that they shall "be considered citizens" of the United States.

The United States Supreme Court, in the case of *Boyd v. Thayer*, says (143 U. S., 135, 162, 169):

Manifestly the nationality of the inhabitants of a territory acquired by conquest or cession becomes that of the government under whose domain they pass, subject to the right of election on their part to retain their former nationality, by removal or otherwise Instances of collective naturalization by treaty or by statute are numerous By the eighth article of the treaty with Mexico, of 1848, those Mexicans who remained in the territory ceded, and who did not declare, within one year, their intention to remain Mexican citizens, were to be deemed citizens of the United States.

The decision of your office, rendered October 12, 1888, affirms that of the local officers, who found from the evidence submitted at the hearing—

That the land in contest has been continuously occupied since the year 1855, and that there have been valuable improvements thereon since that time; that on January 3, 1867, the land was occupied by a *bona fide* settler, and consequently was not affected by the grant to the Southern Pacific Railroad Company.

After a careful examination of the record and the testimony, I find no reason for disturbing said decision, and the same is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

JENKINS ET AL. v. DREYFUS.

The right of purchase under section 5, act of March 3, 1887, is not defeated by an adverse application to enter made after the passage of said act, nor by an application to enter pending at the passage of said act under which no settlement right is alleged.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, T. 4 S., R. 67 W., Denver land district, Colorado.

The record shows that this land is within the limits of the grant to the Union Pacific Railway Company and that the road was definitely located on May 26, 1870.

One Daniel T. Lord filed his pre-emption declaratory statement for the tract described on September 4, 1866, alleging settlement on that day.

May 16, 1882, the Union Pacific Railway Company selected the NE. $\frac{1}{4}$ of said Sec., township and range, but no patent has been issued for the land in question.

January 24, 1887, Solomon Dreyfus applied to make homestead entry of the land, and upon a refusal to allow the same, applied to your office.

On April 3, 1888, Henry Jenkins also applied to make homestead entry for this tract, and being refused, he likewise appealed.

July 24, 1890, James Tynon applied to make proof of his right to purchase this land under Sec. 5, of the act of March 3, 1887.

November 24, 1890; a hearing was had to pass upon the merits of case thus raised, and the local officers rendered their decision in favor of Solomon Dreyfus, and upon appeal, your office decision of November 5, 1892, sustained the finding below. From that decision the Union Pacific Railway Company, James Tynon and Henry Jenkins filed appeals.

The act under consideration here is found in the 24 Stat., page 556, and Sec. 5, thereof is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being co-terminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon, patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section, which, at the date of such sales, were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupations have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon, subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same, as aforesaid, shall be entitled to prove up, and enter, as in other like cases.

The appellant, Henry Jenkins, has no standing here, as his application to enter was made subsequent to the passage of this act. *Union Colony v. Fulmele, et al.* (16 L. D., 273).

The pre-emption filing of Daniel T. Lord excepts this land from the railroad company's grant.

In *Malone v. Union Pacific Railway Company*, (7 L. D., 13) the rule was laid down, that a railroad company is precluded from inquiry into the validity of claims existing within its granted limits at date of definite location.

And in the *Union Pacific Railway Company v. Haines*, (9 L. D., 595) it was held that an unexpired pre-emption filing, of record at definite location, raises a *prima facie* presumption of the existence at that time, of a pre-emption claim, sufficient to except the land covered thereby from the operation of the grant. The only question now at issue, is the rights of Solomon Dreyfus and James Tynon.

The Platte Land Company purchased the land in controversy, from the Union Pacific Railway Company, on April 18, 1882, and sold it to J. B. Cozad in 1886, but no deed was made to him, and he gave a quit claim deed to James Tynon on September 29, 1887, and on the same day, the Platte Land Company executed a deed to Tynon, and in the deed from the Platte Land Company to Tynon, the following appears:

This deed is made with the understanding that should the title to the NE. $\frac{1}{4}$, Sec. 33, T. 4 S., R. 67 W., prove defective, the first party will refund second party one-fourth price herein paid, and second party agrees to accept the same to relieve the first party from all obligations in the premises.

It is shown by the evidence that Solomon Dreyfus never established a residence upon the land, and the question now at issue is whether he is entitled to secure title to the land in issue under the second proviso of Sec. 5, of the act. This question has been passed upon by the Department in the case of *Sethman v. Clise* (17 L. D., 307), the syllabus of which is as follows:

The right of purchase under section five act of March 3, 1887, accorded to *bona fide* purchasers of the land who have the requisite qualifications in the matter of citizenship is not dependent upon the qualifications of the immediate grantee of the company.

The right of a qualified transferee to purchase under said section is not affected by the fact that his purchase was made after the passage of said act, if the land was originally purchased in good faith from the company.

A claim resting upon an application to enter is not protected under either of the provisos to said section as the terms thereof provide only for the protection of settlement rights.

And again in the *Union Pacific Railway Co., v. Norton* (idem., 314), it was held—

The right of purchase under section five act of March 3, 1887, is not defeated under the first proviso to said section, if, at the date of the sale by the railroad company, the land was not in the *bona fide* occupation of the adverse claimants under the pre-emption or homestead laws, nor under the second proviso by an application to enter under the homestead law on behalf of one who does not allege a settlement right.

The cases cited are sufficient to show that, there having been no settlement of the land by Solomon Dreyfus, his mere application to enter will not defeat the rights of Tynon, and he will be allowed to purchase, upon making the proper proof. It thus follows that your office decision was in error, and the same is hereby reversed.

SOLDIERS' DECLARATORY STATEMENT—AGENT.

JOHN BENHAM.

One who files a soldier's homestead declaratory statement, and entrusts the selection of the land to an agent, is bound thereby, and disqualified to exercise the homestead right on another tract.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (J. L. McC.)

John Benham, on May 19, 1892, filed soldier's declaratory statement

for the NE. $\frac{1}{4}$ of Sec. 5, T. 13 N., R. 15 W., Oklahoma City land district, Oklahoma.

He afterward applied to make a second homestead entry, naming the NW. $\frac{1}{4}$ of Sec. 11, same township and range. Your office rejected said application.

He appeals to the Department, setting forth that the land was selected for him by an agent; that said land turned out to be "entirely worthless for any purpose of agriculture;" and he contends that your office was in error in holding, "inferentially, that it requires the same showing of diligence to restore a homestead entry lost by the filing of a soldier's declaratory statement that it would take to restore a right exhausted by a homestead entry, for the reason that the right to file a soldier's homestead does not presuppose the actual presence of the homesteader upon the land in person prior to the filing of his soldier's declaratory statement." He contends further that the statute does not, in the case of a soldier's declaratory statement, "presuppose an inspection of the land;" and that as he has made extensive and valuable improvements on the land applied for as a second homestead, for which, moreover, there is no adverse claimant, "the regulations of the Department ought not to be applied with unbending severity."

If a person filing a soldier's declaratory statement entrusts to an attorney the selection of the land for which he files, he is bound by that selection. The applicant in the case at bar, having, by his attorney, selected a tract and filed for the same, the exercise of the homestead right a second time would be as illegal as if he had himself made choice of the tract filed for. (See *Stevens v. Ray*, 5 L. D., 133, and other cases since.)

The decision of your office is correct, and is hereby affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—SETTLEMENT.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. KESLIK.

An indemnity withdrawal for the benefit of the Northern Pacific grant is in violation of the terms of said grant, and is ineffective as against an authorized withdrawal, covering the same lands, on behalf of another grant.

No rights, either legal or equitable, are acquired by settlement on lands included within an authorized indemnity withdrawal.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894.* (F. W. C.)

I have considered the appeal by Thomas Keslik from your office decision of September 3, 1889, sustaining the action of the local officers in rejecting his homestead application for the NE. $\frac{1}{4}$, Sec. 7, T. 130 N., R. 36 W., St. Cloud land district, Minnesota, for conflict with the prior application made of said land on account of the grant for the St. Paul, Minneapolis and Manitoba Rwy. Co. (St. Vincent Extension).

The tract in question is within the indemnity limits common to the grants made to aid in the construction of the Northern Pacific R. R. Co. and the St. Paul, Minneapolis and Manitoba R. R. Co. (St. Vincent Extension).

A withdrawal was made of the land on account of the first mentioned grant in January, 1872, but such withdrawal is held to have been made in violation of the provisions of the act making the grant for said company, and was therefore of no effect, except to mark the limits within which selection might be made on account of said grant. *Northern Pacific R. R. Co. v. Miller* (7 L. D., 100), *Jennie L. Davis v. Northern Pacific R. R. Co.* (19 L. D., 87).

The withdrawal on account of the St. Vincent Extension of the Manitoba grant was made February 15, 1872, at which date the land was, so far as shown by the record, free from adverse claim and was therefore included within said withdrawal.

The Manitoba company selected the land on account of its grant July 31, 1884.

The present case arose upon an application by Keslik to make homestead entry of the land tendered on August 14, 1885, in which settlement was alleged in January, 1881. Said application was rejected by the local officers for conflict with the selection on account of the Manitoba grant, which is sustained by your office decision; from which an appeal is taken to this Department.

In said appeal it is urged that the withdrawal made on account of the grant to the Northern Pacific R. R. Co. was sufficient to except the land from the withdrawal made at a later date on account of the Manitoba grant, and as settlement is alleged by Keslik prior to selection by the Manitoba company, that a hearing should be ordered for the purpose of determining the status of the land at the date of said company's selection.

The question as to the effect of the withdrawal for indemnity purposes on account of the grant to the Northern Pacific R. R. Co. has several times been considered by this Department, and, as before stated, has been held to have been made in violation of the law and therefore illegal, and the only purpose served thereby was to mark the limits within which selection might be made on account of said grant.

In view thereof, I must hold that the land was properly withdrawn on account of the grant for the St. Vincent Extension, a withdrawal for which was authorized by statute and which continued in force until restored in May, 1891. No rights therefore, either legal or equitable, as against said grant, could be acquired by a settlement made upon the land during the continuance of said withdrawal. *Shire et al. v. St. Paul, Minneapolis and Omaha Rwy. Co.* (10 L. D., 85), and as selection was made on account of the Manitoba grant prior to the revocation of the indemnity withdrawal, such withdrawal was a bar to Keslik's application, and your office decision sustaining the rejection of the same is hereby affirmed.

WOODS ET AL. v. BRADLEY.

Motion for review of departmental decision of April 16, 1894, 18 L. D., 455, denied by Secretary Smith, October 10, 1894.

STATE SELECTION—ACT OF SEPTEMBER 4, 1841.

CAMPBELL v. JACKSON (On Review).

The location of lands granted to the States by the act of September 4, 1841, was expressly restricted to lands not "reserved from sale by any law of Congress," and, it therefore follows that land embraced within a statutory withdrawal for the benefit of a railroad grant, is not subject to such location; nor will the relinquishment of the company of its interest under said grant, operate to remove the reservation created thereby so as to render such land subject to location as public land.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (F. L. C.)

I have considered the motion filed on behalf of Henry Jackson, in the case of Mary J. Campbell v. Henry Jackson, involving the NE. $\frac{1}{4}$, Sec. 21, T. 21 S., R. 10 E., M. D. M., San Francisco land district, California, for the review of departmental decision, dated October 17, 1893 (17 L. D., 417), in which decision it was held that lands within the primary limits of a railroad grant, and withdrawn for the purposes thereof, are not subject to selection under the grant made to the State of California by the eighth section of the act of September 4, 1841 (5 Stat., 453). This land was within the primary limits of the grant made by the act of Congress approved July 27, 1866 (14 Stat., 292), to aid in the construction of the Southern Pacific Railroad.

The company failed to build its road opposite to the land in question, and the grant appertaining to the unconstructed portion of this road was forfeited by the act of September 29, 1890 (26 Stat., 496).

On February 4, 1890, Henry Jackson tendered the location of school land warrant No. 320, issued by the State of California, for one hundred and sixty acres, under the said act of September 4, 1841 (*supra*), upon the land in question, which application was forwarded by the local officers to your office for consideration, with register and receiver's letter of April 30, 1890.

By your office letter "K" of September 5, 1890, the application of Jackson in question, together with other applications to locate warrants, was considered and was accepted and permitted to go to record, "subject to future examination and adjudication."

On April 19, 1892, M. J. Campbell applied to make homestead entry of this land, alleging residence and occupation since May 10, 1891. Her application was rejected for conflict with the location by Jackson and from that action she appealed to your office. Your office decision

of September 6, 1892, affirmed the action of the local officers, and the case was further prosecuted to this Department, resulting in a decision of October 17, 1893, for the review of which the present motion is filed.

In the departmental decision just referred to it was held that these lands were reserved under the law of Congress making the grant for the company, from the time of the withdrawal upon the filing of the map of the location by the company, to the date of the passage of the act of forfeiture, which latter date was subsequent to the tender of the warrant location and its acceptance by your office.

For this reason it was held that the land was not subject to the location; your office decision was reversed and you were directed to permit Mrs. Campbell to make entry of the land as applied for.

In the motion for review it is alleged that, accompanying Jackson's application to locate the tracts in question was a relinquishment by the Southern Pacific Railroad Company of all right, title, interest and claim by said company under its grant to the land in question. This fact was not set forth in your office decision, nor was it referred to in the decision of the Department now under review.

Upon inquiry at your office I learn that such is the fact; that accompanying Jackson's application was a relinquishment, dated August 24, 1889, by Jerome Madden, land agent for said Southern Pacific Railroad Company, of all of its right, title, and claim in and to the land in question.

It would thus appear that Jackson procured from the land commissioner of the railroad company a waiver or relinquishment of its right or claim under the grant of 1866, and presented the same with his application to locate school warrant upon the tract in question.

The contention of counsel seeking the review is, that said relinquishment removed all bar to the selection which might otherwise have existed, and therefore that the application was a good and valid one. This proposition has been ably argued, both orally and by brief.

After full consideration of the case and the arguments, I am unable to concede the correctness of the position taken in the motion for review. The grant was "for the purpose of aiding in the construction of said railroad . . . and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches." The benefit of the public, and especially of the government, was the thing uppermost in the mind of Congress. The benefit of the company was merely incidental. This being the theory upon which this, as well as other railroad grants, was made, it follows, it seems to me, that any waiver or relinquishment by or for the company was ineffective without the assent of the government. In such case there must be mutuality. It is to my mind a serious question, whether such assent must not be by the power which made the grant, to wit, the Congress of the United States, since not only was the grant made by that body, but the withdrawal for the benefit of the grant, including this tract, was a legislative one. However

this may be, there must certainly be, in any event, mutuality by the making and delivery of a formal conveyance and the acceptance of the same by the government. The mere tender of a relinquishment by or in behalf of a railroad company of land covered by a grant to it can not of itself operate to restore said lands to the public domain. The grantee can not be allowed to thus informally divest itself of the grant, nor any part of it, nor can it in such manner appear to repudiate, in whole or in part, the obligations to the public and the government which under the grant it assumed.

The Southern Pacific Company, by resolutions of its board of directors, formally accepted its grant, November 26, 1866, and subsequently located its line of road. This fixed its status as grantee, and also its obligations under the grant.

Again, the grant of 1841, under which the application to locate was made, provided in section eight thereof that the locations might be made "on any public land, except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States."

This tract was withdrawn and reserved for the purposes of the grant, and that by the law making the grant, and while such reservation remained, location under the act of 1841 could not be made. The grant of 1841 could not be made effective on reserved lands.

The tender by the locator of the waiver of the company of its claim under the grant of 1866, in the form of a relinquishment executed and delivered to the locator and by him presented with his application, could not of itself operate to revoke and remove the reservation, and restore the land to the public domain, so as to render it subject to location as public land. To so hold would be to say that a reservation made by the government could at any time be annulled and set aside by some one other than the power that made it. The mere announcement of such a proposition is sufficient to show its fallacy.

For the reasons given, the motion for review must be and it is hereby denied.

In view of this conclusion, it is unnecessary to consider other questions raised by the motion.

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

DAVID SAMPSON.

The inadvertent issuance of final certificate, without payment of the lawful price for the land, does not place the entryman in a position to invoke the confirmatory provisions of section 7, act of March 3, 1891.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (G. C. R.)*

10. 1894.

(G. C. R.)

David Sampson has filed his petition in the nature of a motion for re review of departmental decisions of May 1, 1893 (16 L. D., 407), and

of March 21, 1894 (L. and R. 282, p. 415), involving his pre-emption cash entry, made October 15, 1888, for the N.W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of Sec. 29; the E. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ and the S.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 30, T. 2 S., R. 57 W., Denver, Colorado.

It appears that one hundred and twenty acres of the land, viz: the E. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ and the S.W. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$, are within the twenty mile limits of the Union Pacific Railway, and therefore subject to disposal only at two dollars and fifty cents per acre. The register and receiver, however, inadvertently accepted one dollar and twenty-five cents an acre, and issued final certificate, at the time above given. On the discovery of this mistake, claimant was called on to pay the amount due the government for the land he had entered. Answering this demand, he did not attempt to controvert the fact that three-fourths of the land covered by the entry had been inadvertently sold to him for one-half its value, but insisted that the entry should be confirmed under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

The Department, in both decisions above cited, denied his application for confirmation, and directed that full payment of the land be made.

It is clear that this entry was allowed without authority of law. The register and receiver had no jurisdiction to issue final receipt and certificate upon one hundred and twenty acres of this land without the payment of two dollars and fifty cents an acre.

Section 2357 of the Revised Statutes absolutely requires that price to be paid for lands so situated, and the local officers had no authority whatever for accepting a less amount. The inadvertent issuance of the final certificate, without payment for the land, does not place claimant in a position to ask for confirmation, and the series of cases cited to sustain that contention—namely, Jairus Lincoln, 16 L. D., 465, Joseph Yocum, *idem.*, 467, and others—can not be accepted as authority for the position taken. In those cases entries were confirmed because they were apparently made under existing laws, the local officers having jurisdiction of the subject matter, the conditions all being present authorizing confirmation.

In this case, as above shown, the local officers went beyond their authority and in direct opposition to the law, in allowing the entry without the required payment. It was not the intention of Congress to confirm such an entry. Payment for the land is the vital requirement without which patent can not lawfully issue.

The petition is denied, and claimant will be called on to pay the required amount, in a reasonable time, failing in which the entry will be canceled as to the one hundred and twenty acres not yet paid for.

RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO.

By the terms of section 6, of the forfeiture act of September 29, 1890, lands within the forfeited limits of the main line, not subject to indemnity selection on behalf of the branch line prior to said act, are thereafter not open to such appropriation.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad company from your office decision of December 7, 1892, holding for cancellation its indemnity list No. 1, selected on account of the branch line of said road, for the reason that the lands selected are also within the primary limits of that portion of the grant extending from Wallula, Washington, to Portland, Oregon, which was never constructed by the company, and the grant appertaining to which was forfeited by the act of September 29, 1890 (26 Stat., 496).

Your office bases its decision upon the ground that these lands being within the primary limits of the grant opposite the portion of the main line before described, and not excepted from said grant, could not have been selected as indemnity for the branch line while said grant for the main line stood unforfeited, and that the sixth section of the forfeiture act specifically prohibits a selection of such lands for indemnity purposes after the forfeiture.

The section referred to reads as follows:

That no lands declared forfeited to the United States by this act shall, by reason of such forfeiture, inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant or to confer any right upon any State, corporation or person to lands which were excepted from such grant, etc.

These lands being of the number prescribed and within the place limits of the grant for the main line, and not coming within any of the terms of exception of said grant, could not have been selected as indemnity on account of the branch line prior to the forfeiture; so that, if selection is now permitted to be made of such lands it must be by reason of, or as a result of, the forfeiture of this portion of the grant along the main line.

It would seem that this is just what is intended to be prevented by the provisions of section six, of the act of forfeiture to which your office decision refers and which is above quoted.

By the act of March 2, 1889 (25 Stat., 1008), the lands appertaining to the unconstructed portion of certain grants in the Northern Peninsula of Michigan were declared forfeited, and the fourth section of that act contains a provision similar to that of section six just referred to.

The language of said section four is as follows:

That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of lands originally covered by any such grant, or to waive or release in any way any right of the United States now existing, to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant, etc.

In the neighborhood of Ontonagon, Michigan, the grant running south-easterly from said point to the State line near the Brule river, is overlapped by the road running from Marquette to Ontonagon. To aid in the construction of both of said roads, grants were made by the act of June 3, 1856 (11 Stat., 21), and the portion of the road from Marquette to Ontonagon, west of L'Anse being unconstructed, the grant appertaining thereto was forfeited by said act of March 2, 1889, *supra*.

The Ontonagon and Brule river railroad company upon which the grant running south-easterly from Ontonagon towards the State line had been conferred, sought to select the lands within its indemnity limits where the same was overlapped by the place limits of the road running from Marquette to Ontonagon, and it was held that, under the provisions of said section four of the act of March 2, 1889, said company is not entitled to select as indemnity any lands formerly embraced within the granted limits of the road from Marquette to Ontonagon, which lands not having been subject to selection under the original grant, were not made so by the act of forfeiture. See Ontonagon and Brule river railroad company (13 L. D., 463).

It would seem that said decision is conclusive of the case at bar, and I must therefore sustain your office decision and direct that the company's said indemnity list No. 1, be ordered canceled.

CITIZENSHIP—EXPATRIATION—CONTESTANT.

GABY v. THOMPSON.

The children of a citizen of the United States, though born in a foreign country, are citizens of the United States by virtue of their father's citizenship.

A citizen of the United States who, in order to practice his profession while residing in a foreign country, takes an oath of allegiance to the reigning ruler thereof, without renouncing his own citizenship, does not thereby expatriate himself. The right of a homesteader to file an amended affidavit, showing his qualification to make entry, will not be defeated by the pendency of a contest, wherein it is apparent that the contestant is not qualified to take the land in the event that he secures a judgment of cancellation.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 10, 1894. (J. I. P.)*

The appeal of the defendant from your office decision of December 21, 1892, holding for cancellation his homestead entry No. 245, made March 5, 1891, Olympia, Washington, series, and embracing the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 18, R. 1, has been considered.

Numerous errors are assigned, but the substance of the appellant's contention is that your office erred, in the decision appealed from, in holding his homestead entry for cancellation, on the ground that he was not a citizen of the United States.

It is shown by the records that the appellant's father was born in the United States in the early part of this century. That when quite a young man he went to England; after a stay of some time there, he went to Italy, where a son, this appellant, was born to him. Thence he returned to England for a short time, taking his family, including appellant, with him. From England he went to New Zealand, where appellant grew to manhood, and lived until about the age of forty, when he came to America. Appellant's father never returned to America, but died abroad at an advanced age.

When he was about twenty-one years old appellant was admitted to practice as an attorney at law in the courts of New Zealand. The oath required of him at that time included not only the ordinary clause of fidelity to his clients' interests, etc., but an oath of allegiance to the British Queen, as well. After his admission to the bar of New Zealand, appellant remained there some nineteen years, or until about the age of forty, when he came to Oregon, and was admitted to the bar of that State by the supreme court thereof. He practiced law in Oregon for a time, when he removed to the Territory of Washington, where he voted at the elections and was elected to and held the office of justice of the peace, and was a resident of said Territory when it was admitted to the Union as a State. These are in substance the pertinent facts established by the record.

Appellant's father, by virtue of his birth in the United States, was an American citizen. (Revised Statutes, Sec. 1992.)

There is no evidence that at the date of appellant's birth his father had any intention of not returning to the United States, or that he had expatriated himself, or taken any steps in that direction. Hence we must conclude from the evidence before us that at the date of appellant's birth his father was still an American citizen, and that, although born in a foreign country, appellant was a citizen of the United States by virtue of his father's citizenship. (Revised Statutes, Sec. 1993; *State v. Adams*, 45 Iowa, 99.)

Did appellant's oath of allegiance to the British Queen expatriate him? The form of that oath is as follows—"I do sincerely promise and swear that I will be faithful and bear true allegiance to her majesty Queen Victoria." (21 and 22, Viet., Chap. 48.)

The case of *Gower v. Southern Pacific R. R. Co.* (Copp's Public Land Laws, Vol. 2, p. 932), is a case in point. It is held in that case that—

Where a citizen of the United States declared allegiance to the King of the Sandwich Islands, without renouncing his own government, held not to be construed as a forfeiture of the right of American citizenship; and the fact that he held office under the foreign government is not proof or act of expatriation.

The decision in the Gower case, *supra*, was based on the opinion of Attorney-General George H. Williams, on the subject of expatriation, given August 30, 1873 (14 Atty.-Gen's Op., 295). In that opinion he says—

Congress has made no provision for the formal renunciation of citizenship by a citizen of the United States, while he remains in this country; but if such citizen emigrates to a foreign country, and there, in the mode provided by its laws or in any other solemn and public manner, renounces his United States citizenship, and makes a voluntary submission to its authorities with a *bona fide* intent of becoming a citizen or subject there, I think that the government of the United States should not regard this procedure otherwise than as an act of expatriation.

* * * * *

"Residence in a foreign country, and an intent not to return, are essential elements of expatriation; but to show complete expatriation, as the law now stands, it is necessary to show something more than these. Attorney-General Black (9 Opin., 350) says that expatriation includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence. My opinion, however, is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship, and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military services, etc., may be treated by this government as expatriation, without actual naturalization. Naturalization is without doubt the highest, but not the only evidence of expatriation. . . . When a citizen of the United States goes abroad without intending to return, he takes one indispensable step towards expatriation; but to effect a complete annihilation of all duties and obligations between the government and his native country and himself, which expatriation implies, it is necessary that he should become a resident in some foreign country, with an intent to remain there, superadded to which there must be acts in the direction of becoming a citizen or subject of such foreign country, amounting at least to a renunciation of United States citizenship.

In the Gower case the oath of allegiance was taken to aid Gower in prosecuting his business as a merchant. In the case at bar appellant took the oath of allegiance to the British Queen in order to enable him to practice his profession. It was held in the Gower case that because he did not renounce his American citizenship the oath of allegiance taken by him did not expatriate him. In the case at bar appellant was not required to and did not renounce his American citizenship, and hence, by parity of reasoning, did not, by taking that oath, expatriate himself. It follows, therefore, on the authority of the Gower case, that at the date of making the homestead entry in question appellant was an American citizen, and in that respect a qualified entryman. This conclusion removes the necessity of considering the question of "collective naturalization," raised in the case.

It is further urged by the appellee that appellant is disqualified to make said entry, because of the fact that prior to the date of making the entry in question he had made another homestead entry, which he relinquished for a valuable consideration, and that he therefore could not be heard to say that he had derived no benefit from the homestead law.

The second section of the act of March 2, 1889 (25 Stat., 854), pro-

vides in general terms that any person who has heretofore made a homestead entry and who has not perfected title thereunder, may make another homestead entry, but that this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated. The circular of March 8, 1889 (8 L. D., 314), provides that persons applying to make a second homestead entry under said section two shall make an affidavit "designating the entry formerly made, by description of the land, number and date of entry, or other sufficient data, that it was made prior to the date of said act, and also that he has not since perfected a pre-emption or homestead title initiated prior to that date." Appellant has filed an affidavit, as he claims, in compliance with that circular. In his said affidavit, after describing the land, and the number and date of his former homestead entry, he says, "and the same was canceled upon his relinquishment April 27, 1886, and that he never received any benefit from said entry, nor perfected title to the tract embraced in said entry nor to any other tract under the homestead law."

The above does not comply with the provisions of section two of the act of March 2, 1889, nor with the instructions of March 8, *supra*, in that there is no affirmative showing that he has not since the passage of said act perfected title under the pre-emption law, on a right initiated prior to the passage of said act. The question now arises, can the affidavit in question be amended so as to cover the defect mentioned—provided the facts warrant it—in the presence of an alleged adverse claim. But in the case at bar there is no adverse claim, so far as the plaintiff is concerned, notwithstanding his position as contestant. While the rule of this Department is that it will not pass on the question of who is entitled to make an entry, or to exercise the preference right thereof until that question is presented, yet it has the right to avail itself of all pertinent facts in the record for the protection of the government, which is a party to all these transactions, and it is in evidence from the plaintiff himself that he is the owner of 211 acres of land, and hence is not a qualified entryman (act of March 3, 1891, Sec. 5, 26 Stat., 1095), and therefore can assert no claim adverse to the defendant.

Your office decision of December 21, 1892, *supra*, is therefore modified as follows: You will direct the local office to notify the appellant that he will be allowed fifteen days from the date of receipt of notice hereof, in which to file an amended affidavit, covering the defect indicated; that if such affidavit is not filed in the local office within the time named, said homestead entry No. 245 is to be canceled, and entry of the land permitted by the first qualified entryman. Should the affidavit be filed within the time named, it is to be transmitted to your office, and if found sufficient, you will dismiss appellee's contest and protest, approve appellant's final proof, if found to be regular, and pass the same to patent. Should said affidavit be found not to comply with

the requirements of the act of March 2, 1889, *supra*, you will proceed as though the affidavit had not been filed within the time named, as above directed.

ACCOUNTS—REPAYMENT—AUTHORITY OF FIRST COMPTROLLER.

CALVIN A. STANFIELD.

The First Comptroller of the Treasury may refuse to pass an account for repayment, if he is of the opinion that the proof required by law has not been made, though the proof submitted may be deemed sufficient by the Department.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (G. C. R.)

On March 14, 1894, the Department passed upon the application of Calvin A. Stanfield, and concurred in the recommendation of your office for the repayment to him of the purchase money paid on his entry of the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 9 S., R. 10 W., Little Rock, Arkansas, as per certificate No. 8608, issued July 23, 1857.

It appears that Stanfield's entry was canceled November 24, 1860, because the land covered thereby was embraced in a prior patented swamp selection of the State of Arkansas.

It thus appearing that the land was "erroneously sold," your office on March 26, 1894, certified the account to the First Comptroller of the Treasury Department (Report No. 58, 316) for forty dollars.

On April 17, 1894, the Comptroller addressed a communication to your office calling attention to the fact that "No proof of loyalty accompanies the papers," and that section 3480 of the Revised Statutes "prohibits the payment of all such accounts or claims arising prior to April 13, 1861, without such proof."

The Department, in a letter dated June 30, 1894 (Misc. L. and R. No. 287, p. 440), addressed to the Secretary of the Treasury, dissented from the opinion of the Comptroller, and suggested if that officer still adhered to his opinion, that the legal question involved might be submitted to the Attorney General for an opinion.

I am now in receipt of a letter from the Comptroller dated July 13, 1894, by reference from the Secretary of the Treasury, declining to pass the account, for reasons theretofore given by him. The Comptroller is only authorized to countersign such warrants as are "authorized by law." He has the undoubted authority, therefore, to refuse the payment of a claim or demand when he is of opinion that the proof required by law has not been made, although the sufficiency of that proof has been favorably passed upon by other officers of the government specially charged with those duties.

The papers are therefore returned, and you will call upon Mr. Stanfield to furnish the proof required.

HOMESTEAD ENTRY-MINING CLAIM-CONFLICT.

WINTERS ET AL. v. BLISS.

The failure of mineral claimants to comply with a departmental order, and show by survey the extent of an alleged conflict with an agricultural entry, warrants the conclusion, in the disposition of said entry, that no such conflict exists.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (F. W. O.)

In departmental decision of January 14, 1892 (14 L. D. 59), the matter of the alleged conflict of certain mineral claims with homestead entry made by David F. Bliss, on October 21, 1882, covering the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lot 2, Sec. 17, T. 6 S., R. 13 E., Hailey land district, Idaho, was considered, and it was held that the evidence offered to show the location of said conflict is conflicting; further, that the boundaries of said mineral claims were not well known or identified.

For the purpose of determining whether any conflict existed on the part of the Eureka, Ontario, New York Bar and Smith and Justice Mines with the land covered by the entry by Bliss, it was directed in said departmental decision that the mineral claimants should be required, within sixty days after notice, to have said mining claims surveyed so as to mark the boundaries, distances, and courses of the same as required by the mining laws, instead of having a segregated survey of the homestead entry made at the expense of the homestead claimant.

I am now in receipt of your letter of December 20, 1893, from which it appears that due notice was given the mineral claimants of the requirement under said departmental decision in the matter of marking out the claims under the mining laws, in order to determine whether there was any conflict with the entry by Bliss, and if so, the extent of such conflict, and that they have declined to make the survey necessary for this purpose.

Your said letter further reports that on May 6, 1893, the local officers issued final homestead entry No. 476 for the whole of the land embraced in Bliss' original entry and the matter is presented to this Department for further instructions.

The mineral claimants having alleged that a conflict existed with the entry of Bliss, which was of land returned as agricultural, it was required that they establish the extent of the conflict in accordance with directions given in the departmental decision before referred to. Having failed to make the survey as required, it must be considered for the purposes of disposing of Bliss' entry, that no conflict exists, and the action of the local officers under the circumstances, in issuing a final entry to the whole of the land claimed by Bliss was proper, and, if the same is otherwise regular, will be passed to patent.

MISSOURI KANSAS AND TEXAS RY. CO. v. TROXELL.

Motion for review of departmental decision of July 26, 1893, 17 L. D., 122, denied by Secretary Smith, October 10, 1894.

RES JUDICATA—SECOND HOMESTEAD ENTRY.

MILLER v. SEBASTIAN.

The fact that the validity of an entry is *res judicata* so far as the General Land Office is concerned will not preclude the consideration of such question by the Secretary of the Interior.

The right to make a second homestead entry under section 7, act of February 18, 1891, may be exercised by one whose first entry was made prior to the passage of said act, and relinquished subsequently thereto in the settlement of a contest.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (J. I. H.) (C. W. P.)

I have considered the appeal of Joseph H. Miller from your office decision of January 13, 1893, dismissing his contest against the homestead entry of George M. Sebastian for the SW. $\frac{1}{4}$ of Sec. 23, T. 12 N., R. 4 E., Oklahoma land district, Oklahoma Territory.

On the day of trial before the local officers, the attorney for the claimant moved to dismiss the contest for the following reason, that the complaint filed therein fails to state a cause of action, the records of this office showing that said entry was made after being passed upon by the Commissioner of the General Land Office, and that the same is *res judicata*.

The local officers sustained the motion and dismissed the contest.

It appears from the record that, on September 28, 1891, the claimant herein filed an application to make a second entry for the land in question. The local officers rejected his application. He appealed to your office, and filed an affidavit alleging that April 25, 1889, he made homestead entry for the SW. $\frac{1}{4}$ of Sec. 22, T. 12 N., R. 3 E.; that he established his residence on said tract in good faith, and expended thereon in permanent and valuable improvements about \$1200; that August 2, 1889, his claim was contested by J. R. Barrows; that for the purpose of compromise, and for that purpose only, he relinquished said tract to the United States, receiving from the said contestant less than he had expended in his improvements on the tract, and in defending the suit, April 27, 1892, your office reversed the decision of the local officers, and ordered that his application should be allowed. Sebastian thereupon made the homestead entry now in contest.

June 9, 1892, Miller filed his affidavit of contest, charging:

That George M. Sebastian, on May 4, 1892, made homestead entry No. 4215, at the Oklahoma City land office, upon the SW. $\frac{1}{4}$ of Sec. 23, T. 12 R. 4 E., I. M., which said homestead entry was made upon the order of the Commissioner of the General Land Office at Washington, as shown by said Commissioner's letter to the register and receiver of the local land office at Oklahoma City, of date April 27, 1892.

That said homestead entry is void in law for the following reasons, to wit:—Upon April 25, 1889, said George M. Sebastian made homestead entry No. 108, at Guthrie local land office, upon the SW. $\frac{1}{4}$ of Sec. 22, T. 12 R. 3 W., the same being a part of the lands opened to settlement by the proclamation of the President, of date of March 23, 1889.

Upon August —, 1889, John R. Barrows filed in the land office at Guthrie an affidavit of contest against the last named homestead entry of said George M. Sebastian, charging that the said George M. Sebastian did after March 2, 1889, and before noon of April 22, 1889, enter upon and occupy parts of the lands described in, and declared open to settlement by the proclamation of the President. On said contest affidavit a hearing was commenced before the register and receiver at Oklahoma City, O. T., and progressed for some days, when the same was compromised, and John R. Barrows paid the said George M. Sebastian the sum of one thousand dollars, which was accepted by said George M. Sebastian; and he did, on June 8, 1891, execute a relinquishment to the United States for said SW. $\frac{1}{4}$ of Sec. 22, T. 12 R. 3 W., and filed the same in the United States land office at Oklahoma City, and his said homestead entry No. 108 was cancelled by said relinquishment; and on the same day said John R. Barrows made his homestead entry No. 570, (Oklahoma Series) upon said SW. $\frac{1}{4}$ of Sec. 22, T. 12 R. 3 W.

Thereupon, on the 4th day of May, 1892, said George M. Sebastian made his said homestead entry No. 4215, as before stated.

The ground of the decision of your office affirming the action of the local officers is, that your office decision of April 27, 1892, is *res judicata*:

That where the office has rendered a decision on a certain state of facts, it should not again be called on to pass judicially on the same entry, unless different allegations be had.

Even if it should be admitted that the legality of Miller's entry is *res judicata* so far as your office is concerned, it cannot be doubted that the case should be considered by the Secretary of the Interior, and if the entry be found to be illegal, it is his right and duty to direct its cancellation. *Lee v. Johnson* (116 U. S., 48); *Charles W. Filkins* (5 L. D., 49); *Puget Mill Company* (7 L. D., 301).

It is therefore necessary to consider the question raised by the contest, namely: Was Sebastian qualified, under the 7th section of the act of February 13, 1891 (26 Stat., 758), to make his second homestead entry?

It is contended by counsel for contestant that Sebastian is not protected by said act. But clearly he is. The land covered by his second entry, lying within the territory ceded by the Sac and Fox Nation and the Iowa tribe of Indians, falls within section 7 of said act, which provides that these lands:

Shall be disposed of to actual settlers only, under the provisions of the homestead laws, except section 2301, which shall not apply: . . . and any person otherwise qualified, who has attempted to, but for any cause failed to, secure a title in fee to a homestead under existing law, . . . shall be qualified to make a homestead entry upon any of said lands.

The evident meaning of this is, that one who has made an entry prior to the passage of the act, and has not perfected it, whether before or after the passage of the act, shall be entitled to a second entry; but

if the original entry was made after the passage of the act, a second entry cannot be made. It is the time of making the first entry, not of failure to secure title, that controls the right to make a second entry.

This is the interpretation put upon the act of March 2, 1889, (25 Stat., 980) which is *ipsissimis verbis* of the act under consideration, in the general circular of the Department of February 6, 1892, pp. 16 and 39, referred to in the Departmental circular of September 18, 1891, as operative in relation to these lands. See also, Joseph B. Baldwin (15 L. D., 374).

I am consequently of opinion that the contest was properly dismissed, and the decision of your office is affirmed.

STATE OF OREGON.

Motion for review of departmental decision of March 21, 1894, 18 L. D., 245, denied by Secretary Smith, October 10, 1894.

OKLAHOMA TOWNSITE—TOWN LOTS—OCCUPANCY.

BENSON v. HUNTER.

An "occupant" as the word is used in the act of May 14, 1890, means one who is in open, exclusive, and adverse possession, under a claim of ownership, and the possession in such case must be notorious and unequivocal, carrying with it such recognized marks of ownership as will serve to notify all comers that another claims the most complete interest therein then available.

The occupancy required by said act must be in good faith, either for the purpose of residence, or for conducting some sort of legitimate business thereon.

After occupancy once begins, and actual possession of the lot is acquired, it must be maintained up to the date of entry by the townsite trustees.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894.

I have considered the appeal of Robert A. Benson from your office decision, dated February 26, 1894, awarding lot 6, block 15, in the town of Norman, Oklahoma, to A. T. Hunter.

The record shows that on August 30, 1890, the townsite trustees, board No. 4 of Oklahoma, made entry of the land embracing said lot, under the act of May 14, 1890, (26 Stat., 109). Robert A. Benson and A. T. Hunter are both claimants for said lot. A hearing was had before the board of townsite trustees No. 4, at which the parties appeared and submitted their testimony. The board rendered a decision on the 11th day of December, 1890, in which it held that Hunter is entitled to a deed for the lot. One member of the board filed a dissenting opinion, in which he held that it should be awarded to Benson.

Benson appealed to your office, which, on the 26th day of February, 1894, affirmed the judgment of the board, awarding the lot in question to Hunter.

From your office decision Benson appeals.

Both of the parties to this controversy claim the lot in controversy, by reason of alleged occupancy thereof. The facts disclosed by the record and testimony in the case, upon which their claims must be decided, are substantially as follows:

As to Benson's claim, it appears that he went on said lot on the 24th day of April, 1889, and drove a stake into the ground, on which he wrote a statement that he claimed the lot, and signed his name to it. Soon afterwards, he procured about a half of a wagon load of rock, and put it in the shape of a foundation for a house; all of which cost him some \$5 or \$6.

About May 6, 1889, he transferred his claim to his sister, one Kempie Benson, who resided in the State of Indiana, and never became a resident of the town of Norman, or the Territory of Oklahoma. Benson caused the lot to be registered with the provisional town authorities, recognized by most of the people of the town of Norman, in the name of Kempie Benson, and after the transfer to her, he nailed a few boards on the fence posts he had set in the ground on the lot, before the transfer to her.

Benson testified that in June, 1889, his sister sold and transferred the claim back to him, by assigning to him the certificate of registration issued by the said town authorities in her name. The testimony, however, shows that as late as October 23, 1889, Benson represented to Hunter that his sister, Kempie Benson, was at that time claiming to be the original occupant of the lot, for on that date he gave to Hunter a written notice signed "Kempie Benson by R. A. Benson", in which Hunter was notified that she was

the original occupant of lot No. 6, block 15, in the town of Norman. That I placed valuable improvements thereon at the time of my occupancy. That I have never relinquished or sold my right thereto. That a part of my said improvements remain on said lot, and that I shall, at the proper time, and before the proper tribunal, ask for a deed to said lot. That I claim the sum of \$10 per month from you, rental for the wrongful detention of the same, from this date, October 23, 1889.

As to Hunter's claim, it appears that about the 1st of July, 1889, one Brown went on the lot and tore down the fence, and appropriated the rock put there by Benson; built a dwelling house on it, which was occupied by a tenant of his until about the 1st of August, 1889, when he sold it and his claim to the lot to Hunter for the sum of \$90. Hunter had his claim registered with said town authorities, and he took possession of the house on said lot immediately after he purchased it, and continued in the actual possession of it up to the date of hearing. He was residing on the lot, and had the exclusive peaceable possession of it at the date the townsite board made entry of the tract, of which it was a part.

Section one, of the act of May 14, 1890, *supra*, provides that entries for town sites may be made by a board of trustees, "for the several

use and benefit of the occupants thereof", under regulations to be provided by the Secretary of the Interior.

Section two of said act provides that:

In the execution of such trust, and for the purposes of the conveyance of title by said trustees, any certificate, or other paper evidence of claim, duly issued by the authority recognized for such purpose, by the people residing upon any town site, the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property, such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.

At the times the respective certificates were issued to Miss Benson and Hunter, the town of Norman was not incorporated; there had been no territorial legislature in that Territory; there was no judge of the county court for the county in which the land is situated, as required by sections 2387 and 2388, of the Revised Statutes, under which section 13, of the act of March 2, 1889, (25 Stat., 980-1005) empowered the Secretary of the Interior to permit entry of lands for townsites; notwithstanding the apparent want of lawful authority on the part of the so-called provisional town authorities of Norman to pass ordinances generally, and prescribe penalties for their violation, it is quite clear that Congress recognized the authority of such organizations in the matter of issuing certificates to claimants of lots in such town, by making a rule of evidence, applicable to certificates, duly issued by the recognized authority, whereby such certificate must be taken as some evidence of the occupancy of the holder thereof, of the lot or lots described in the certificate, but where there is an adverse claim to such lot, the certificate "shall only be *prima facie* evidence of the claim of occupancy of the holder." In this case, each of the claimants claims under a certificate issued by the recognized town authorities, as well as occupancy of the lot, Benson claiming under one issued to his sister, and Hunter claiming under a later one issued to him. There is nothing in the record or testimony tending to show that Hunter's certificate was issued through a mistake, on the part of the authorities issuing, or that it was procured by any fraud on the part of Hunter; as his was issued after the one to Kempie Benson had been issued, it seems reasonable to presume that the authorities found that she had abandoned whatever claim she had to the lot before Hunter's certificate was issued, and in that case Hunter's certificate would, under the law, only be *prima facie* evidence of his claim of occupancy.

In your office decision, an occupant is defined to be:

One who is in open, exclusive, and adverse possession, under a claim of ownership; and such possession must be notorious and unequivocal, carrying with it such recognized marks and evidences of ownership as will serve to notify all comers that another claims the most complete interest therein, then available.

I think that this definition is sufficiently clear and full to cover cases arising under the act in question; however, each that may arise should be determined on its own peculiar facts. After such occupancy begins,

and the actual possession of the property is acquired by the claimant, in order to be available as a foundation on which to rest a claim, it must be maintained up to the date of entry by the townsite trustees. Primarily, the entry for a townsite is made by the trustees, "for the several use and benefit of the occupants thereof", which must mean good faith occupancy of the lot or lots, either for the purpose of residence, or for conducting some sort of legitimate business thereon, such as a store, shop, office, bank, factory, etc. A mere colorable occupancy, for the purpose of speculating in the lot or lots, is not such an occupancy as would warrant the trustees in allowing such claimant to purchase as an occupant. It is quite clear that a good faith occupant is not necessarily required to actually occupy the property in person; he may do so by a tenant or agent. *Berry v. Corette* (15 L. D., 210).

The acts of Benson in doing what he did on the lot in question may have been sufficient to have initiated such an occupancy as the law requires, but whatever rights he acquired thereby, he surrendered or abandoned when he made the transfer to his sister, who was not an actual or constructive occupant of the lot, for she was a non-resident, and the nailing of a few boards on the fence posts, which Benson testified he did for her, was not sufficient to constitute her an occupant by her agent, especially in the face of an adverse claim. Benson, therefore, acquired no right by the alleged re-transfer of the right of occupancy to him by his sister, for she had no such right to convey.

Brown's acts in going on to the lot, and doing what he did, at a time when it was not in fact occupied—after it had been abandoned—was not such a trespass as would prevent his right as an occupant, attaching to the property. Hunter's occupancy should be considered independently of the acts of Brown, for he bought the house and paid for it, and went into the possession of it at a time when Benson was not claiming possession, and after Benson had surrendered and transferred all his rights to the property, Hunter's occupancy was lawful, and it was continued up to the date of entry of the land by the trustees.

I concur in the conclusion reached in the decision appealed from, and it is accordingly affirmed.

EGERT *v.* JONES.

Motion for review of departmental decision of February 12, 1894, 18 L. D., 55, denied by Secretary Smith, October 10, 1894.

PRACTICE—APPEAL—REVIEW—REHEARING.

SCHWEITZER v. HILLIARD ET AL.

The provisions of Rule 79 of Practice can only be invoked on behalf of a litigant who has himself filed a motion for review.

A cause will not be remanded, on application for rehearing, for the purpose of inquiring into charges of abandonment subsequent to a final decision of the Department, though such charges may form the proper basis for a new contest.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (W. F. M.)

A short account of the proceedings heretofore had in this case is necessary to the orderly consideration and disposition of the matters now pending therein.

The land in controversy is lot 1 of section 35, and the NW. $\frac{1}{4}$ of section 36, township 36 N., range 6 E., of the district of Wausau, Wisconsin, and was withdrawn for reservoir purposes by executive proclamation of April 5, 1881, and restored to the public domain by the act of Congress of June 20, 1890, 26 Stat., 169, to take effect as to homestead entries on December 20, 1890.

On December 20, 1890, Lonson Hilliard made homestead entry of lot 1, section 35, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 36; and on January 12, 1891, January 7, 1891, and January 8, 1891, Philip Schweitzer, Jacob Lutz and Edward Houlehan filed applications, respectively, to make homestead entry of the N.W. $\frac{1}{4}$ of section 36, each alleging settlement on December 20, 1890.

A hearing having been had before the local officers, they held Hilliard's entry for cancellation, and that Schweitzer, Lutz and Houlehan were equally entitled to make entry of the NW. $\frac{1}{4}$ of section 36.

On appeal to your office the recommendation of the register and receiver was affirmed as to the cancellation of Hilliard's entry, but Houlehan's application was denied, and the land was directed to be disposed of to the highest bidder as between Schweitzer and Lutz. Hilliard filed a motion for review, and that being denied, he brought the case on appeal to this Department. Houlehan also appealed, but on motion of Schweitzer his appeal was dismissed as having been filed out of time.

The matters and things in issue having been then and there fully considered, this Department rendered a decision on February 12, 1894, in all respects affirming the decision of your office. L. and R. No. 279, p. 440.

On April 6, 1894, Edward Houlehan filed in the local office a motion for review, and on April 21, 1894, Lonson Hilliard filed a motion for rehearing. These motions will be considered and disposed of in the order of the dates of their filing.

Houlehan, in his motion, complains of the action of this Department in dismissing his appeal, contending that the time between the filing of Hilliard's motion for rehearing in your office on August 22, 1892, and the notice of a decision upon that motion should be excluded in computing the time allowed him for appeal. Practice rule 79, upon which he relies for relief, according to my construction of its object, can only be invoked in behalf of a litigant who has himself filed a motion for review, and not for the benefit of other parties to the controversy who have no such motions pending. That is to say, a judgment becomes final after the expiration of the sixty clear days provided for by rule 86, as to all parties who have failed or neglected to cause its suspension by appeal or by motion for review.

Hilliard's application for a rehearing sets out three several grounds therefor, as follows:

1. That Philip Schweitzer, one of the parties, on February 21, 1894, filed a relinquishment of all his claim and right to the land.
2. That Jacob Lutz is disqualified from making homestead entry for that he went upon the land prior to December 20, 1890, contrary to the statute by virtue of which it was restored to the public domain and re-opened to entry.
3. That Lutz has abandoned the land and failed to occupy, cultivate and improve it.

It is obvious that the first and third of the foregoing charges supply no reasonable basis for a rehearing. The relinquishment of Schweitzer will inure to the benefit of Lutz, and the right of the latter must be determined with reference to his attitude to the land at the date of the hearing heretofore had.

A cause will not be remanded for the purpose of inquiring into charges of abandonment subsequent to a decision by this Department which has become final as to all the issues therein, though such charges might form the proper basis of a new contest.

As to the second allegation that Lutz is disqualified for having entered upon the lands in controversy prior to December 20, 1890, it appears that one of the grounds upon which Hilliard asked for a new trial before your office was that Lutz was camped on the land on the 19th day of December, 1890, and the very matter was therefore in issue before this Department on February 12, 1894, the day upon which the decision now under review was rendered, and consequently is now *res judicata*.

For the foregoing reasons both the motions under consideration are denied.

MCGREGOR ET AL. v. QUINN.

Motion for review of departmental decision of April 5, 1894, 18 L. D., 368, denied by Secretary Smith, October 10, 1894.

OKLAHOMA LANDS—EXTENSION OF TIME FOR PAYMENT.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 13, 1894.

REGISTER AND RECEIVER,

Oklahoma, Oklahoma Territory.

GENTLEMEN:—You were addressed, under date of September 13, 1893, 17 L.D., 263, in reference to an anticipated action of Congress for an extension of time within which the first payment of purchase money in cases of entries of lands ceded by the Citizen Band of Pottawatomie and the Absentee Shawnee Indians, and of lands ceded by the Cheyenne and Arapahoe Indians, was required to be made under the 16th section of the act of March 3, 1891, 26 Stat., 1026, and you were then directed in reference to the Pottawatomie and Absentee Shawnee lands to postpone making demand for the first instalment of purchase money under instructions of June 8, 1893, 17 L. D., 51, until further instructions from this office, in order to afford time for Congress to act upon the proposed legislation.

Congress acted by statute of October 30, 1893, granting the settlers an extension of one year so as to admit of such payment being made at any time within three years from the date of the entry of such lands. This statute was the subject of circular of February 14, 1894, 18 L. D., 50.

It is now represented on reliable authority that pressing necessity exists for a further extension of time in favor of settlers on the lands ceded by the Pottawatomie and Absentee Shawnee Indians, and that the first payment in some cases will become due before the action of Congress can be obtained, which is to be invoked for the purpose. I have, therefore, as in the former instance, to direct, in reference to the Pottawatomie and Absentee Shawnee lands, above mentioned, that you postpone making demand for the first instalment of purchase money, under instructions of circular of June 8, 1893, 17 L. D., 51, until further instructions from this office, in order to afford time for Congress to act upon the proposed legislation.

Respectfully,

EDWARD A. BOWERS,
Acting Commissioner.

Approved:

HOKE SMITH,
Secretary.

HOMESTEAD ENTRY—CONTIGUITY OF TRACTS.

PIERRE LAUZON.

A homestead entry may stand intact though it includes tracts that according to the public survey are non-contiguous, by reason of their lying on both sides of a meandered lake, where it appears that said tracts in fact form a compact body of land, and a fractional quarter section, and where the rights of the entryman are entitled to an equitable consideration.

Secretary Smith to the Commissioner of the General Land Office, October 10, 1894. (F. W. C.)

I have considered the appeal by Pierre Lauzon from your office decision of March 10, 1893, holding for cancellation his homestead entry No. 13,195, made September 7, 1885, for lots 2, 3, 4, and 5, Sec. 34, T. 47 N., R. 27 W., St. Cloud land district, Minnesota, upon which final certificate No. 7936 was issued July 26, 1892, for the reason that the land embraced in said entry is non-contiguous, being situated on both sides of a meandered lake according to the plat of survey on file in your office.

It appears that on October 12, 1892, your office suspended said entry and required the entryman to elect which portion of the entry he would retain, in answer to which he makes affidavit to the fact that the land entered is a compact body of land and that the return in the survey is erroneous, due either to fraud or mistake.

In support of these allegations the affidavit of the county surveyor is furnished, which shows that instead of being one continuous lake running across the section, there are two lakes, the distance between them being eighty-eight rods, and that the land between said lakes is from twenty to fifty feet above the level of said lakes; consequently, the change is not due to the drying up of the lake but rather to error in representing the same in the return of the government survey. He is also corroborated by two other witnesses.

Without considering the question as to the correctness of the original survey, these affidavits clearly establish the fact that said lots now form a compact body of land. Further, that they are within the boundaries, and form the fractional SE. $\frac{1}{4}$, of said Sec. 34.

The records of your office show that filings have been made for the SE. $\frac{1}{4}$ as a body, and that several parties had made filings embracing said lots 2, 3, 4 and 5, prior to the entry by Lauzon, which, however, they failed to perfect.

It must also be remembered that Lauzon was permitted by the local officers to make entry of this land in 1885; that he has since shown compliance with law and final certificate has issued upon his entry. It would therefore work a great hardship to Lauzon to now cancel his entry on account of non-contiguity, or to require him to eliminate one-half of his entry.

It also appears that the surrounding lands have all been entered, and even if the lots on either side of the lake represented in the plat were eliminated from the entry, they would form isolated tracts of such a small area that their disposition would hardly be likely in the usual course of disposing of public lands.

I must, therefore, reverse your action and direct that the entry be considered upon its merits as regularly allowed.

DESERT LAND ENTRY—ACT OF AUGUST 4, 1894.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., October 11, 1894.

REGISTERS AND RECEIVERS,

United States Land Offices,

GENTLEMEN: Your attention is called to an act of Congress, approved August 4, 1894 (Public 159), entitled "An act for the relief of persons who have filed declarations of intention to enter desert lands," a copy of which is hereto annexed.

In accordance with the first provision of said act, you will in all cases where a desert land entry was made between January 1, 1890, and August 4, 1894, withhold notice of the expiration of the statutory period for making final proof, until the expiration of five years from the date of such entry.

Another provision of the bill suspends for the year eighteen hundred and ninety-four the requirement that persons who have filed declarations of intention to enter desert lands shall expend the full sum of one dollar per acre during each year toward the reclamation of the land, and such annual expenditure for that year, and the proof thereof, is dispensed with.

Inasmuch as the annual expenditure and proof thereof may be made at any time prior to the expiration of the year within which such expenditure is required, you will withhold notices of a failure to submit yearly proof in all cases where the same would have been due in 1894, if this act had not been passed. In such cases the yearly proofs must be made on or before the dates in 1895, that correspond to the dates in 1894 when said proofs would otherwise have been required.

Under the terms of the act the annual expenditures for the year 1894, and proof thereof are dispensed with, consequently parties who made desert land entries during 1894, prior to the passage of said act are not required to make any expenditure during the present year, but the year within which they will be required to make such expenditure and proof will begin January 1, 1895.

The proviso to the act is sufficiently explicit, but it may be said that it is not construed as waiving the expenditure of the full sum of three dollars per acre before the submission of final proof.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.

Approved:

HOKE SMITH,
Secretary.

(PUBLIC—No. 159.)

AN ACT for the relief of persons who have filed declarations of intention to enter desert lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirement that the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: *Provided*; That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and in the manner provided by existing law, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as therein provided.

Approved August 4, 1894.

EASTMAN v. WISEMAN.

Motion for review of departmental decision of April 4, 1894, 18 L. D., 337, denied by Secretary Smith, October 12, 1894.

ENTRY—LIMITATION OF ACREAGE—ACT OF MARCH 3, 1891.

W. R. HARRISON.

An entry of land, valuable only for the timber and stone thereon, should not be included in the maximum amount of lands that may be acquired under the limitation imposed by the act of August 30, 1890, as construed by the subsequent act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 12, 1894. (I. D.)

W. R. Harrison, assignee of S. N. Harrison, appeals from your office decision of February 10, 1893, holding cash entry No. 2810 for cancella-

tion, involving the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 9, T. 32, R. 14 E., M. D., Susanville land district, California.

November 11, 1891, S. N. Harrison made desert entry for W. $\frac{1}{2}$, Sec. 15, T. 29 N., R. 15 E., containing three hundred and twenty acres.

On July 2, 1892, he made cash entry for the tract first herein described, containing eighty acres. This last entry, and the testimony sustaining it, shows that the tract is valuable only for the timber and, perhaps, for stone, but is unfit for cultivation and "will be unfit for cultivation when the timber is removed."

The act of August 30, 1890 (26 Stat., 391), limits the amount of land that may be acquired by one person under any of the land laws, to three hundred and twenty acres "under all of said laws."

Your office decision is based on that act, and holds the cash entry of the eighty-acre timber tract for cancellation by reason of the prior entry of three hundred and twenty acres of agricultural lands.

If the act cited stood alone, your office decision would be clearly correct, but the act of March 3, 1891 (26 Stat., 1101), has restricted the limitation of the act of August 30, 1890, to "agricultural lands" in these words:

The provision of 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1891, and for other purposes,' which reads as follows, viz: 'No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws,' shall be construed to include in the maximum amount of lands, the title to which is permitted to be acquired by one person, only agricultural lands, and not to include lands entered or sought to be entered under mineral land laws.

It can not be held that this legislative construction meant to exclude from the limitation mineral lands only for then the clause saying that the three hundred and twenty acres should "include only agricultural lands" must be treated as mere surplusage and void of meaning.

On the other hand, to adopt the rule of construction that "Every word, and clause of a statute shall be presumed to have been intended to have some force and effect" (2 Pick., 571), leaves no ambiguity.

The act last quoted makes two exceptions to the limitation of the act of August 30, 1890:

First, no more than the three hundred and twenty acres can be acquired of "only agricultural lands;" and

Second, if more than that limitation is sought to be entered as "mineral land," the excess (not to exceed one hundred and sixty acres) may be also suitable for agricultural purposes, but if its chief value is for the minerals thereon, then it would be subject to the mineral land laws and exempt from the limitation.

Sections 2330 and 2341 recognize the fact that the same land may be both agricultural and mineral.

In this case the eighty-acre cash entry can in no case be treated as

agricultural lands, and so is not included "in the maximum amount of lands" that may be acquired by one person.

If the entry of the eighty-acre tract be permitted to stand, Harrison does not thereby acquire title to more than three hundred and twenty acres of agricultural land.

Your office decision is overruled, and cash entry No. 2810 is held intact.

ACCOUNTS—SURVEY—EXPENSE OF EXAMINATION.

P. M. NARBOE.

Under the act of August 18, 1894, making an appropriation for public surveys, the expenses of a hearing, to determine the character of a survey alleged to be fraudulent or defective, may be paid from said appropriation, as well as the expense of such field work as may be necessary in connection with said investigation.

*Secretary Smith to the Commissioner of the General Land Office, October
(J. I. H.) 12, 1894. (F. W. C.)*

By departmental letter of May 16, 1894, in the matter of certain surveys made in California by P. M. Narboe, under his contract No. 364, dated August 25, 1884, you were instructed to

direct the surveyor general to notify Narboe to submit testimony in support of his survey at a time to be fixed by the surveyor general of California, within sixty days from the date of the notice; and to make his report to your office without delay.

With your office letter of September 13, 1894, is forwarded a letter from the surveyor general in which he recommends that he be authorized to hold the hearing

upon the land, and to employ such assistants as may be necessary to run the lines, and that an advance of \$250, to defray the expense of such a hearing and examination, be made to this (his) office from the appropriation for surveys of public lands.

In forwarding said letter you express approval of the proposition to hold the hearing as suggested, but are of the opinion that under the appropriation for surveys the money can be used only for field examination and can not be used for the other expenses of the hearing.

The act of August 18, 1894, making appropriation for "surveying the public lands" for the fiscal year ending June 30, 1895, provides as follows:

And of the sum hereby appropriated not exceeding forty-five thousand dollars may be expended for examination of public surveys in the several surveying districts in order to test the accuracy of the work in the field, and to prevent payment for fraudulent and imperfect surveys returned by deputy surveyors and for examinations of surveys heretofore made and reported to be defective or fraudulent.

It will be noticed that this appropriation is not only for examinations in the field for the purpose of testing the accuracy of the work performed, but

to prevent payment for fraudulent and imperfect surveys returned by deputy-surveyors and for examination of surveys heretofore made and reported to be defective or fraudulent.

From this appropriation I am of the opinion that the expenses of a hearing in order to determine the character of a survey alleged to be fraudulent or defective, can be paid, as well as the work of such field examination as may be necessary in connection therewith.

In other words, that any expense incurred in inquiring into the character of the surveys, to the end that payment may be prevented for such as are fraudulent or imperfect, can be paid from said appropriation.

You will, therefore, make the advance as recommended and direct that the matter be proceeded with at once.

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF AUGUST 18, 1894.

CIRCULAR.

dated 38-51
DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 16, 1894.

REGISTERS AND RECEIVERS,

United States Land Offices:

GENTLEMEN: Your attention is called to the following provision contained in an Act of Congress, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August 18, 1894, viz:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

You will observe that all certificates of right, regularly issued by this office, showing that the parties named therein are entitled to make soldier's additional homestead entries, are declared to be valid by the statute, notwithstanding any attempted sale or transfer, and that, where such certificates have been or may hereafter be, sold or transferred, the sale or transfer thereof shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value, and that all entries made by such purchasers therewith shall be approved, and patent shall issue in the name of the assignees, but before approving such entries for patent, the transferee shall file in this office satisfactory proof of ownership and of bona fide purchase for value.

To enable assignees of these certificates to exercise in their own names the right of entry confirmed by this statute, it is directed that the certificate itself shall, in each instance, prior to any entry by the assignee, be presented to this office for examination and additional certification covering the fact of assignment. Holders of such certificates desiring to exercise a right of entry in their own names, must file such certificates in this office, together with satisfactory proof of ownership and of bona fide purchase for value. If, upon examination, the proof so filed is satisfactory, an additional certificate will be attached to the original authorizing the location thereof, or entry of land therewith, in the name of the assignee or his assigns. You will allow no entries in the names of assignees except upon presentation of such additional certificates issued by this office. When such additional certificates are presented, you will issue homestead papers and the final certificate and receipt, in the name of the transferee, referring to him in said papers as the "Assignee" of the soldier.

You will also observe that this law does not prohibit the location of said certificates, by the holders, as heretofore, either by the soldiers in person or by others acting as attorneys for the soldiers and in the names of the soldiers. Therefore, when application is made to locate such a certificate by the holder in the name of the soldier, you will allow the entry of land under said certificate, if the application papers are regular in all other respects, and issue the homestead papers, and final certificate and receipt in the name of the soldier, under the instructions heretofore issued in reference to such cases, which are still operative.

When soldiers, to whom certificates of right have not been issued, who made their original homestead entries for less than one hundred and sixty acres prior to June 22, 1874, and who have not exhausted their additional rights, apply in person to make entries, you will, as heretofore, before allowing the applications to go to record, transmit the same to this office for examination as directed in the circular letter of February 18, 1890, which is still operative in regard to this class of claims.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved.

HOKÉ SMITH,
Secretary.

RIGHT OF WAY PROCEEDINGS—ACT OF MARCH 3, 1891.

TILLIE GIBSON ET AL.

Protests against the allowance of applications for right of way should not be acted upon independently of the merits of the application.

Entrymen who allege injury to their premises by reason of the subsequent allowance of right of way privileges, and action thereunder, must seek redress in the courts.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1894. (J. T. H.) (F. W. C.)

With your office letter of June 25, 1894, was transmitted the appeal by Tillie Gibson *et al.*, from your office decision of February 10, 1894, dismissing their protests against the approval of the application for right of way under the provisions of the act of March 3, 1891 (26 Stat., 1095), on account of a reservoir site made in the name of Edward Nippel.

With the papers in the case is a copy of your office letter of March 10, 1894, returning the application and maps filed of said reservoir site, for compliance with said act, and therein attention is called to the fact that said site conflicts with the right of way for the Glenwood High Line Railroad, and notice is required to be given said company of the pendency of the application under consideration and thirty days allowed it to file objection to the same.

It seems to me that the practice of acting upon protests independent of the merits of the applications for right of way, is not proper practice, for this Department may be called upon to pass upon appeals and dismiss protests against the approval of maps for right of way, and said maps may, upon further consideration by your office, be refused approval on other grounds than those set forth in the protest.

Since forwarding said appeals, however, to wit, by letter of August 14, 1894, you forward the maps and other papers in the matter of the application for a reservoir site in the name of Edward Nippel, with a recommendation that the same be approved subject to the existing rights of the Glenwood High Line Railroad company.

In the matter of the protests by Tillie Gibson *et al.*, it appears that the same are based upon the ground that to use the reservoir as planned, will seriously interfere with the enjoyment of their right to lands entered under the public land laws prior to the application for the reservoir site.

In this connection it must be remembered that the approval by this Department of the map of location of a reservoir site filed under the provisions of the act of March 3, 1891 (*supra*), carries only the right of way over the *vacant* public lands covered by such location and in no wise affects other tracts.

As it appears, therefore, that the applicant has complied with the regulations prescribed under the act of March 3, 1891, this Department can not inquire into the merits of the protests, but must refer the parties to the courts for their proper remedy, if in anywise injured in their possession by the building and use of the proposed reservoir.

I have, therefore, approved and herewith return said maps of location for the files of your office.

EXTENSION OF TIME FOR FINAL PROOF AND PAYMENT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 18, 1894.

REGISTERS AND RECEIVERS,

United States Land Offices,

GENTLEMEN: Your attention is called to the act of Congress approved July 26, 1894 (Public No. 127), entitled "An act extending the time for final proof and payment on lands claimed under the public land laws of the United States," a copy of which is hereto annexed.

The first section of said act extends the time for making final proof and payment on existing entries under the desert land and homestead laws for one year from the time when proof and payment would otherwise become due, and needs no comment other than to direct that notice of the expiration of the statutory period for making final proof and payment be not given in desert land entries until the expiration of five years from date of entry, and in homestead cases until the expiration of eight years from date of entry.

The second section of the act extends the time for making final payment on entries under the pre-emption act for one year from the date when the same becomes due in all cases where the claimants are unable to make final payments from causes which they cannot control.

The instructions under the joint resolution of Congress of September 30, 1890 (circular of February 6, 1892, pp. 14 and 15, 11 L. D., 417, and 14 L. D., 293), will be a sufficient guide for cases arising under this section of the act. Those instructions should be followed except that, instead of setting forth facts relating to failure of crops, the applicant for such extension must set forth the causes which render him unable to make the necessary payment.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

HOKÉ SMITH,

Secretary.

[PUBLIC—No. 127.]

An act extending the time for final proof and payment on lands claimed under the public land laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for making final proof and payment for all land located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made, be, and the same is hereby, extended for the period of one year from the time proof and payment would become due under existing laws.

SEC. 2. That the time of making final payments on entries under the pre-emption act is hereby extended for one year from the date when the same becomes due in all cases where pre-emption entrymen are unable to make final payments from causes which they can not control, evidence of such inability to be subject to the regulations of the Secretary of the Interior.

Approved, July 26, 1894.

PRACTICE—MOTIONS FOR RE-REVIEW.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 18, 1894.

REGISTERS AND RECEIVERS,

U. S. Land Offices,

SIRS: In regard to motions or petitions for re-review of decisions emanating from the Office of the Secretary of the Interior, hereafter presented or received through the mails in your office, you are instructed as follows:

Such motions or petitions if presented in person, must be declined by you and such persons informed that if they elect, they may forward the same directly to the Secretary of the Interior.

In event such motions or petitions are received through the mails, you will return the same to the sender with like information. *Standley v. Jones, 19 L. D., 104.*

This order does not include or in any manner refer to motions or petitions for re-review or rehearings based upon newly discovered evidence.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

HOKE SMITH,

Secretary.

RAILROAD GRANT—FORFEITURE—ORDER OF RESTORATION.

ONTONAGON AND BRULÉ RIVER R. R. CO.

The forfeiture act of March 2, 1889, operated to restore to the public domain the lands forfeited thereby free from the effects of the original grant and the certification thereunder.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1891. (J. I. H.) (F. W. C.)

In the matter of the adjustment of the grant made by the act of June 3, 1856 (11 Stat., 21), in so far as the same makes a grant to aid in the construction of a railroad from Ontonagon, Michigan, to the State line, which grant is claimed by the Ontonagon and Brûlé river Railroad company, it was held in departmental decision of October 31, 1891 (13 L. D., 463), that said grant—

is one of "place" and not of "quantity" and the amount of land to which the company is entitled, is the number of acres included in the odd sections within the six miles granted limits coterminous with constructed road and without the granted limits of the road from Marquette to Ontonagon, and the moiety of the odd numbered sections found within the common granted limits of the two roads coterminous with the constructed portion of the Ontonagon and Brûlé River road, and for the moiety of lands lost, the company is not entitled to indemnity.

The grant made by the act of June 3, 1856 (*supra*), to aid in the construction of a road from Marquette to Ontonagon was forfeited west of L'Anse by the act of March 2, 1889 (25 Stat., 1008). By said act of forfeiture the United States was invested with title as to the lands formerly granted to aid in the construction of said road west of L'Anse. The effect of said act of March 2, 1889, was to make the United States and the Ontonagon and Brûlé River Railroad company joint tenants as to the lands within the common granted limits of the two roads, and that each might enjoy its respective right in the premises, you were directed by departmental letter of March 21, 1894, to call upon the Ontonagon and Brûlé River Railroad company to make selection of one-half the lands within the common area of the two grants referred to in satisfaction of its moiety.

Your office letter of June 19, 1894, reports that the company has made due selection of one-half of the vacant lands in the common limits referred to and recommends that the remaining lands be restored to entry after reconveyance by the governor of the State.

The reason for such reconveyance is said to be that the lands in question were approved to the State on account of the grants made by the act of June 3, 1856, *supra*, in the year 1863.

In the case of the New Orleans Pacific Railroad Company *v.* Sancier (14 L. D., 328), referring to the forfeiture declared by the act of July 14, 1870 (16 Stat., 378), it was held that said act of forfeiture operated to restore the lands to the public domain free from the effect of the original grant and the certification thereunder.

It would therefore seem that a reconveyance by the governor is unnecessary, and I have to direct that the lands in the common limits of the two grants referred to and not embraced in the selection of the Ontonagon and Brule River Railroad company on account of its moiety, be restored to entry after due notice by advertisement, and that the same be disposed of under the provisions of the act of March 2, 1889, *supra*.

TOWNSITE—APPRAISAL OF LOTS—SECTION 2381, R. S.

POR T ANGELES TOWNSITE.

After town lots have been appraised and offered for sale under section 2381 R. S., there remains no authority for re-appraisement, or reduction of the price fixed originally.

Secretary Smith to the Commissioner of the General Land Office, October 18, 1894. (F. W. C.)

I am in receipt of your letter of August 17, 1894, in the matter of the charges of excessive appraisal of lots in Port Angeles townsite, Washington.

By the act of August 30, 1890 (26 Stat., 390), an appropriation was made for the survey and appraisal, with a view to sale under section 2381 of the Revised Statutes, of land for townsite purposes at Port Angeles, Washington.

The survey and appraisement were regularly reported and approved, and acting thereunder, a day was set for the sale.

By said act those who had settled and made substantial improvements prior to January 1, 1890, were accorded a preferred right of purchase at the appraised price prior to the day of public sale.

As soon as the appraisement was made known protests were filed in many instances by settlers claiming that the same was unfair and excessive, and for the purpose of obtaining full information in the premises a special agent was detailed to investigate and report upon the matter. His report suggested many reductions in the appraisement, but recommended that the sale take place as advertised, which was done.

Your letter, based upon the results of the sale, concludes as follows:

While the appraised value of the lots and blocks referred to herein may be excessive, as compared with the appraisal of other lots near the same locality, I think the fact that nearly one-half of said lots have been sold at the appraised value, or in excess thereof, is sufficient to show that the appraised value is not in excess of their real value.

Even if it be conceded that the valuation is too high, it would hardly be just to reduce the appraisement in individual cases, and leave others, with adjoining lots who had completed their purchase at the appraised price, without any recourse or redress.

For the reasons herein stated, I have the honor to recommend, that no change be made in the appraisal, as approved, and that all claimants who have not made the necessary payment on lots settled upon prior to July 5, 1893, be allowed ninety days to complete their purchases.

From a careful review of the matter, I am of the opinion that no reduction can now be made of the appraised value of the lots in this townsite without further legislation.

The sale was to be made under section 2381 of the Revised Statutes, which provides as follows:

When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lots shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land-office in the district in which the reservations may be situated, in accordance with the instructions of the Commissioner of the General Land-Office.

Under this section, after the lots have been appraised and offered for sale, no authority remains for reappraisement or reduction of price fixed by the first appraisement, as "no lot shall be disposed of at public sale or private entry for less than the appraised value thereof."

In view of the previous suspension of action upon those cases where protests were filed, I have to direct that such persons, where shown to be entitled to the preferred right of purchase, be allowed ninety days within which to complete their purchases, and at the expiration of that time all lots so claimed and not purchased be held subject to private entry at their assessed value.

CONTEST—PRACTICE—AMENDMENT.

WALLACE *v.* WOODRUFF.

The amendment of an affidavit of contest relates back to the original, and excludes intervening contests, where the said amendment does not introduce a new ground of contest but merely makes more specific and definite the original charge.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 19, 1894. (J. L.)

I have considered the appeal of Luman C. Woodruff from your office decision of February 21, 1893, in the case of Willie A. Wallace *v.* Luman C. Woodruff, affirming the decision of the local officers, and holding for cancellation Woodruff's homestead entry No. 88 for the SE. $\frac{1}{4}$ of Sec. 34, T. 12 N., R. 3 W., Indian meridian, Oklahoma City land district, Oklahoma.

On April 25, 1889, Woodruff made homestead entry of said land, alleging that he settled upon and commenced to improve said land on April 22, 1889.

On May 17, 1889, Wallace filed his affidavit of contest against said entry, in which he alleged:

That the said Luman C. Woodruff is disqualified from entering above described land as a homestead by reason of the act of Congress approved March 2, 1889, and entitled, 'An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1890, and for other purposes.'

On January 26, 1891, Wallace filed another affidavit of contest in which he alleged:

That Woodruff did subsequently to the 2d day of March, 1889, and prior to 12 o'clock noon of April 22, 1889, enter upon and occupy a portion of the lands open to settlement under the act of Congress of March 2, 1889, as particularly described in the said affidavit to which this is amendatory, and in violation of said act of Congress and in violation of the proclamation of the President of the United States, issued thereunder, and in pursuance thereof.

Notice of said second affidavit was served on Woodruff, January 29, 1891, and he was notified that "the charges in this amended affidavit are made part of and will be heard at the same time with the original contest."

The hearing of the contest of Wallace *v.* Woodruff began on June 14, 1892, in the presence of both parties with their attorneys.

Woodruff filed a motion to dismiss Wallace's contest because, he said, the allegation of disqualification on the part of Woodruff contained in Wallace's first affidavit of contest was not sufficient; and also because Wallace's amendatory affidavit charging Woodruff's disqualification

was filed long subsequent to the intervention of other and vested rights, to wit: That by the contest of Gideon W. White, filed May 28, 1890, and that, by the contest of John T. Renfro, filed November 14, 1890; both charging same grounds of disqualification against this contestee.

Said Gideon W. White also filed his protest against the hearing of Wallace's contest for the same reasons above stated, and claimed that he was entitled to be first heard upon the charge of disqualification made by him against Woodruff in his affidavit of contest filed May 28, 1890.

The local officers overruled Woodruff's motion, and White's protest, and proceeded to take the testimony of witnesses. The hearing was closed on July 20, 1892. Woodruff and his attorney cross-examined the contestant's witnesses at length; but refused to introduce any testimony for the defence.

On July 27, 1892, the local officers rendered their joint decision recommending that Woodruff's homestead entry be held for cancellation, and that the preference right to enter said land be awarded to Wallace. And Woodruff appealed to your office.

On February 21, 1893, your office affirmed the decision of the local officers. And Woodruff alone appealed to this Department.

The second affidavit of contest by Wallace was filed and treated as an amendment of the first. This affidavit did not introduce a new ground of contest, but merely made more specific and definite his original affidavit, and the amendment related back to the date of the original. Wallace was therefore the first contestant. No one of the defeated contestants appealed from the decision against them. Woodruff, the contestee, alone appealed. This being true, it does not concern Woodruff that the preference right was given to Wallace asagainst the other contestants. It was clearly shown that Woodruff was disqualified by reason of his premature entry into the Territory from making entry of the land.

After careful examination of the record, the testimony, and the briefs of counsel, your office decision is hereby affirmed.

CITIZENSHIP—MEMBERSHIP IN INDIAN TRIBE.

BLACK TOMAHAWK v. WALDRON.

A claim of membership in an Indian tribe may be established by the laws and usages thereof, although such recognition may not be in harmony with the general rule that among free people the child of married parents follows the condition of the father.

Secretary Smith to the Commissioner of Indian Affairs, October 20, 1894.

Upon further considering the matters involved in this controversy, I see no good reason for changing the conclusions heretofore reached by the Assistant Attorney-General, on the record, then before him, and which conclusions were approved by me.

There can be no doubt of the correctness of the general rule as laid down, that, among free people, the child of married parents follows the condition of the father. But it has been suggested that the laws and usages of the Sioux Indians may have made Mrs. Waldron a member of the tribe on March 2, 1889, the date of the agreement between the tribe and the United States, either by furnishing a different rule as to the effect of her birth, or by causing her adoption as a consequence of the facts connected with her life. While the general rule is as has been before held, yet it must yield to the laws and usage of the tribe when laws and usage upon the subject are satisfactorily proven.

If the laws and usages of the Sioux Indians made Mrs. Waldron a member of the tribe on March 2, 1889, then she should be given the benefits which accrue to members of said tribe from the agreement referred to. You are therefore directed to charge some special agent with the investigation of this matter. To this end he should give notice to the contesting parties to produce before him on a day certain,

any testimony they may desire to submit showing whether there were tribal laws and usages of the Sioux Indians bearing upon the citizenship of Mrs. Waldron on the 2d of March, 1889, and also what was her true status in consequence of the same.

The special agent will report to you such testimony, or other information which may be obtained by him, with his conclusions, and in the same manner you will report to this Department.

As the matter has been delayed some time, you will cause prompt action to be taken in the premises.

PRACTICE—ACTION ON REVIEW—COMMISSIONER.

LITTLEPAGE *v.* JOHNSON.

While the subject-matter of a case remains within the jurisdiction of the General Land Office the Commissioner has authority to revoke, on his own motion, and for due cause, a former decision therein, and render a judgment in accord with the record.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 22, 1894. (J. L.)

This case, which involves the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 23, T. 13 S., R. 2 E., San Bernardino meridian, Los Angeles land district, California, has been certified to this Department in obedience to departmental letter of March 3, 1893.

The record shows that on September 22, 1888, Johnson made homestead entry No. 4546 of said land. His homestead affidavit, bearing date September 17, 1888, was made before the clerk of the court for San Diego county, California, and is in due form, except that the words "I am" were not inserted in the blank space of the printed form, between the word "that" and the words "now residing on the land I desire to enter."

On March 11, 1889, Littlepage filed an "application for hearing" or affidavit of contest, subscribed and sworn to before a notary public in San Diego county, California, on March 8, 1889.

In said application Littlepage alleged:—

1. That he settled upon said land September 10, 1888.
2. That prior thereto he had said land enclosed by a wire fence, and built a house thereon, and moved his wife and family into the same, and remained therein with them until the present time (March 8, 1889) with the exception of about two months; during which his wife was confined and was absent for that purpose.
3. That he has cleared and plowed about ten acres of said land, and that the value of his improvements is at least \$300.
4. That on September 10, 1888, he went before F. R. Sawday, deputy clerk for San Diego county, and made a homestead application and affidavit for said land, and gave him twenty dollars to be forwarded therewith to the land office at Los Angeles. That said papers were returned by the local officers, because they did not show

whether the applicant was or was not a citizen of the United States. That he immediately caused the papers to be corrected and returned to the land office.

5. That he was subsequently informed by said deputy clerk that he could not get a homestead entry on said land because of the entry thereof by W. W. Johnson made September 22, 1888.

6. Whereupon Littlepage further averred, that neither Johnson, nor any other person for him, did, prior to the 24th day of September, 1888, make any improvements, settlement or residence upon said tract; that he, the affiant, is the prior settler, the first applicant and a qualified one, an actual *bona fide* resident and possessor of said tract; and has complied with all the rules and regulations in such case made and provided, and is entitled to a homestead entry upon said tract.

7. And therefore Littlepage prays for a hearing to establish his priority of right to enter said land.

On May 22, 1889, the local officers ordered a hearing for August 15, and directed the testimony to be taken before the clerk of San Diego county on August 5, 1889, at which time both parties appeared in person with their attorneys and witnesses, and the testimony was taken.

On September 2, 1889, the local officers rendered their joint decision, recommending that Johnson's entry be canceled and that Littlepage be allowed to make homestead entry of said tract.

Johnson appealed, and on November 9, 1891, your office affirmed the decision of the local officers.

On January 6, 1892, Johnson filed a motion for a reconsideration of your office decision, and for a rehearing and review of the case, upon the ground of newly discovered evidence; and filed affidavits in support of said motion.

On March 3, 1892, your office, while considering said motion and in connection therewith the whole record in the case, became satisfied that the decision of November 9, 1891, was erroneous and must be set aside. Therefore, disregarding Johnson's pending motion for a new trial, your office proceeded of its own motion to reconsider the case as it stood upon Johnson's appeal from the local officers; and after elaborate discussion of the evidence, your office revoked its former decision of November 9, 1891, and dismissed Littlepage's contest.

On May 31, 1892, your office was informed by the local officers that notice of your office decision of March 3, 1892, was served on Littlepage on March 15, 1892, by registered letter, the receipt of which on March 22, 1892, was acknowledged by J. M. Robinson, his attorney, and that no appeal had been filed or other action taken.

On June 15, 1892, Littlepage, by Messrs. Copp and Luckett, his attorneys, filed in your office an appeal from the decision of March 3, 1892, which appeal your office, by letter "H" of June 29, 1892, refused to forward to the Department, for the reason that it was not filed in time.

On July 7, 1892, Littlepage filed in your office a motion for a review of the decision of June 29, 1892, refusing to forward the appeal. This motion was overruled by your office, by letter "H" of August 6, 1892.

On August 29, 1892, Littlepage, by his said attorneys, filed in this

Department a petition for an order directing the Commissioner to certify to the Department, for examination and action, the record of the case. On March 3, 1893, the prayer of said petition was granted by my predecessor, who held that notice of your office decision of March 3, 1892, was not received by Mr. Robinson, attorney for Littlepage, until April 16, 1892, and that the failure was not due to his neglect.

Thus the whole record of the case is now before me for consideration and action.

Counsel for Littlepage earnestly contend that the Commissioner had no authority, or jurisdiction, to revoke the decision of November 9, 1891, and make the contrary decision of March 3, 1892. Johnson's motion for a rehearing, supported by affidavits, was obliged to be considered in connection with the testimony already in the case. During the examination thus necessitated, the Commissioner became satisfied that his former decision was erroneous and should be set aside. He seems to have regarded the papers filed with the motion for review and rehearing, as insufficient to sustain it under the rules of practice. But he felt it to be his duty, in the exercise of his supervisory powers, to correct the error he had incidentally discovered.

Section 453 of the Revised Statutes enacts, that—

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands.

Section 441 enacts, that—

The Secretary of the Interior is charged with the supervision of public business relating to . . . the public lands.

In the case of Malone *v.* Union Pacific R. R. Co. (7 L. D., 13), this Department held that:—

The Commissioner of the General Land Office has authority to review a decision of his office *sua sponte*, and without notice to the parties, where such action is required to put the office in accord with its own records. (See also Parker *v.* Castle, 4 L. D., 85.)

In the case of the Northern Pacific R. R. Co. *v.* Bass (14 L. D., 443), it was held that—

In the absence of a motion for review the Department through the supervisory power conferred upon the Secretary, has the requisite authority to correct its own mistakes while the subject matter is yet under its jurisdiction. (See also Pueblo of San Francisco, 5 L. D., 483-494.)

In the case of Knight *v.* U. S. Land Association (142 U. S., 181), the Supreme court of the United States held that—

It makes no difference whether the appeal is in regular form according to the established rules of the Department or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner takes up the case and disposes of it in accordance with law and justice.

And on page 178 the court quotes with approbation the following from the case in 5 L. D., 494, *supra*:

When proceedings affecting titles to land are before the Department, the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact, the patent if issued would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for the annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul.

Considering that it is the Commissioner's express duty to "perform all executive duties in anywise respecting the public lands," it seems to me, that the rules of conduct indicated by the decisions quoted for the guidance of the Secretary, should apply also to the conduct of the Commissioner, so long as the subject-matter remains under the jurisdiction of his office.

There can be no question as to his authority and duty before the promulgation of his decision:

If, after the promulgation of a decision, before an appeal has been taken and allowed, and before the papers in the case have been forwarded to the Secretary's office, the Commissioner shall discover that his decision is erroneous, unlawful, or unjust, he would have authority, and it would be his duty, to interfere and prevent its execution, whether procured by fraud or accident, or by the mistake or oversight of himself or some of his subordinates. It would be idle to delay the case and encumber the Secretary's office by transmitting for review, upon appeal, a decision which the Commissioner knows ought to be reversed; and equally idle, if there be no appeal, to make formal application to the Secretary for supervisory authority to revoke the erroneous decision. The Commissioner's authority is commensurate with his duties; and the words of the statute defining the latter are broad. The simplest and quickest way to remedy such a wrong, is for the Commissioner *sua sponte* to revoke the erroneous decision and promulgate the right one, giving notice to the parties interested, either before or after the promulgation of the new decision, as he, the Commissioner, may deem best, and saving all rights of appeal.

In this case the witnesses did not appear before the local officers. After carefully examining all the testimony, I find that Littlepage has failed to prove the material allegations contained in his affidavit of contest, and that Johnson was the prior settler; that he made settlement and established his residence upon the land in contest on September 10, 1888, and was residing thereon when he made his homestead affidavit. There is no question as to the sufficiency of Johnson's

improvements, cultivation, and continuous residence. Littlepage's contest must be dismissed and Johnson's entry held intact.

Your office decision of March 3, 1892, is hereby affirmed.

PALMER *v.* STILLMAN.

Motion for the review of departmental decision of March 17, 1894, 18 L. D., 196, denied by Secretary Smith, October 22, 1894.

PRACTICE—NOTICE—SERVICE BY PUBLICATION—APPEARANCE.

RIDDELL *v.* HANSON'S HEIRS.

The publication of notice does not confer jurisdiction, if the order therefor was issued without due showing of diligence on the part of the contestant, nor can such notice be made good by a subsequent affidavit setting forth facts sufficient to warrant publication.

The appearance of the defendant, on motion to re-open a case, after default therein on his part, is not a waiver of his right to subsequently raise the question of jurisdiction; and, on appeal from the denial of said motion, the appearance of counsel, on behalf of the defendant, will be held a special appearance for the purpose of determining the question of jurisdiction, where said question is the only one at issue.

Secretary Smith to the Commissioner of the General Land Office, October 22, 1894. (E. M. R.)

This case involves parts of Secs. 22 and 27 in T. 14 N., R. 10 W., Vancouver land district, Washington.

Your office decision shows—and from the facts stated no appeal was taken—that Alexander Hanson filed a notice of his donation claim April 30, 1855, on unsurveyed lands, under the act of congress of September 27, 1850 (9 Stat., 496).

April 15, 1855, proof of the above notice was made before a justice of the peace; July 14, 1857, another notice was made by Hanson, at which J. S. Morgan and Francis S. Garretson were witnesses who stated that Hanson's residence upon the land commenced on December 15, 1851, and continued until July 14, 1857.

Again in February 19, 1862, Hanson filed another notice of his claim in which he states that at its date he was a resident of San Francisco, California. The proof with this notice consisted of Hanson's affidavit and the affidavits of F. S. Garretson and Mark Winant, who fixed the date of Hanson's settlement on the land as December 10, 1851, and stated that his residence continued thereon until July 14, 1859. It is also in evidence that Kate S. Hanson made an affidavit before a notary public in San Francisco, California, on the 10th day of December, 1863, stating that she was the administratrix of the estate of Alexander Hanson, deceased.

February 21, 1885, the local officers forwarded copies of the declaration of intention and admission to citizenship of Alexander Hanson, which show that he made and filed the same in the county court of San Francisco on December 30, 1852.

Hanson became a citizen of the United States on February 13, 1855, and the court in passing upon his application states:

And the said Alexander Hanson having then exhibited to said court a certificate of his declaration of his intention to become a citizen, made in the county court, county of San Francisco, state of California, on the 30th day of December, A.D., 1852, and proved by the oaths of Mark Wm. Wm. and John S. Morgan, citizens of the United States, his residence within said State for the last year.

On the 30th of June, 1890, the local officers rendered a decision in favor of John Riddell against the heirs of Alexander Hanson. This contest was for abandonment and notice was given by publication first, against Alexander Hanson; subsequently a new notice was given also by publication against the heirs-at-law of Alexander Hanson. The first notice was addressed to Alexander Hanson and the second to the heirs-at-law of Alexander Hanson at San Francisco, California. At the hearing thereafter held in this case the contestant appeared and the contestee was in default.

On the 31st day of July, 1890, Kate S. Dorland filed a petition alleging that she was an heir-at-law of Alexander Hanson, deceased, and asked for a re hearing in this case. The local officers denied this petition. Upon appeal your office decision of February 2, 1893, affirmed the decision below.

The question was raised before you that as the notice by publication had not been accompanied by an affidavit of due diligence it was an improper notice and that jurisdiction had never been acquired upon the heirs of Alexander Hanson. The decision appealed from seems to be based upon the ground that the re-opening of the case and ordering of a hearing would be to permit the heirs of Alexander Hanson to dispute the statement made by him during his lifetime in the application to become a citizen and that the question of jurisdiction, not having been raised before the local officers, can not be raised upon appeal.

Rule 11 of practice provides:

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

In a large number of cases this Department has held that the affidavit of due diligence was the basis and authority for the order of service by publication.

There is an affidavit in this case made by J. A. Munday, attorney for Riddell, in which he states that due diligence was used, and if the affidavit had been made at the proper time it would have been a proper service. There were two notices given by publication in this case: one on March 21, 1890, and the other on April 25, 1890; the affidavit of Mr. Munday was not made until May 1, 1890, consequently it cannot cure

the defect for the reason that the affidavit being the basis of the order of publication, such order was a nullity in the absence of such an affidavit. In *Jardee v. Cannon* (16 L. D., 28), it was held that—

Affidavits were filed by the contestant after the notice was issued, for the purpose of curing the defect in the first affidavit but such showing was too late.

There can be no question that the issue of jurisdiction may be raised at any stage of the proceedings. The appearance of Mrs. Dorland to make a motion for rehearing in the case can not be held to have been a waiver upon her part of the defect in the service.

This case is not similar to one in which a person appears at the day of trial, but the case having been already heard, the decision of the local officers having been rendered, an appearance upon a motion to re-open is not such an appearance as in anywise waives the right to a question of jurisdiction.

The fact that Mrs. Dorland admits that she was a resident of California does not debar her from raising the question of jurisdiction, when the absolute plain requirement of the rule of practice demands it as the *sine qua non* of issuance of notice in that way.

On July 22, 1891, the attorneys in this city filed the following appearance:

Before the Commissioner of the General Land Office:

In the case of John Riddell, contestant, *v.* Alexander Hanson, involving the latter's donation claim No. 37, notification No. 11999, for parts of Secs. 22 and 27, T. 14 N., R. 10 W., Vancouver, Washington, land district, we enter our appearance on behalf of the heirs of Alexander Hanson, deceased, and ask to be advised of the receipt of the papers in said case, and thereafter allowed the usual time for submission of argument thereon.

It is maintained by the contestant-appellee that this appearance is a general appearance, and as such it is a waiver of the serving of process in this case.

This case was before your office upon appeal from the register and receiver's decision denying a motion for rehearing upon the ground set out in the petition. The question before your office and before this Department is that of jurisdiction, and whatever the language might indicate, I am of opinion—there being but one question at issue—that the ground taken is technical, and that, under all the facts and circumstances of this case, the appearance is a special appearance for the purpose of having the Department pass upon the question of the jurisdiction of the parties.

The case of *Pankonin v. Crook* (5 L. D., 456), cited by counsel for Riddell, is not in point as sustaining the position taken, that a non-resident cannot be heard to maintain that the absence of the affidavit of due diligence is a fatal defect. The syllabus of that case is as follows:

Service by publication of notice is authorized on due showing that personal service cannot be made.

A non-resident will not be heard to say that due diligence was not used to secure personal service.

The facts in the case at bar, and the one cited, are materially different. In that case an affidavit of diligence was made, and the question came up on the denial by the defendant that any diligence had been used, and when the defendant admitted that he was not a resident of the State of Nebraska—where the case was tried—it was held that "he cannot be heard to say that contestant has not used due diligence in attempting to secure personal service." That case simply held that when an order of service by publication had been granted on an affidavit that conformed to the requirements of the rule, the question of the truthfulness of the affidavit could not be raised by one who admittedly resided outside of the State.

Counsel for contestant urge that the point, that the affidavit was not filed prior to the first publication, not having been raised before the local officers, when counsel entered a full appearance, and filed a motion for review, and subsequently on application for a rehearing, it was waived, and cites Cole v. Shotwell (15 L. D., 404).

The syllabus of that case is as follows:

An attorney who files a motion for a new trial, on behalf of the defendant, on the ground that due notice of the former proceedings was not given, subjects thereby his client to the jurisdiction of the local office; and if said motion is granted, notice to the defendant of the time fixed for trial is sufficient if given to his attorney.

But in that case, the new trial had been granted, and it was upon the second default that it was held that jurisdiction had been acquired.

The local officers not having acquired jurisdiction over the heirs of Alexander Hanson, the proceedings in this case have been a nullity, for the reason that the heirs of Hanson are entitled to their day in court. It does not necessarily follow that to re-open the case would be to allow them to dispute the record made by their ancestor; it may be that the discrepancies between the proof of Hanson and his naturalization can be explained; but however this may be—and it will be time enough to raise the question of estoppel when the parties are properly before us—it is sufficient now to say that the service of notice in this case is fatally defective, and for the reasons herein stated, your office decision is reversed, and the contest of Riddell remanded to the local officers to be initiated *de novo* at his option.

INDIAN RESERVATION—EXECUTIVE ORDER—RIGHT OF WAY.

FOND DU LAC RESERVATION.

The change of the boundaries of the Fond du Lac Indian reservation by executive order, to correct an error of description therein, did not affect the validity of said reservation as finally established, although said reservation was originally created under an act that described the boundaries thereof.

The relinquishment to the United States by the Indians of their interest in said lands, does not defeat their subsequent claim for damages on account of the location of a railroad right of way through said reservation prior to such relinquishment.

Assistant Attorney General Hall to the Secretary of the Interior, January 22, 1894.

I am in receipt, by reference from the First Assistant Secretary, of a communication from the Commissioner of Indian Affairs, addressed to you, in which two questions are raised in regard to the right of the Indians to recover of the Northern Pacific Railroad Company for the right of way through the Fond du Lac Indian reservation. The questions are—First: Is that part of the land that has been taken by said railroad company for its right of way in fact a part of a legally established Indian reservation. Second: Can the Indians now claim damages of the railroad company for taking such right of way, inasmuch as they have transferred and relinquished to the United States all their right, title and claim of every kind to said lands. You ask my opinion on these two questions.

The treaty by which these Indians went into possession of this reservation was ratified on September 30, 1854. The land embraced within said reservation, as set out in the treaty, was a tract of land

beginning at an island in the St. Louis river above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running west to the boundary line heretofore described, thence north along said boundary line to the mouth of the Savannah river, and thence down the St. Louis river to the place of beginning, and if said tract shall contain less than 100,000 acres, a strip shall be added on the south side thereof large enough to equal such deficiency.

A history of the transaction between this band of Indians and the United States government, is fully set forth in the record. It appears there that, in consideration of the fact that an error had been committed in the description of the land—it being understood at the time that the articles of the treaty were drawn up that the improvements made by these Indians at Perch Lake should be included in the reservation, which was not the fact as finally located—the President subsequently changed the boundaries of the reservation to include these improvements.

It is upon this ground that the counsel for the Northern Pacific Railroad Company asserts that the right of way of the said road does not pass over, or through, any portion of the Fond du Lac reservation. In

other words, the contention now is, that, as the act ratifying the treaty described the boundaries of the reservation and, as the road, as completed, did not go through such described land, the act of the President in changing such boundaries of said reservation was without authority of Congress and without force and effect in law, and conferred no interest or title whatever, to the Indians in reference to the land subsequently added.

It is well here to note that in Article three of said act of September 30, 1854, (10 Stat., 1109), it is stated—

And he (the President) may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart, and he may also make such change in the boundaries of such reserved tracts, or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

It may be noted that the error here corrected by the President, was an error of failure to carry out the intention of the contracting parties. It was the intention on the part of the Indians and upon the part of the agents of the United States government, that these lands, improved by the Indians, should be embodied in the reservation set aside for them. Upon this ground alone it would appear that the act of the President was justified and could be maintained.

It will further be noted that the section of the treaty hereinbefore set forth, contains the clause—after giving the President power to change the boundaries—“as shall be necessary to prevent interference with any vested rights.”

The act of Congress, it appears, should be construed so as to protect with equal force the rights of those with whom they were contracting, as of its own citizens, and, as the Indians had, prior to this time, made substantial improvements upon these lands, their rights were vested within the meaning of this clause, and the act of the President could therefore be defended on the ground of the power therein granted to him.

In addition to the special authority given to the President to change the boundaries of the Fond du Lac Reservation, he had, in virtue of his general authority, the right to establish an Indian Reservation. In the case of *ex parte* C. N. Cotton (12 L. D., 205), it was held that

the general allotment act of February 8, 1887, gave the Indians the same rights within a reservation created by executive order, as if made by treaty or act of Congress, and lands subject to such right can only be relieved therefrom by congressional action.

In the case of *Grisar v. McDonald* (6 Wall., 381), the supreme court says:

From an early period in the history of the government it has been the practice of the President to order, from time to time as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public use.

In *ex parte* John Campbell (6 L. D., 317), it was said:

The President is vested with general authority in the matter of reserving lands for public uses and land so set apart is not subject to disposal under the public land laws during the existence of such reservation.

It would seem from these decisions, that outside of the authority granted in the treaty hereinbefore referred to, the President had the authority to set aside and reserve these lands, as an addition to the reservation created by treaty, if, in his judgment, the interest of the Indians or of the United States would be promoted thereby.

It is evident that the Indians did not have a fee simple title, because in article three of the treaty, it is set forth that—

The United States will define the boundaries of the reserved tract whenever it may be necessary, by actual survey, and the President may, from time to time at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of the land for his or their separate use, and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose.

But whilst this is true, it is equally true that they did have some legal estate in the lands, and, for the purposes of the question now at issue, it is not pertinent as affecting the right of action for damages or compensation, as to whether they had a fee simple title or were simply tenants at will. In either event, they had such interest as would maintain a cause of action and the degree of their title is only in point as determining the extent and the amount of damages or compensation to which they would be entitled.

Whatever interest the Indians had in these lands passed to the government of the United States by their subsequent treaty, but the treaty did not carry with it the cause of action which had already accrued prior to the date of such relinquishment.

It may, perhaps, be said that as the title to these lands has passed from the Indians to the United States government, the former could not maintain a cause of action against the defendant railroad company. In this connection I quote from the Massachusetts decision that which seems to be in point: *Starr et al. v. Jackson* (11 Mass., 518, page 519); Parker (chief justice) in delivering the opinion of the court says:

There seems to be no doubt but that a tenant at will and his landlord may both maintain actions for injuries done to the soil or to buildings upon it. They are both injured but in different degrees; the tenant in the interruption to his estate and the diminution of his profits, and the landlord in the more permanent injury to his property, etc., (page 523).

Chitty in his Pleading, speaking of the action of trespass *quare clausum*, says:

The gist of the action is injury to the possession; and unless, at the time the injury was committed, the plaintiff was in actual possession, trespass cannot be supported.

It is contended by counsel for the railroad company that its right of way grant is without exception of any kind.

Concede this contention to be true, yet it cannot be successfully maintained that the grant to the Northern Pacific Railroad Company is in any wise to be construed as giving them the right of way through these lands without compensation for the reason that the reverse is expressly stipulated in the act of 1854, *supra*.

In the case of the Leavenworth, Lawrence and Galveston Railroad Co. v. The United States, (92 U. S., 733), it was held as follows:

3. The doctrine of Wilcox v. Jackson, 13 Pet., 489, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to military, reservations, inasmuch as the latter are the absolute property of the government, whilst in the former other rights are vested.

5. Where the right of an Indian tribe to the possession and use of certain lands, as long as it may choose to occupy the same, is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them.

6. A proviso, that any and all lands heretofore reserved to the United States, for any purpose, whatever, are reserved from the operation of the grant to which it is annexed, applies to lands set apart for the use of an Indian tribe under a treaty. They are reserved to the United States for that specific use; and, if so reserved at the date of the grant, are excluded from its operation. It is immaterial whether they subsequently become a part of the public lands in the country.

I therefore conclude that both questions should be answered in the affirmative, and I so advise.

Approved,

HOKÉ SMITH,

Secretary.

ALASKA—LEGAL STATUS OF NATIVES.

JOHN BRADY ET AL.

The legal status of the aborigines of Alaska is not that of "Indians" as said term is used in section 2103 R. S., providing for the approval of contracts with persons so described.

Assistant Attorney General Hall to the Secretary of the Interior, June
12, 1894. F. L. C.

I am in receipt, by reference from Acting Secretary Sims, of an agreement between John Brady and certain Alaska Indians, who sign as representatives and head men of Indians at Sitka, relative to a tract of land near Sitka harbor, known as survey No. 7.

My opinion is asked

as to the legal status of the aborigines of the District of Alaska, and whether they are as such, Indians within the meaning of that term as used in chapters 1 and 2, Title XXVIII R.S., as to render section 2103 R. S. applicable to contracts made by them.

The treaty concluded March 30, 1867, by which Alaska was ceded to the United States (15 Stat., 539), no where speaks of any of the inhabitants of the ceded territory as Indians. In Article 3 it speaks of uncivilized native tribes and says they "will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

The act of July 27, 1868 (15 Stat., 240), entitled "An act to extend the laws of the United States, relating to customs, commerce and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes," makes no mention of the aborigines as Indians or otherwise, but in the sundry civil appropriation act of March 3, 1873, 17 Stat., 510 (530), the act of 1868, *supra*, was amended so as to extend the provisions of sections 20 and 21 of the act of June 30, 1834 (4 Stat., 732), to Alaska. Said sections relate to the sale of spirituous liquors to Indians in Indian country.

In the case of *Waters v. Campbell* (4 Sawyer, 121), in the circuit court, district of Oregon, Judge Deady held (syllabus):

Alaska is not "Indian country" in the technical sense of that phrase, only so far as the introduction and disposition of spirituous liquors is concerned; and subject to this restraint, is open to occupation and trade generally.

The status of the natives or aborigines as a race or races has never been defined by statute, nor has their political status been fixed, although the word Indian is sometimes used with reference to some of the inhabitants of Alaska. For example, in section 8 of the act of May 17, 1884, providing a civil government for Alaska (23 Stat., 26), the following language is found:

Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

And section 12 provides for a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district.

The office of Indian Affairs in this department has never exercised any jurisdiction over any of the inhabitants of Alaska as Indians. No Indian agencies have been established, and none of the moneys appropriated for Alaska have been disbursed under the supervision of the office of Indian Affairs.

Congress annually appropriates for education in Alaska, the last appropriation being in the sundry civil act of March 3, 1893 (27 Stat.,

596), and the money so appropriated is used without reference to race, and is, as I am informed, dispensed under the direction of the Bureau of Education.

From an ethnological standpoint, the status of the tribes in Alaska is by no means definitely fixed. In the volume of the report of the Superintendent of the Eleventh Census, relating to Alaska, chapter 10, p. 153, it is said:

Though there is room for doubt as to whether the natives of Alaska may properly be designated as Indians, they have been classed as such for the purpose of enumeration.

Congress has not as yet given to the natives of Alaska a definite political status. In government reports and documents they have been variously described, either by the collective term of Indian, or by their tribal names. But a small proportion of the aboriginal people of Alaska belong to the family known as North American Indians.

Under date of November 29, 1891, my predecessor, Assistant Attorney General Shields, had before him for an opinion the question as to whether an account of money expended by Mr. Whittlesey, a member of the Board of Indian Commissioners, on a trip to Alaska to visit the schools, could properly be allowed as chargeable to any fund or appropriation. The opinion was adverse to Mr. Whittlesey's claim. It could not be paid him from any Indian fund, because there "are no Indian agencies in Alaska and no Indian schools under the control of that office;" it could not be paid from moneys appropriated for education in Alaska, for the appropriation was not for Indians as a race, but was without reference to race. That opinion was adopted by the Department, and the claim was disallowed.

With this review of the laws and holdings with reference to Alaska and its inhabitants, and after a careful consideration of the specific question referred to me, I am led to conclude that section 2103 of the Revised Statutes has application only to Indians in Indian country; that Alaska is not Indian country within the meaning of the laws, and therefore that the provisions of said section 2103 do not require or authorize you to approve a contract made, as was the one before me between a white man and so-called Indians in Alaska.

I may add that had I reached a different conclusion, I could not recommend the approval under any circumstances of an agreement as crudely and ambiguously drawn as is the one under consideration. It starts out purporting to be a contract for a deed in trust; it closes by being a loosely drawn and very indefinite contract for a decidedly uncertain sort of an easement.

Approved,

HOKÉ SMITH,

Secretary.

PUEBLO INDIAN LANDS—JURISDICTION OF DEPARTMENT.

JOSEPH E. SAINT ET AL.

The Department has no such power or jurisdiction over the Indians of the Pueblo of Cochiti, or their lands, as will authorize it to lease said lands, or to "approve or disapprove" the leasing thereof.

Acting Secretary Sims to the Commissioner of Indian Affairs, June 30, 1894.

I acknowledge the receipt of your communication of 29th ultimo, submitting for the consideration of the Department the application of Mr. Joseph E. Saint, and associates, of Albuquerque, N. M., for a lease of certain lands of the Cochiti Pueblo, for the purpose of erecting smelting and reduction works, and conducting a smelting business thereon.

You call attention to the form of lease submitted by Captain Bullis, U. S. A., and request to be advised whether or not the Department would approve a lease in simple terms to said parties for the lands described in said lease, for the period of ten years for the purpose named, in consideration of the payment of a reasonable and just rental.

In response, you are advised that by the patent issued to the Cochiti Pueblo November 1, 1864, the United States

Do give and grant unto the said Pueblo of Cochiti, in the county of Santa Ana aforesaid, and to the successors and assigns of the said Pueblo of Cochiti, the tract of land above described, as embraced in said survey, but with the stipulation, as expressed in the said act of Congress (Dec. 22, 1858), "that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist," to have and to hold the said tract of land unto the said Pueblo of Cochiti, in the aforesaid county of Santa Ana, and to the successors and assigns forever, of the said Pueblo of Cochiti, with the stipulation aforesaid,

and as the Pueblo Indians were, by an act of the legislature of New Mexico, created and constituted bodies politic and corporate, and given names by which they and their successors should have:

Perpetual succession; sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever proper to recover, protect, reclaim, demand or assert, the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual.

And as the supreme court has held that the Pueblo Indians not being tribal Indians, they were not within the provisions of the intercourse act of 1834, and not subject to the jurisdiction of the Indian Department of the United States Government (U. S. Reports 94, p. 614); and as it was held by the Department, May 5, 1891, based on the opinion of the Honorable Assistant Attorney-General of May 4, 1891, that the jurisdiction of the Department did not extend over the Pueblo Indians

so as to authorize rules and regulations to enforce the attendance of their children in the schools established by the government for the education of Indians, I am of opinion that it is not within the province of the Department to approve a lease made by the Cochiti Pueblos for the purpose named.

I transmit herewith copy of an opinion of the Assistant Attorney-General for this Department, to whom this matter was referred, of June 26, 1894, wherein he expresses the same opinion as is set forth herein.

OPINION.

Assistant Attorney-General Hall to the Secretary of the Interior, June 26, 1894. (J. I. P.)

On May 29, 1894, the Commissioner of Indian Affairs, by letter of that date, submitted for the consideration of the Department the application of Mr. Joseph E. Saint *et al.*, of Bernalillo county, New Mexico, for a lease of 168.83 acres of land belonging to the Pueblo of Cochiti, on which it was desired to erect smelting and reduction works, and to conduct a smelting business. Accompanying said letter was a communication on the subject of said proposed lease, dated May 22, 1894, from Captain J. L. Bullis, United States Army, Acting Indian Agent, Pueblo and Jicarilla Agency, Santa fe, New Mexico. Also a form of said proposed lease, a form of a bond, a plat of the tract sought to be leased, and other papers relating to said subject.

Under date of June 4, 1894, the Acting Secretary referred the matter to me

with request for an opinion as to whether this Department has such control over these Indians and their lands as to authorize its taking jurisdiction to approve or disapprove a lease of said lands.

The lands here involved are a part of those included in the patent issued to the Pueblo of Cochiti, November 1, 1864. This pueblo was one of a number in said territory whose title to land, claimed under old Spanish grants, was protected by the treaty of Guadalupe Hidalgo, and was confirmed by United States patents in 1864. (11 Stat., 374; 12 Stat., 71; Executive Order, March 16, 1877; General Land Office Report for 1876, p. 272.)

The patent issued to the Pueblo of Cochiti is of the form adopted by the government with reference to all Spanish and Mexican land grants, and is in effect but a release or quit claim of whatever right or interest the government may have in said lands, and does not attempt to affect any adverse valid rights thereto, should such exist. But the government by said patent confirms in said pueblo the title to said lands, and so far as it is able to do so, vests in it the absolute title thereto, without reserving any rights or powers to itself, or limiting the power of the pueblo to control and dispose of said lands as it may see fit.

In the case of the United States *v.* Joseph (94 U. S., 614), the supreme

court hold that the Indians of a pueblo have a complete title to their lands, and are not an Indian tribe within the meaning of the intercourse act of 1834 (4 Stat., 729), nor the act of 1851 (9 Stat., 587, Sec. 7), extending the provisions of the act of 1834 to New Mexico. That when the act of 1834 was passed, there were no such Indians as these in the United States, with some possible exceptions named, and that when it became necessary to extend the laws regulating intercourse with the Indians to New Mexico, it was evidently intended to apply them to the Apaches, Comanches, Navajoes and other nomadic tribes incapable of self government and while the court in said opinion declines to pass on the question as to whether said pueblo Indians are citizens of the United States and New Mexico, it does unhesitatingly declare that their status is not, in the face of the facts stated, to be determined solely by the circumstance that some officer of the government has appointed for them an agent.

In an opinion prepared by the Assistant Attorney General of this Department May 4, 1891, (Assistant Attorney-General's Opinions, Vol. 6, p. 305), the status of the Pueblo Indians, and their relations to the government was elaborately discussed. And it was therein held that the provisions of the Indian appropriation act for the year ending June 30, 1892, which authorized such rules and regulations as would secure the attendance of Indian children at schools established for their benefit, did not, in the absence of an express provision to that effect, apply to the pueblo Indians of New Mexico.

The only authority vested in this Department to lease or authorize the leasing of Indian lands is conferred by section 3 of the act of February 28, 1891 (26 Stat., 794); which act is amendatory of the general allotment act of February 8, 1887 (24 Stat., 388). Prior to the act of February 28, 1891, *supra*, it had been held both by the Attorney-General of the United States and the Assistant Attorney-General of this Department, that this Department had no power to lease or authorize the leasing of Indian lands. (See Opinion of Assistant Attorney-General, Vol. 10, p. 391.) But the act of February 28, 1891, applies only to those lands that have been allotted by the government in severalty to the Indians, and which it holds in trust for them, and which the allottees, because of the disability therein stated, cannot occupy or improve, and it will require no argument to show that said act does not apply to the Pueblo Indians of New Mexico, who hold their lands by patent from the government, and not as individuals, but as a community.

It is clear to my mind that this Department has no such power or jurisdiction over the Indians of the pueblo of Cochiti, or their lands, as will authorize it to lease said lands, or to "approve or disapprove" the leasing thereof, and I so hold.

INDIAN LANDS—ALLOTMENT—TRIBAL RIGHTS.

JOSEPHINE VALLEY ET AL.

An Indian may not be a member of two tribes in a sense that will entitle him to secure lands from both tribes under the provisions of the allotment act of February 8, 1887.

Secretary Smith to the Commissioner of Indian Affairs, July 10, 1894.

I acknowledge the receipt of your communication of October 25th last, relative to certain Citizen Pottawatomie Indians, to whom patents for lands have been issued as Citizen Pottawatomies, and who also hold patents for lands allotted to them as members of other tribes.

In response thereto, I transmit herewith copy of an opinion dated 23d ultimo, from the Honorable Assistant Attorney-General for the Department of the Interior, to whom the matter was referred.

As it is held in this opinion, in which the Department concurs, that one person may not be a member of two tribes of Indians in a sense that will entitle him to secure lands from both tribes, under the provisions of the general allotment act, I have to request that copies of the correspondence, and such other papers as may be required, be prepared for transmittal to the Honorable Attorney-General, that suit may be brought, as suggested, for the recovery of these lands.

OPINION.

Assistant Attorney General Hall to the Secretary of the Interior, June 23, 1894. (E. W.

Under date of February 15, 1894, you referred to me certain correspondence between Josephine Valley and Joseph Socto, citizen Pottawatomie Indians, and Hon. D. M. Browning, Commissioner of Indian Affairs, relative to the rights of said citizen Indians under the acts of Congress providing for the allotment of lands in severalty to Indians on the various reservations, requesting my opinion

as to whether a person may be a member of two different tribes of Indians at the same time, and secure lands and other benefits from both tribes; and if not, what steps should be taken in this case to compel the surrender of the title to the lands to which the party is not entitled.

It appears that the Department upon ascertaining the fact that patents had issued to certain Pottawatomie Indians, who also held patents to lands allotted to them as members of other tribes, requested the Commissioner of Indian Affairs to take the necessary steps to secure the relinquishment by said parties of one of the patents so held by them.

When this request was made known to Joseph Socto and Josephine Valley, the citizens thus holding more than one patent, each of them declined to relinquish in compliance with said request, furnishing reasons therefor in writing. Joseph Socto states that the mother of his

two children—for whom it seems he made selection—is a Peoria by birth; and that when the children were born they were enrolled on the Peoria annuity roll and have drawn their payments until the allotment and settlement of the Peoria business, so that they have an undisputed right to their Peoria patents. Socto being a Pottawatomie by birth, claims that his children—Mary and Eliza—have a birthright among the Pottawatomies and that they were enrolled by the proper authorities of said tribe. For these reasons he declines to surrender either patent.

Josephine Valley, being a Pottawatomie by birth, claims that she was legally adopted into the Peoria tribe and lawfully placed on the rolls of said tribe, which action was approved by the Indian agent and by the Department; that she has drawn annuities for nearly twenty years, and has, in every respect, been lawfully and legally recognized as a member thereof. Being a Pottawatomie by birth, she has drawn lands as a member of that tribe, and refuses to surrender either patent.

It seems to me to be very clear that Congress never intended to confer a dual privilege upon any one Indian and no tribal arrangements or relations will receive such a construction as to give one person a twofold interest in a beneficent provision of a statute manifestly intended to treat all individuals affected thereby, in the same manner.

By the act of March 2, 1889 (25 Stat., 1013), the provisions of the act of February 8, 1887 (24 Stat., 388), are extended to and made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, etc., with certain exceptions not necessary to mention here. In the first section of the act of 1887, *supra*, it is provided that

the President of the United States be, and he is hereby authorized to allot the lands in said reservation in severalty to any Indian located thereon as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age one-eighth of a section, and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

It will be observed from the above recited provisions of the statute, that it is specifically set forth how much each individual person is to receive by allotment. There is no ambiguity in the provisions of the statute, and it must be conformed to in accordance with its terms.

I am of the opinion, therefore, that one person may not be a member of two tribes of Indians in a sense that will entitle him to secure lands from both tribes under the provisions of the act above referred to.

As to what steps should be taken in this case to compel the surrender of the title to the lands to which the parties are not entitled, I suggest that the Attorney General be furnished with a copy of the correspondence and of this opinion, accompanied with the request that he cause suit to be instituted before the proper tribunal for the recovery of said lands.

PRACTICE—CERTIORARI—TOWNSITE LOCATION.

HOWDEN ET AL v. WOODWARD TOWNSITE.

A petition for certiorari will not be granted in the absence of a *prima facie* showing that calls for a reversal of the action below.

A protest against the location of a townsite, on the ground that action was taken on erroneous information, will not warrant favorable consideration by the Department, where said townsite is designated in the proclamation of the President, and a townsite settlement has been made in accordance therewith.

*Secretary Smith to the Commissioner of the General Land Office, July 23,
(J. I. H.) 1894. (E. W.)*

Your office letter of April 4, 1894, transmits the petition of Robert D. Howden and Joseph Hunter, for writ of certiorari, asking that your office be directed to transmit to the Department, without delay, the records in the above stated cause, for consideration upon protestants' appeal.

It appears that the President's proclamation of August 19, 1893, opening up to settlement and entry the Territory of Oklahoma, commonly known as the Cherokee Outlet, designated the S. $\frac{1}{2}$ of Sec. 25, T. 23 N., R. 21 W., I. M., as the location of the county seat, county N, of said outlet.

It further appears that the board of townsite trustees for Oklahoma Territory filed a townsite application in the local office on September 29, 1893, to enter said section as a townsite by the name of Woodward, which said application was amended and re-filed January 20, 1894.

Sometime in November, 1893, said townsite board proceeded to make proof on said application, for the purpose of obtaining a townsite patent, under the act of Congress of May 14, 1890, (26 Stat., 109).

Against the allowance of said proof, petitioners filed a protest as follows:

In the matter of the final proof to be made by F. G. Harris, A. N. Whillington and N. C. Cunningham, trustees and claimants of the government townsite of Woodward, O. T.

Comes now Robert D. Howden and Joseph Hunter, of Woodward, Oklahoma Territory, by their attorneys, and in their own behalf, and in behalf of the occupants and citizens of the true and original town of Woodward, in response to the notice of final proof (a copy of which is hereto attached and marked exhibit "A"), as given by said trustees, and in defense of the rights of the occupants and citizens of the original town of Woodward, enter their most solemn protest against the acceptance of the proof tendered by said trustees to the register and receiver, upon the ground that the alleged townsite on Sec. 25, Tp. 23 N., R. 21 W., Ind. Meridian, is not now, and never has been the true and original town of Woodward, and that the effort to transfer and establish the town of Woodward upon Sec. 25, is in effect, a fraud, perpetrated upon the general government, and the citizens of the original town of Woodward.

That the Hon. Secretary of the Interior and the President of the United States, were misled by reason of false information sent them regarding the true location of the town of Woodward, as originally developed. Said false information being fur-

nished to the Interior Department at the last moment before the date fixed for the President to issue his proclamation, that the false information was furnished to A. P. Swineford, government townsite inspector, by designing parties, which caused him to telegraph to the Secretary of the Interior that the S. $\frac{1}{2}$ of Sec. 25, instead of the S. $\frac{1}{2}$ of Sec. 30, was the true location of the original town of Woodward; that on this misleading information the Interior Department acted, and the incorrect description of Woodward's true location was incorporated in the President's proclamation, a laud office ordered erected on this distant and undesirable location, thereby perpetrating an outrageous and inexcusable infringement on the rights and interests of the citizens of the original town of Woodward. Not content with having located an unnecessary town upon the immediate border of the original town of Woodward, and inaugurating all the unpleasantries that would naturally follow, but absolutely gobbling and appropriating even the name of Woodward, a high-handed outrage, seldom even equalled, if ever excelled.

Therefore, to the end that justice may be done, your protestants respectfully ask that they may be permitted to introduce witnesses in support of the foregoing allegations, and cross-examine the witnesses offered by the townsite trustees.

R. D. HOWDEN,
JOSEPH HUNTER.

Petitioners allege that under instructions from your office, the local officers were directed to transmit said final proof and said protest, without receiving any evidence thereon, and that, subsequently, on January 16, 1894, your office rendered a decision, dismissing said protest, and directing the approval of said final proof; whereupon, within the time given therefor, by the Rules of Practice and the regulations governing appeals in Oklahoma Townsites, petitioners, by their attorneys, filed an appeal from said last mentioned decision, to the Department.

Petitioners further allege that on February 24, 1894, your office denied the right of petitioners to appeal from said decision of January 16, 1894, and that your office directed patent to issue forthwith on said entry of the S. $\frac{1}{2}$ of said Sec. 25, which action, petitioners allege, was contrary to the provisions of Rule of Practice 85, inasmuch as their appeal was filed within less than twenty days from the date of the decision appealed from.

The ground of error upon which petitioners predicate their right for writ of certiorari is as follows:

1. It was error to cause patent to issue immediately for said S. $\frac{1}{2}$ of Sec. 25, without regard to the plain and unmistakable language of Rule 85.
2. It was error to reject and refuse to transmit the appeal of protestants.
3. It was error to hold that protestants had no interest in the question of the entry on Sec. 25.
4. The decision of January 16, 1894, was erroneous as specified in our appeal therefrom. (Exhibit E.)
5. It was error to disregard the concurring recommendations of Inspector Swineford, Chairman Harris of the townsite board, and Special Agent Johnson, that the south halves of both sections 25 and 30 should be embraced in the same townsite entry, and error, under all the circumstances, not to have directed the amendment of the application of said townsite board, so as to include the S. $\frac{1}{2}$ of Sec. 30, in order that all the townsite settlers at and near Woodward might be placed on a footing of perfect equality.

In support of their petition, petitioners further allege that on, and prior to the date of said proclamation of August 19, 1893, and at the date of the opening of said Cherokee Outlet, on September 16, 1893:

There was located on the S. $\frac{1}{2}$ of Sec. 30, T. 23 N., R. 20 W., I. M., a well known station on what is known as the "Panhandle Division" of the Atchison, Topeka and Santa Fe Railroad, which station was called Woodward; and they allege that, as is shown by a statement made in writing by F. S. Harris, Esq., hereinafter referred to more particularly, there was at, and about said station of Woodward a post office, a depot, a round house, machine shops, coal yards, stock yards, and quite a settlement of railroad employes, all of which made up and constituted a town of some size, with streets and alleys laid out, which had, long prior to said opening, received the name of Woodward.

* * * * *

And petitioners further allege that prior to said protest, to wit, on October 2, 1893, A. P. Swineford, as inspector of land offices, reported to the Commissioner of the General Land Office that a mistake had been made in selecting the S. $\frac{1}{2}$ of said Sec. 25 as the location of the county seat of "N" county, his intention having been to select the S. $\frac{1}{2}$ of said Sec. 30, upon which the station of Woodward and other improvements of the town of Woodward were located.

* * * * *

And petitioners further allege that on January 1, 1894, said F. S. Harris, chairman of said townsite board, in a letter to Hon. Hoke Smith, Secretary of the Interior, reported that a mistake had been made in the location of said county seat, that there was no Indian reservation near said Woodward station, that 'both (Sec.) 25 and (Sec.) 30 will finally be a town'; that there were about 400 settlers on said Sec. 30, there being a large enough population to authorize both the S. $\frac{1}{2}$ of Sec. 25 and the S. $\frac{1}{2}$ of Sec. 30 to be included in one and the same entry and patent; that 'Soon both sections will be covered with, I believe, a town of four or five thousand people', and that 'If you (the Secretary) will patent it (S. $\frac{1}{2}$ of Sec. 30) to our board to prove up, it will settle permanently a western townsite war.'

Under the provisions of Rule 85 of Practice, when the Commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue, for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered, to apply to the Secretary for an order, in accordance with Rules 83 and 84.

Under the provisions of said rule, it would become the duty of the Department to direct your office to certify said proceedings, if it should appear from an inspection of the petition that the declarations embodied therein make a *prima facie* showing for reversal of the action of your office.

Upon considering the averments in the petition now before me, I note that petitioners have no interest in the land embodied in the townsite of Woodward, and that no reason is shown why the final proof should be rejected, except that fraud was practiced upon the government agent who located said townsite.

It may be true that a mistake was made by said agent, owing to the fraudulent representations of other parties, still, said townsite was designated in the proclamation of the President of August 19, 1893, and pursuant to the information therein contained, many citizens who

went upon said townsite on September 16, 1893, settled upon the same in good faith, and at the time when petitioners preferred their request, were in the enjoyment of vested rights. If petitioners who resided in the adjacent town of Woodward have been injured on account of the alleged fraudulent representations which caused the mistake in locating said townsite, they must pursue a different remedy from that which they propose to avail themselves of by protest.

For these reasons said petition is denied.

OKLAHOMA TOWN SITES.

REGULATIONS PROVIDED BY THE SECRETARY OF THE INTERIOR FOR THE GUIDANCE OF TRUSTEES IN THE EXECUTION OF THEIR TRUST.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., November 30, 1894.

*To the Boards of Townsite Trustees in the
U. S. Land Districts, Oklahoma Territory.*

By virtue of the authority vested in me by an act of Congress approved May 14, 1890 (Appendix A), entitled "An act to provide for townsite entries of lands in what is known as 'Oklahoma' and for other purposes" (26 Stat., 109), and the joint resolution of Congress making the provisions of said act applicable to townsites in the "Cherokee Outlet", approved September 1, 1893 (Appendix B), I have prepared the following rules and regulations for your observance and guidance in the execution of the trust thereby created.

1. Your several boards are, as required by the statute, composed of three trustees. Your several commissions designate your respective boards, and each board will act as a separate body as to the particular townsite to which it is assigned. As soon as you are officially advised of the townsite, or townsites, which you are to enter as trustees, you will proceed to qualify in the following manner, to wit: You will appear before some officer having a seal and duly authorized to administer oaths, or before the register or receiver, and take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm) that I have no interest either directly or indirectly in the townsite of _____ or any part or parcel thereof; that I will faithfully discharge the duties of my office, and execute the trust imposed upon me with fidelity; that I will impartially hear, try and determine all controversies submitted to me fairly and justly, according to the law and the evidence, free from bias, favoritism, prejudice, or personal influence of any kind or character whatever. So help me God. (or, if by affirmation, "under the pains and penalties of perjury").

This oath or affirmation shall be made by each member of your board in each townsite entry made by your board.

Having taken said oath you will proceed to discharge the duties imposed on you by law and these rules and regulations.

2. In case you find a contest or controversy pending between a claimant, or claimants, under the agricultural land laws and the occupants of the townsite to which you are assigned, involving the title to any portion of the land occupied for townsite purposes, you will at once, as a board, and before taking any other step or proceeding, make application at the local office in the district where the townsite is situated to intervene and be made parties to the proceeding, and thereupon the case will be made *special* and disposed of as expeditiously as the transaction of public business will permit, as no entry can be completed until after the contests are disposed of.

3. Publication of notice of intention to make townsite proof must be made for five days, and such publication and the proof thereof shall be made as in ordinary cases. The proof shall relate to actual occupancy of the land for the purposes of trade and business number of inhabitants, and extent and value of town improvements.

4. The entry is to be made by you as trustees as near as may be conformably to section 2387 of the Revised Statutes and in trust for the use and benefit of the occupants of the townsite according to their respective interests and, at the minimum price per acre. (4 L. D., 54). No provision having been made in the act for the payment of the entry fees and the price of the land, and as the entry must be made before the townsite can be allotted, you may call upon the occupants thereof to furnish the requisite amount to pay the government for said land, keeping an accurate account thereof, to be filed with your report in the manner hereinafter directed.

5. Section one of the said act of May 14th, 1890, requires me to provide rules and regulations for the survey of the land occupied for townsite purposes, into streets, alleys, squares, blocks, and lots, or to approve such survey as may already have been made by the inhabitants thereof, and section five of said act makes the provisions of section four, five, six, and seven of the act of the legislature of the State of Kansas entitled "An act relating to townsites", approved March 2, 1868, so far as applicable, a part thereof. (Appendix C).

Section four of the Kansas act adopted requires you to cause an actual survey of the townsite to be made, conforming as near as may be to the original survey of such town, designating on such plat the lots or squares on which improvements are standing, together with the value of the same and the name of the owner, or owners, thereof. Hence, if you deem it advisable to survey the townsite assigned you, you will observe this rule in connection with the first proviso of section twenty-two of the act approved May 2, 1890 (26 Stat., 92), but if the townsite has already been surveyed by the inhabitants thereof and you are satisfied that the same is correct and in harmony with the spirit of the act under which you are appointed, you may approve and adopt such survey, making the designations on the plat thereof as required by said section four so far as the same is applicable under

said act of May 14th. The value of the improvements, however, will not be considered in making the assessments hereinafter provided for.

6. In any event, you will, as soon as you definitely fix the survey, cause to be designated on each of the plats thereof, the lots and blocks occupied, together with the value of the same, with the name of the claimant, or claimants thereof; you will also designate all squares, parks and tracts reserved for public use, or sites for public buildings, and all lots occupied by any religious organization which are subject to disposal under the provisions of said act. The designation of a claimant on such plat shall be temporary until final decision of record in relation thereto, and shall in no case be taken or held as in any sense or to any degree a conclusion or judgment by the board as to the true ownership in any contested case coming before it.

7. You will observe that no townsite can embrace any greater number of legal sub-divisions than are "covered by actual occupancy for the purposes of trade and business," and in no case can it exceed twelve hundred and eighty acres, hence, in making your survey of the land "into streets, alleys, squares, blocks, and lots", or in approving such survey as may have been made by the inhabitants of the townsite, when you deem the same sufficient, you will determine the area thereof by legal sub-divisions so occupied for such purposes. For a construction of the term "actual occupancy"; as used in the act and herein, see the case of *Walker v. The Townsite of Lexington*, 13 L. D., 404.

8. As soon as the survey is completed, as aforesaid, you will cause to be published in some newspaper printed in the county in which said town is situated or if none is printed in said county, then in one printed in the adjoining county, or if there be none printed in that county, then in one printed in the Territory a notice that such survey has been completed, notifying all persons concerned or interested in such townsite that on and after a designated day you will proceed to set off to persons entitled to the same according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled, under the provisions of said act. Such publication shall be made at least fifteen days prior to the day set apart by you to make such division and allotment. Proof of such publication shall be evidenced by the affidavit of the publisher or foreman of the newspaper in which such notice is printed, accompanied by a printed copy of such notice.

9. The entry having been made for the use and benefit of the occupants, only those who were occupants of lots at the date of entry, or their assignees thereafter, are entitled to the allotments hereinafter provided for. An occupant is one who is in open, exclusive, and adverse possession under a claim of ownership, and such possession must be notorious and unequivocal, carrying with it such recognized marks and evidences of ownership as will serve to notify all comers that another is in adverse and actual possession thereof. There is no limitation placed by statute on the number of lots that may be claimed by

any one person, but such person must be an occupant of each lot in the sense of the law, as stated, and not one seeking to defeat the rights of the town to the unoccupied lots. Minority and coverture are not disabilities.

You will bear in mind the provisions of section 13 of the act of Congress approved March 2, 1889 (25 Stats., 1005), and section 10 of the act of Congress approved March 3, 1893 (27 Stats., 643), and especially that part of the President's proclamation of August 19, 1893 (17 L. D., 230), forever prohibiting the acquisition of title, under the public land laws, to any part of the lands thereby opened to settlement, by any person entering upon and occupying said lands in violation of law and proclamation.

No person who went into said Territory in violation of said law and proclamation will be allowed any portion of a townsite, and you will recognize no claim filed by such person in making your allotments. You will also observe that section 2 of said act of May 14, 1890, provides that any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose "by the people residing upon any townsite the subject of entry under said act" shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder." But any person holding any such certificate who went into said territory in violation of law and the President's proclamation, shall be held to have acquired no rights thereunder.

Notice must be taken in the performance of your duties of the act of Congress, entitled "An act to restrict the ownership of real estate in the Territories to American citizens, and so forth", approved March 3, 1887 (24 Stat., 476), whereby aliens or corporations "not created by or under the laws of the United States, or of some State or Territory of the United States" are prohibited from acquiring real estate in the Territories.

10. After the publication shall have been duly made, as provided in paragraph 8, you will proceed on the day designated in the said notice, except in contest cases, which shall be disposed of in the manner hereinafter provided, to set apart to the persons entitled to receive the same (see paragraph 9) the lots, blocks, and grounds to which each person or company shall be entitled according to their respective interests, including in the portion or portions set apart to each person or company of persons the improvements belonging thereto.

Applications for deeds to lots tendered on, or after, the day designated in the published notice as provided in paragraph 8, and prior to issuance of patent for the townsite, shall be received by you and placed on file, as no deeds shall be executed until such patent has issued.

11. After setting apart such lots, blocks, squares, or ground and

upon a valuation of the same, as hereinbefore provided for, you will proceed to determine and assess upon such lots and blocks according to their value, such rate and sum as will be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees as provided for in said act, and in so doing you will take into consideration:

First. The ten thousand dollars (\$10,000) appropriated by said act of May 14, 1890, and such further sum as may be appropriated by Congress, before said assessment is made, for the purpose of carrying into effect the terms of said act, which is to be refunded to the Treasury of the United States; but, of course, only so much thereof as it will be necessary to use.

Second. The money expended for entering the land.

Third. The costs of survey and plotting the townsite.

Fourth. The expenses incident to making the conveyances.

Fifth. The compensation of yourselves as trustees.

Sixth. The compensation of your clerk.

Seventh. The necessary travelling expenses of yourselves and clerk.

Eighth. All necessary expenses incident to the expeditious execution of your trust.

More than one assessment may be made, if necessary, to effect the purposes of the act of Congress.

12. When the survey is finally completed you will have quadruplicate plats thereof prepared on tracing linen and on a scale of one hundred feet to one inch, each of which plats will be certified to by you as follows:

We, the undersigned, trustees of the townsite of _____ Oklahoma Territory, hereby certify that we have examined the survey of said townsite and approve this plat as strictly conformable to said survey in accordance with the act of Congress approved May 14, 1890, and our official instructions. In testimony whereof we have hereunto subscribed our names this _____ day of _____ 189_____.

If the plats approved by you, as a board, be of such survey as may already have been made by the inhabitants of the townsite represented by said plats, the fact that the plats so approved are of such survey should be made to appear in the foregoing required certificate by inserting immediately after words "survey of said townsite", the words "being a survey already made by the inhabitants thereof."

The preparation of the plats required, as above, should be at the least possible cost and devoid of embellished titles and all unnecessary pen work.

One of said plats shall be filed in the land office in the district where the townsite is located, one in the office of the register of deeds in the county in which the townsite is situated, one in the office of the Commissioner of the General Land Office, and one retained in your custody for your own use.

13. Whenever you find two or more claimants for the same lot, block, or parcel of land, you will proceed to hear and determine the controversy, fixing a time and place for the hearing of the respective claims of the interested parties, giving each ten days notice thereof, and all a fair opportunity to present their interests in accordance with the principles of law and equity applicable to the case, observing as far as practicable the rules prescribed for contests before registers and receivers of the local office. You will administer oaths to the witnesses, observe the rules of evidence as near as may be in making your investigations, and at the close of the case, or as soon thereafter as your duties will permit, render your decision in writing.

And in this connection you are advised that the municipality, by its authorized representatives, may become a party to any contest proceeding for the purpose of showing that a lot, block, or parcel of land is being fraudulently or illegally claimed, with a view to defeating such fraudulent or illegal claim, and having such lot, block, or parcel of land reported as unclaimed, and thereby causing the same to become subject to sale, or reservation, for the benefit of such municipality.

And in such cases the municipality shall have the same standing as an individual claimant, possessed of the same rights and privileges, and subject to the same requirements.

14. If the notice of hearing, provided for in paragraph thirteen, can not be personally served upon the party therein named within three days from its date, such service may be made by a printed notice, to appear for ten days in a newspaper published in the town or city in which the lot to be affected thereby is situated; or, if there is none published in such town, then said notice may be printed in any newspaper in the county, or if there is none published in the county, then in one printed in the Territory, such printed notice to appear in the principal sheet of any such newspaper, and not in any supplement thereof; and in addition to such published notice the party, or parties, therein named shall be served by registered letter with a copy of the notice to his, or their last known post-office address, said letter to be mailed at least ten days before the day fixed for the hearing.

Proof of such notice by publication and by registered letter must be filed with the records, and be made in form, as provided by these rules and regulations as in paragraphs 16 and 27.

15. Instructions contained in 12 L. D., p. 186, modifying rule 42 of Rules of Practice, by allowing you to omit transcribing testimony in contest cases until it is required for use on appeal or otherwise, will be observed.

16. All decisions by you involving the right of appeal, or the exercise of other rights by a claimant within a certain time or compliance with some official requirement, shall be in writing and be served by you personally or by registered letter.

When personal service is had you will transmit to this office the

acknowledgment of such service or evidence thereof. When service is made by registered letter the return letter receipt, or return letter, as the case may be, must, in every instance, be sent up with the papers in the case.

17. Any person feeling aggrieved by your judgment may, within thirty days after notice thereof, appeal to the Commissioner of the General Land Office under the rules, as provided for appeals from the opinion of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal, within sixty days from notice thereof, to the Secretary of the Interior, upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary. Such cases will be made special by the Commissioner and the Secretary and determined as speedily as the public business of the Department will permit but no contest for particular lots, blocks, or grounds shall delay the allotment of those not in controversy.

18. All motions for review and rehearing before your board, or before the Commissioner of the General Land Office, or the Secretary of the Interior, shall be filed within thirty days after the judgment complained of, the filing of any such motion for review or rehearing to be in accordance with the rules as to reviews and rehearing in the Rules of Practice in cases before district land offices, the General Land Office, and the Department of the Interior. If neither party shall present his appeal, or motion for review, or for rehearing within the time herein provided for, the case will be closed.

19. After the transmittal of the papers in a contest case to the Commissioner of the General Land Office upon appeal from the decision rendered therein by the board, you will execute no deed to any part of the lot, block, or parcel of land involved in such contest until you are advised that the case is duly closed and authority is given you to do so. No withdrawal of application for deed, withdrawal of appeal, or compromise filed by the parties subsequent to the transfer of the case to the General Land Office, will confer jurisdiction upon you, but the same must be promptly transmitted to the Commissioner for appropriate action.

20. All costs in contest proceedings will be governed by rules now applicable to contests before the local land offices. But in order to secure the payment of costs you will, when there are but two claimants, require each of them to deposit with the disbursing officer of the board each day, a sum sufficient to cover and pay all costs and expenses on such proceedings for the day, including the items mentioned in regulation numbered 11, so far as said regulation is applicable, and also including in such costs, for the first day, as part of the expenses, all charges for notices where notice is by publication.

Where there are three or more claimants for a lot the deposit which

each claimant shall be required to make daily shall be ascertained by dividing the sum sufficient to cover and pay all costs and expenses of such proceedings for the day by the number of claimants less one.

Two or more persons claiming as joint occupants and making joint application for deed to the same lot or lots, are to be regarded as but a single claimant in the aforesaid method for ascertaining and providing costs of contest. In ascertaining, as directed herein, the gross amount to pay the costs and expenses of trial for the day, care must be exercised that this amount be not in excess of a just and reasonable sum for those purposes, so that no unnecessary hardship be imposed on claimants, and lest any undue levy for costs and expenses be brought by claimants to the attention of the Department for relief. Upon the final adjudication of a case on appeal or otherwise, the sum deposited by the successful party shall be restored to him subject to the rules in such cases; but that deposited by the losing party, or parties, shall be retained and accounted for by the disbursing officer of the board.

In the event of a judgment for a claimant, or claimants, through a default of any adverse claimant or claimants, on the day fixed for hearing, after due notice thereof, the accruing costs of said proceeding as herein provided, including specially unpaid charges for notice by publication, shall be assessed upon the lot or lots involved therein, but should a case be reopened for want of due notice, then all the costs and expenses of the first proceeding shall not be assessed to the land in controversy, but included wholly within the amount to be deposited on the first day of hearing by the party who was in appearance at the first hearing ordered said costs and expenses of the first proceeding to be so included and added, *after* determining the amount to be deposited for costs by the parties respectively, as hereinbefore provided, and said first costs so added will be retained and accounted for and in no event returned to the successful party. Where prior to the day fixed in the notice for hearing, the parties in interest make and file in your office a compromise of their respective claims to the lot or lots named in said notices of hearing, the charges for such notices, if by publication and registered letter as herein provided shall be specially assessed upon the aforesaid lot or lots. Charges for notices by publication and registration may be temporarily advanced, if necessary, out of the general assessment fund on hand, which fund shall be subsequently reimbursed by a like amount, at the earliest moment, from the amount deposited by the parties respectively for costs and expenses on the first day of the hearing had for which said notice by publication issued; or, if there be no such amount deposited, as aforesaid, then such reimbursement shall be from the special assessment levied on the lot or lots named in the said notice, when realized. If the amount of the charges for publication and registration of notice for hearing shall have been voluntarily deposited by a party in interest, or said charges paid by him as shown by a receipt therefor, prior to the day of hearing no

advance by the board for said amounts will become necessary, and no assessment on the particular lot or lots for said sum shall be made, in the event of a default of adverse claimants or a due compromise of claims. Payment, in advance of hearing, of publication and registration charges by a claimant, where the adverse parties duly appear, will be taken into account in estimating costs of trial as herein above provided.

21. From each board the Secretary of the Interior will designate a chairman and a secretary. The secretary shall keep the minutes and a record of your proceedings, and an accurate account of all money received and paid out, taking and filing proper vouchers therefor in the manner hereinafter provided; he shall also be the disbursing officer of the board, shall receive and pay out all moneys provided for in said act, subject to the supervision of the Secretary of the Interior; and he shall, before entering upon duty, take the official oath, and also enter into a bond to the United States in the penal sum of ten thousand dollars for the faithful discharge of his duties, both as now prescribed and furnished from the Department of the Interior. The money in the hands of the disbursing officer shall at all times be subject to the control and order of the Secretary of the Interior, and the sum appropriated by Congress which is to be refunded to the Treasury of the United States shall be paid over to the Treasurer thereof at such times, in such sums, and in such manner as the Secretary of the Interior may direct. No regular clerk will be employed by you, but all clerks to boards of trustees will be appointed by the Secretary of the Interior. When a clerk for the board shall have been appointed by the Secretary of the Interior such clerk shall do all the clerical and, if stenographer, stenographic work of the board, and of the secretary thereof, under the control and direction of the board, subject to the general supervision of the Secretary of the Interior; but where said clerk is not a stenographer, and a stenographer becomes necessary in contest cases, your board may, upon an application to, and authority granted by, the Commissioner of the General Land Office, employ a stenographer, for whose services compensation will be allowed not to exceed \$3 per day, for each day actually employed. Also, where no regular clerk to your board has been provided by the Secretary of the Interior and a stenographer or clerk becomes necessary, in contest cases, your board may employ a stenographer, or clerk (no stenographer being available) after the manner hereinabove required, for whose services compensation will be allowed not to exceed \$3 per day for each day actually employed.

In making the required application for authority to employ a stenographer, an estimate of the number of days the service of such stenographer may be needed must be submitted with said application.

22. The minutes of each day's proceedings shall be completed and written out in ordinary handwriting, or type-written, and duly signed by the chairman and secretary before the next day's business shall be

begun and shall not thereafter be changed, except by a further record, stating accurately the changes intended and ordered and the reasons therefor. This is not intended to include the testimony or other than actual decisions, orders, and proceedings of the board.

23. All payments of money for lots and blocks shall be in cash and made only to the disbursing officer, who shall receipt therefor in duplicate, one to be given the party making the payment, and the other to be forwarded to the Commissioner of the General Land Office, and said officer shall charge himself with each payment on his books of account, and he shall deposit all sums received by him at least once a week, and, when practicable, daily in some designated United States depository, and he shall pay the same out only on his checks countersigned by the chairman of the board of which he is secretary, which checks, after they are honored, shall be filed with the accounts as vouchers.

24. Upon the payment to the disbursing officer of all sums assessed by you upon any lot, block, or parcel of land by the person entitled thereto, and not before, you will proceed to execute him a deed therefor pursuant to the terms of said act. All conveyances made by you shall be acknowledged before an officer duly authorized in said Territory to take acknowledgements of deeds. Blank deeds and other necessary blank forms in which uniformity is desired will be furnished to you by the Commissioner of the General Land Office upon requisition duly made therefor.

25. All lots occupied by any religious organization will, upon the payment of the assessments thereon, be conveyed by you to it directly, or in trust for the use and benefit of the same at its option.

26. You will ascertain and submit to the Secretary of the Interior as soon as practicable after all allotments and awards have been made by you, a statement showing separately:

First. All lots not disposed of under the provisions of said act which are subject to be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of the town or city controlling the town site which you are directed to allot.

Second. Such part thereof as may be reserved for public use as sites for public buildings.

Third. Such part thereof as may be reserved for the purpose of public parks.

27. Should any of the allottees fail to make payment of the assessment or assessments, that would entitle them to deeds for the several lots, blocks, or parcels of land allotted to them, you will publish for fifteen days in some newspaper of general circulation published in the town wherein said lots are situated, or if there be no newspaper published in said town, then in some newspaper of general circulation published in the county in which said town is situated, a list of the lots together with the names of the delinquent allottees giving notice therein to such delinquent allottees that unless the assessments upon said lots are paid

within twenty days from the date of said notice, said lots will be considered as unclaimed and included in the list of lots unclaimed which are to be sold under the direction of the Secretary of the Interior in accordance with the provisions of section four of the act of May 14, 1890. At the expiration of the twenty days you will transmit to the Commissioner of the General Land Office a copy of the notice given, accompanied by an affidavit of the publisher or foreman of the newspaper in which such notice was printed to the effect that such notice was published for the required time, and you will also transmit a list of the advertised lots for which the parties have obtained deeds.

In addition to the notice by publication herein provided notice should also be given by registered letter to the delinquent allottee. You will transmit, with your report, a list of the advertised lots remaining undeeded, together with the post-office address of each delinquent allottee, so far as known, and state if notice was given by registered mail in addition to the notice by publication, forwarding with said report proof of said notice as provided in paragraph 16.

28. In towns where there remain unclaimed lots not reserved the board of trustees having jurisdiction therein, will give notice by publication, in the same manner and for the same length of time as herein-before indicated relative to those allotted to delinquent allottees, that upon a day to be fixed by the board, which shall not be less than twenty days, nor more than thirty days, after the date of said notice, and at a certain place, said lots will be offered for sale to the highest bidder; said notice to contain a list of the lots. You will not, however, in towns where there are delinquent allottees, take any steps looking to the sale of the unclaimed lots until the expiration of the time allowed such delinquent allottees to make payment and obtain their deeds as heretofore provided, and when a decision has been made that certain lots in any town should not be awarded to the claimants thereof, but should be sold for the benefit of the municipality, and the claimants have filed appeals therefrom, no steps shall be taken to dispose of the unclaimed lots in such town until the determination of all of such cases, in order that not more than one sale of unclaimed lots may be necessary. When lots are thus sold you will issue deeds to the purchasers, upon the payment of the purchase money.

29. All payments of money for unclaimed lots disposed of at public sale as herein provided shall be in cash and made only to the disbursing officer of the board, who shall receipt therefor in duplicate as heretofore provided in the case of lots disposed of to occupants, and from the proceeds of such sale, all expenses attending the sale and conveyance of the lots sold shall be paid, and all assessments upon the lots sold shall be deducted from such proceeds.

30. Upon the conclusion of each sale the board will report to the Commissioner of the General Land Office the result thereof, the amount of money received from the sale of the lots, the expenses attending

the sale and conveyancing, the amount of assessments upon the lots sold and all claims by members of the board for compensation for service rendered in connection with such sale.

A printed copy of the notice of the sale, and an affidavit of the publisher, or foreman, of the newspaper that the same was published for the required time, must accompany the report. Upon receipt of such report by the Commissioner of the General Land Office, directions will be given, as soon as practicable, as to the disposition of the net proceeds of the sale.

31. Upon application made to you by the municipal authorities of any town of which you have jurisdiction, accompanied by satisfactory proof of the due organization of such municipality, you will convey to such municipal authorities the lots, blocks, or parcels of land reserved for parks and for sites for public buildings which were included in the patent for such townsite, such deed of conveyance to recite that such lots, blocks, or parcels of land are conveyed to such municipality for the specific purposes for which they were reserved.

32. You will be allowed such compensation, not exceeding ten dollars per day, and such per diem in lieu of subsistence for each day's service when you are actually engaged and employed in the performance of your duties as such trustees as may be fixed by the Secretary of the Interior; and you will also be allowed your actual necessary traveling expenses. When a clerk shall be provided for the board he shall also be allowed such compensation as the Secretary of the Interior shall determine, and his actual necessary traveling expenses.

33. The record of your proceedings with your oath of office and all papers filed with you, the record in each case, and all evidence of your official acts, except conveyances, you will file in the office of the Commissioner of the General Land Office to become a part of the records therein.

In matters of detail relative to your expenditures and accounts, you will be guided by the instructions contained in the circular of October 20, 1893.

34. You will correspond with the Commissioner of the General Land Office, and only through him with the Secretary of the Interior, so that a complete record may thereby be kept in the General Land Office.

It is believed that the foregoing regulations, together with copies of the laws referred to therein, and copies of the rules and regulations furnished registers and receivers in contested cases and appeals will be found sufficient for the proper determination of all cases which may arise, but should unforeseen difficulties present themselves, you will submit the same for special instructions.

In view of the fact that the expenses incident to the allotment of town sites by the provisions of this act are necessarily burdensome to those interested therein, you will be expected to proceed as expeditiously as possible.

tiously as is consistent with a due regard to the proper performance of your duties in disposing of the trust imposed upon you. It is hoped that you will, from a sense of duty relieve as much as possible the inhabitants of the town sites under your control from unnecessary delays, fees, and expenses.

The regulations of June 18, 1890, 10 L. D., 666, and all subsequent regulations and instructions explaining, amending, or extending the same, inconsistent with the foregoing regulations, are hereby revoked.

Very respectfully,

HOKÉ SMITH, *Secretary.*

APPENDIX A.

[PUBLIC—No. 114.]

AN ACT to provide for town site entries of lands in what is known as "Oklahoma," and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may when practicable cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

SEC. 2. That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

SEC. 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town site, shall be conveyed to or in trust for the same.

SEC. 4. That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

SEC. 5. That the provisions of sections four, five, six, and seven, of an act of the legislature of the State of Kansas, entitled "An act relating to town sites," approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

SEC. 6. That all entries of town sites now pending on application hereafter made under this act, shall have preference at the local land office of the ordinary business of the office and shall be determined as speedily as possible, and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit, and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided, such entries shall be prosecuted to final issue in the names of such trustees, without other formality and when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

SEC. 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become a part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed; and such traveling and other necessary expenses as the Secretary may authorize and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

SEC. 8. That the sum of ten thousand dollars or so much thereof as may be necessary is hereby appropriated to carry into effect the provisions of this act, except that no portion of said sum shall be used in making payment for land entered hereunder, and the disbursements therefrom shall be refunded to the Treasury from the sums which may be realized from the assessments made to defray the expense of carrying out the provisions of this act.

Approved, May 14, 1890.

APPENDIX B.

[PUBLIC RESOLUTION—No. 4.]

JOINT RESOLUTION to make the provisions of the act of May Fourteenth, One Thousand Eight Hundred and Ninety, which provides for townsite entries of lands in a portion of what is known as Oklahoma applicable to the territory known as the "Cherokee Outlet," and to make the provisions of said act applicable to townsites in the "Cherokee Outlet."

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of an act of Congress, approved May Fourteenth, One Thousand Eight Hundred and Ninety, which provides for townsite entries of lands in a portion of what is known as "Oklahoma," be, and the same are

hereby, made applicable to the territory known as the "Cherokee Outlet," and now a part of the Territory of Oklahoma; and that all acts or parts of acts inconsistent with this joint resolution be and the same are hereby repealed.

Approved September 1, 1893.

APPENDIX C.

SEC. 4. At any time after the entry of any such town site, the probate judge of the county in which such town may be situated may appoint three commissioners, who shall not be residents of such town, or the owners of any interests therein; and it shall be the duty of such commissioners to cause an actual survey of such site to be made, conforming, as near as may be, to the original survey of such town, designating, on such plat, the lots or squares on which improvements are standing, with the name of the owner or owners thereof, together with the value of the same.

SEC. 5. Said commissioners shall, as soon as the survey and plat shall be completed, cause to be published, in some newspaper published in the county in which such town is situated, a notice that such survey has been completed, and giving notice to all persons concerned or interested in such town site that, on a designated day, the said commissioners will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, squares or grounds, to which each of the occupants thereof shall be entitled. Such publication shall be made at least thirty days prior to the day set apart by such commissioners to make such division.

SEC. 6. After such publication shall have been duly made, the commissioners shall proceed, on the day designated in such publication, to set apart to the persons entitled to receive the same, the lots, squares or grounds to which each shall be entitled, according to their respective interests, including, in the portion or portions set apart to each person or company of persons, the improvements belonging to such persons or company.

SEC. 7. After the setting apart of such lots or grounds and the valuation of the same, as hereinbefore provided for, the said commissioners shall proceed to levy a tax on the lots and improvements thereon, according to their value, sufficient to raise a fund to reimburse to the parties who may have entered such site, the sum or sums paid by them in securing the title to such site, together with all the expenses accruing in perfecting the same, the fees due the commissioners and the surveyor for their respective services, and other necessary expenses connected with the proceedings.

REGULATIONS TO BE OBSERVED IN THE EXECUTION OF THE PROVISIONS OF THE SECOND PROVISO OF THE TWENTY-SECOND SECTION OF THE "ACT TO PROVIDE A TEMPORARY GOVERNMENT FOR THE TERRITORY OF OKLAHOMA ETC.," APPROVED MAY 2, 1890.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 30, 1894.

To the Registers and Receivers,
of the U. S. Land Office, Oklahoma Territory.

GENTLEMEN: All applications to commute homestead entries, or portions thereof, to cash entries, at the rate of ten dollars per acre, for the purpose named in the twenty-second section of the act of May 2,

1890 (26 Stats., 81), will be made through your respective offices, addressed to the Hon. Secretary of the Interior and transmitted to the Commissioner of the General Land Office, in accordance with the following regulations:

1. Entries under said section must be made according to the legal subdivision of the land, and no application for a less quantity than is embraced in a legal subdivision, or for land involved in any contest, will be received by you.

2. An entryman desiring to commute his homestead entry, in whole or in part, for townsite purposes shall present his application (form 4-001) at the local land office of the district in which his land is situated, and, if his application and the status of his homestead entry are found to be in accord with the foregoing requirements, you will permit him to make publication of notice of his intention to submit commutation townsite proof in accordance with the law herein referred to. The notice of intention to make proof as above provided shall be the same in all respects as that required of a claimant in making final homestead proof, with the addition that it shall state that said proof will be made under section 22 of the act of May 2, 1890.

3. Proof in accordance with the published notice, consisting of the testimony of the claimant and two of the advertised witnesses, must be furnished relating—

First. To evidence that the tract sought to be purchased is required for townsite purposes.

Second. To the observance by the entryman of the provisions of the law and of the President's proclamation under which settlement on the land sought to be purchased became permissible.

Third. To the claimant's citizenship and qualifications in all other respects, as a homesteader, the same as in making final homestead, or commutation proof.

Fourth. To due compliance with all the requirements of the homestead law by the claimant up to the date of submitting proof.

Proof of publication of notice must also be furnished as in ordinary cases.

4. At the time of submitting proof as provided in the preceding paragraph the entryman shall file with you triplicate plats of the survey of the land applied for, duly verified by the oaths of himself and the surveyor. Such plats shall be made on tracing-linen and on a scale of one hundred feet to one inch; they shall be provided with a margin sufficient to contain the oaths of the entryman and the surveyor, and the approval of the Secretary of the Interior; they must state the name of the city or town, describe the exterior boundaries thereof according to the lines of public surveys, exhibit the streets, squares, blocks, lots, and alleys, and must specifically set forth the size of the same, with measurements and area of each municipal subdivision; and, if the survey was made subsequent to May 2, 1890, the plats must also show that the

provisions of the first proviso of the section of the act under consideration have been complied with, viz: the setting apart of "reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres."

5. It is of the utmost importance that all plats of townsites should be correct. The size of each lot should be stated, and if the lot is irregular in shape the width at each end should be indicated; the width of each street and alley should be marked, and the dimensions, together with the area of the reservations and parks, indicated.

Whenever an entry is made adjacent to a town already in existence the streets must conform to the streets already established, and this must be stated in the affidavit of the surveyor. The affidavit of the surveyor shall also contain a statement of what tract of land is surveyed as the townsite and that the tracts reserved for public purposes contain the requisite amount of land.

The affidavit of the party applying to make the entry shall embrace the statement that the application to enter the described tract of land as the townsite of _____ is made under the provisions of the second proviso to section 22 of the act of May 2, 1890, entitled "An act to provide a temporary government for the territory of Oklahoma," etc., that all streets, alleys, parks and reservations are dedicated to public use and benefit, and that the plat is correct according to the survey made by the proper surveyor.

6. At the time of submitting proof and filing the triplicate plats the claimant shall tender to the receiver the purchase price of the land applied for, exclusive of the portions reserved for parks, schools and other public purposes (which are to be patented as a donation to the town when organized as a municipality, for the specific purposes for which they were reserved), payment to be made by draft on New York made payable to the order of the Secretary of the Interior, at the rate of ten dollars per acre for that portion of the land actually entered.

You will thereupon transmit the proof and triplicate plats to this office for examination and the approval of the Secretary of the Interior, together with the application to make entry and your joint report as to the status of the land applied for, and at the same time you will transmit to the Secretary of the Interior the draft tendered in payment for the land, making references in each letter to the other.

7. When the proof and triplicate plats are received by this office, if found to be regular, and in accordance with these regulations, they will be forwarded to the Secretary of the Interior, with recommendation that the plats be approved.

Should the triplicate plats be approved, and receipt of the purchase price of the land be acknowledged by the Secretary, one of said approved plats will be retained in this office and the other two will be returned to you with directions to the register to issue final certificate

for the land embraced in said approved plats (exclusive of the lands to be donated and maintained for public purposes as heretofore provided), such certificate to be given the current number of the series of cash entries issued by your office and to be transmitted to this office by special letter. Receipt of the purchase money having been acknowledged by the Secretary of the Interior no final receipt will be issued by the receiver. One of the approved plats returned to you will be retained in your office and the other you will deliver to the applicant to be by him filed and made of record in the office of the recorder of deeds of the county in which the town is situated.

8. Upon the issuance of final certificate you will note on your records the commutation of the applicant's homestead entry, in whole or in part as the case may be. When patent is ready for delivery the entryman will be required to surrender his duplicate homestead receipt for transmittal to this office if the entire homestead entry is commuted, or to deliver the same to you to have the commuted townsite entry noted thereon and returned to the entryman if the homestead entry is commuted in part only, before said patent will be delivered.

9. The foregoing regulations will be observed in all cases in which the entry and claimant's application to commute for townsite purposes are free from protest, contest or other adverse proceedings. But in all cases in which, at the time of submitting proof, or prior thereto, a protest, or an affidavit of contest, is filed you will take appropriate action on such protest or contest in accordance with the prevailing practice in ordinary homestead commutation or final proof cases before transmitting the papers to this office, and should such action be adverse to the application to commute, or favorable thereto, and an appeal be filed by the contestant, you will not require tender of the purchase price of the land sought to be purchased for townsite purposes until you are advised of the final determination of such protest or contest proceedings by this office or the Department, favorable to the application to purchase. When so advised you will require the applicant to make immediate tender of the purchase money which you will transmit to the Secretary of the Interior and advise this office thereof as hereinbefore provided.

Protest or contest affidavits filed in your office after the transmittal of the proof and triplicate plats in this office will not be considered by you but must be promptly transmitted to this office for appropriate action. After the approval of the triplicate plats by the Secretary of the Interior no protest or contest relating thereto will be entertained by your office or this office, but should one be filed with you it will be forwarded to this office to be transmitted to the Secretary of the Interior for appropriate action.

10. In all contested cases the contestant will be required to file with you a sworn and corroborated statement of his grounds of action, and that the contest is not initiated for the purpose of harassing the claimant

and extorting money from him under a compromise, but in good faith to prosecute the same to a final determination, and if the allegations therein contained are considered sufficient to warrant the ordering of a hearing the same will be ordered upon compliance by the contestant with the condition that he shall deposit with you a sufficient sum to cover the cost thereof.

Notice of your actions or decisions in all matters affecting an entry, or an application to commute for townsite purposes, under the foregoing instructions, and the proof thereof, shall be the same as in ordinary cases; and any person feeling aggrieved by your judgment in such matters may, within *thirty* days from notice thereof, appeal to this office. Within the time allowed for filing an appeal, the appellant shall serve a copy of the same on the appellee who will be allowed *ten* days from such service within which to file his brief and argument.

Appeals from the decisions of this office lie to the Secretary of the Interior the same as in other matters of like character, such appeal and service thereof to be filed within *sixty* days from notice of the decision of this office from which appeal is taken, in accordance with the rules of practice.

Motions for review of the decisions of your office shall be filed and served within the time allowed for appeal, and motions for review of the decisions of this office and of the Secretary of the Interior shall be filed and served within *thirty* days from notice thereof.

11. The act under consideration provides that the sums received by the Secretary of the Interior for commuted townsite entries shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

Before the money can be paid over, there must be satisfactory evidence that the municipality has been organized as required by the laws of Oklahoma.

In support of an application by the proper municipal officers for payment of the money deposited with the Secretary of the Interior for a particular commuted townsite entry the following evidence shall be furnished:

First. A duly certified copy, under seal, of the order of the board of county commissioners, declaring that the specified territory shall, with the assent of the qualified voters be an incorporated town, also the notice for a meeting of the electors, as required by paragraph 5 of Article 1, chapter 16 of the statutes of Oklahoma.

Second. A like certified copy of the statement of the inspectors filed with the board of county commissioners, also a like certified copy of the order of said board, declaring that the town has been incorporated, as provided by paragraph 9, of said article one.

Third. A like certified copy of the statement of the inspectors, filed with the county clerk, declaring who were elected to the office of trustees,

clerk, marshal, assessor, treasurer, and justice of the peace, as provided by paragraph 16, of said article one.

Fourth. A like certified copy, by the town clerk, of the proceedings of the board of trustees electing one of their number president, also, a copy of the qualifications to act by each of the officers mentioned, as provided by paragraph 19, of said article one.

Fifth. A certified copy, by the town clerk, of the proceedings of the board of trustees, designating some officer of the municipality to make application for and to receive the money to be paid by the Secretary of the Interior.

Sixth. A proper application for the money, by said designated officer.

Said application shall be addressed to the Secretary of the Interior and may either be filed in your office for transmittal to this office or forwarded by the municipal authorities direct to this office. When the same is received by this office, if the application, and accompanying evidence, is in accordance with the requirements herein mentioned, it will be transmitted to the Secretary of the Interior and when approved by him the money will be paid over to the designated officer to be used by the municipality for school purposes only as required.

12. When the towns herein provided for are organized as municipalities, applications, accompanied by proof of municipal organization similar to that provided in the preceding paragraph, shall be made for patents for the reservations, which the act under consideration provides shall be made for parks, schools, and other public purposes and which are to be donated to the municipalities when duly organized as such.

The application for patent shall be made by the mayor or other proper municipal authority, shall be addressed to the Secretary of the Interior, and shall particularly describe the reservations to be patented according to the approved plats of said townsite. Said application shall be filed in your office and if you find the accompanying evidence of municipal organization and authority to make application to be in accordance with these regulations the register will issue certificate thereon as follows:

Land office at _____
(Date) _____, 18____

No. ____.

It is hereby certified that, pursuant to the provisions of section 22 of the act of May 2, 1890, 26 Stats., 81, and the regulations thereunder _____, of the town of _____, in _____ county, Oklahoma, has made application for patent for _____ in the townsite of _____ Oklahoma, reserved for public purposes in accordance with the approved plats of said townsite said application being accompanied by satisfactory proof of the organization of said municipality and of his authority to make application for patent for said reservations.

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office the said _____,

shall be entitled to a patent for the tract of land above described in trust for the municipality of _____ Oklahoma, said land to be maintained for public purposes as provided in the act herein referred to.

Register.

You will give to certificates of this character a separate series of numbers, giving to each certificate its consecutive number in the series, and when issued you will transmit the same to this office, together with the application for patent and accompanying evidence, by special letter.

When such certificate is examined and approved by this office patent will issue in accordance therewith.

The regulations of July 18, 1890, 11 L. D., 68, and subsequent modifications thereof, inconsistent herewith, are hereby revoked.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

HÖKE SMITH, *Secretary.*

PRACTICE—ATTORNEY—NOTICE OF DECISION.

DUNCAN v. RAND.

Notice of a decision to an attorney of record is notice to the party he represents; and said party will not be heard to say that his attorney was not then authorized to act for him in such matter.

Secretary Smith to the Commissioner of the General Land Office, October (J. I. H.) 10, 1894. (P. J. O.)

It appears from the record before me that your office, by letter of June 18, 1892, affirmed the recommendation of the local office in dismissing the contest of Robert E. Duncan against the homestead entry of Warren H. Rand on the SW. $\frac{1}{4}$ of Sec. 11, T. 16 N., R. 7 W., Kingfisher, Oklahoma, land district. Service of said decision was acknowledged by the attorneys of record for both parties July 14, 1892. On the report of the register, dated September 13, 1892, that no appeal had been filed, your office, by letter of October 3, 1892, declared the case closed.

On October 6, 1892, Duncan filed a motion asking for the reinstatement of the case, on the ground that the attorney who appeared for him "was hired or engaged to conduct the trial of said contest before the local office, and to prepare the appeal to the Commissioner of the General Land Office, but for no other purpose." This motion was supported by his own affidavit. Your office, by letter of November 23, 1892, refused to reinstate the case, on the ground that notice to the attorney of record was binding on the party, and if the attorney had

been in fact discharged, his appearance should have been withdrawn from the record.

From this decision Duncan appealed.

I gather from the reports of the local office that Rand has made final proof, and Duncan has filed a protest against the issuance of a patent, on the ground that this appeal is pending.

There is, in my judgment, an entire absence of any merit in this appeal. It would be trifling with justice, and juggling with our rules of practice, to permit parties litigant to come before the Department and claim that their attorneys of record are not authorized to represent them in all matters respecting their contests. If parties do not want to be bound by attorneys of record, their remedy is simple and efficacious; they can have their names withdrawn from the record. While the attorney's appearance on the record remains, litigants are bound by all acts within the rules of practice, and the Department will not aid them in playing fast and loose, in the absence of any specific charge of fraud or collusion.

Duncan swears "that he has reason to believe and does believe" that his attorney received a money consideration from Rand or someone in his behalf for his neglect to notify him of the decision against him. But this charge is entirely unsupported, and is too general in its nature to warrant even an investigation, and is certainly not sufficient to reopen the case.

It is further intimated in the affidavit that his attorney's "conduct, action and interest" in the matter of Rand's final proof, and his zeal in that behalf "was unbecoming and unprofessional." I am unable to find anything in the record that indicates that his attorney had anything whatever to do with Rand's final proof, and the inference—the charge amounts to no more than an inference—of the affiant is too vague and indefinite to demand an action. This Department cannot act on mere suggestions of this character. Attorneys before the Department are presumed to represent their clients with all the professional fidelity that is characteristic of members of the bar generally, and if it is desired to have their action in a given case investigated, the charges must be definite.

Your judgment is therefore affirmed. The protest of Duncan will be dismissed.

HIGGINS *v.* HARRIS.

Motion for the review of departmental decision of March 31, 1894, 18 L. D., 335, denied by Secretary Smith, October 22, 1894.

MINING CLAIM—PROTESTANT—RELOCATION.

SMUGGLER MINING CO. ET AL. v. TRUEWORTHY LODGE CLAIM ET AL.

A protestant, who alleges no surface conflict, is not entitled to be heard on appeal before the Department.

An adverse relocation, made during the pendency of an order holding the original claim for cancellation, gives the relocator no standing to be heard as against the right of the claimant.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (J. I. H.) (J. W. T.)

The above entitled causes—consolidated for the purpose of hearing and determination—were appealed to this Department from your office decisions of July 18, 1893, and August 5, 1893, respectively, in which your said office decision in each case revoked previous orders for hearing, and dismissed certain protests hereinafter mentioned. A brief history of said cases will more clearly develop the present standing of the claims involved.

The Trueworthy Lode was located in 1879, and mineral application No. 212 was filed therefor September 22, 1888. The Accident Lode was located January 17, 1885, and mineral application No. 275 was filed therefor on September 17, 1889.

By your office decision of January 21, 1892, in the case of M. J. McNamara, et al. v. John R. Williams, (Contest No. 670) both of the aforesaid mineral applications were held for cancellation.

Said holding for cancellation was ordered on the admission of claimants that no discovery of mineral in rock in place had been made until the year 1880, and also because the weight of evidence showed, that at the date of the hearing on said contest, no discovery of a valuable mineral character had been made. It was also remarked in said order of cancellation that the aforesaid claims conflicted with the John R. Williams cash entry.

On April 12, 1892, the claims No. 212 and No. 275 were finally canceled.

On April 21, 1892, there was filed in your office an application for the re-instatement of the aforesaid mineral applications, asking that your office decision relating thereto, might be so modified that the applications for patent should be canceled only so far as it conflicted with the aforesaid Williams cash entry. It was stated in said applications, that valuable works were in progress on said claims, that were not in conflict with said cash entry, and that mineral discoveries were being made, through which it was expected that said claims would show great mineral value.

June 10, 1892, following the chronological statement of your office decisions of July 18, 1893, and August 5, 1893, which I find to be correct—the application aforesaid was allowed, and the previous order for

cancellation, in your office decision of April 12, 1892, aforesaid, was modified so that it should only apply to the portions of said mining claims that were in conflict with the aforesaid Williams cash entry, and that the other portions would only be subject to any legal adverse right that might have attached since the order of cancellation.

In accordance with this order for modification and re-instatement, on June 23, 1892, mineral entry No. 426 was made for the portion of the Trueworthy Lode claim not in conflict with the Williams cash entry, aforesaid, and at the same date, the same action was taken as to the Accident Lode claim, mineral entry No. 427.

In the meantime, and on June 9, 1891, certain protests had been filed, in the above entitled causes, by the Smuggler Mining Company, and by David M. Hyman, against mineral entry No. 426, and against mineral entry No. 427, by Charles R. Bell, on behalf of the Emma Lode Mining claim.

The said protests made substantially, the following charges, viz:

1st. That at the time of application for patent, in both cases, there had not been caused to be posted, in a conspicuous place on said claims, or either of them, any plat or notice of intention to apply for said patents, and if the same were posted at all, they were put where they could not be seen. That the notice of intention to apply, as aforesaid, was published in a weekly newspaper in Aspen, Colorado, called the "Weekly Chronicle", a newspaper of small circulation, and read by few persons.

2d. That there had been no discovery of mineral in rock in place, within the limits of either of said claims.

3d. That five hundred dollars worth of improvements had not been made.

4th. That neither of said claims conflicted with the surface boundaries of either the Smuggler Lode, or the Emma Lode, mining claims, but that within the limits of said Smuggler Lode claim, there was a well defined lode or vein of ore, which had its apex within the surface boundaries of the said Smuggler Lode claim, and in its course downward, pitched under, and crossed the aforesaid Trueworthy Lode claim, and that in the matter of locating said last mentioned claim, the design was to harass and annoy the work and development of the said Smuggler Lode claim.

On March 6, 1893, a hearing was ordered upon the allegations of said protests.

June 19, 1893, a motion was made by the mineral claimants in the above entitled cases, that said order for hearing be revoked, and that the aforesaid protests be dismissed.

July 5, 1893, certain affidavits were filed by George M. Thatcher, one of said mineral claimants, in support of said motion for revocation and dismissal.

Waiving the question of the authority of the persons by whom the affidavits of protest were made, to make the same, it appeared upon the hearing of said motion, that the posting of notice and plat was properly made, and the publication of notice of intention to apply for patents, was made in a newspaper used for that purpose in that mining district, and by the protestants themselves, in the process of obtaining patents for their respective mining claims.

The value of improvements also appeared, and affidavits showed the

results of assays of mineral bearing rock in said protested claims, of a very valuable character.

It also appears that no protests or adverse claims were filed, by either the Emma or Smuggler claimants, during the period of publication aforesaid.

No surface conflicts were alleged, or proved, and, by your office decisions hereinbefore referred to, the order for hearing, of March 6, 1893, was revoked, and the aforesaid protests were dismissed.

July 22, 1893, an appeal was made from your office decision of July 18, 1893, and like action was had in reference to your office decision of August 5, 1893, on August 22, 1893.

Motions to dismiss said appeals have been made to this Department, on the ground that the protestants have no right of appeal from your office decision, because they were simply in the position of "friends of the court", or rather, friends of the government, alleging and proving no surface conflicts, and establishing no failures to comply with the laws, on the part of either of the above entitled claims.

It has been repeatedly held by this Department, that a mere protestant without interest, is not entitled to appeal. Bodie Tunnel and Manufacturing Company *v.* Bechtel Manufacturing Company, *et al.* (1 L. D., 584); Lucy B. Hussey Lode (5 L. D., 93); Bright, *et al.* *v.* Elkhorn Mining Company (8 L. D., 122).

Were these appellants protestants? It is held that one who has filed no adverse claim during the period of publication, *must be regarded* as a protestant. McGarrahan *v.* New Idria Mining Company (3 L. D., 422).

As I have before stated, no such claim was filed during said publication period, in this case.

The appellants are only protestants, and as such, in the absence of any alleged surface conflict, are without interest, and not entitled to the character of litigants, before the Department, and their appeal is hereby dismissed. See New York Hill Company *v.* Rock Bar Company (6 L. D., 318).

Accompanying the record of said appeal, transmitted to this Department, I find a paper purporting to be a protest on behalf of the Lookout Lode mining claim, made by one S. I. Hallett, against the aforesaid Trueworthy Lode claim, his affidavit of protest being made on September 6, 1893, and accompanied by a corroborating declaration, upon oath, made on August 23, 1893, just fourteen days before the principal affidavit was made.

Said protest was filed on September 16, 1893, and contains in substance the same allegations of protest which have hereinbefore been considered, and concludes with this additional statement, to wit:

That the location of said Trueworthy Lode claim, being invalid for failure to comply with the law in the discovery and location of mining claims, upon the public domain of the United States, Ed. F. Browne and William Schwartz made a re-location of said (Lookout) claim, or a portion thereof, on January 25, 1892. * * *

That since the 25th day of January, and on, to wit: the 23d day of November, 1892, the said Ed. F. Browne and William Schwartz, by quit-claim mining deed of conveyance, conveyed said Lookout claim to one Charles A. Hallam, who, since said date, conveyed the same to this petitioner.

It does not appear that any proceeding was ever had in consequence of said protest, and it follows that no appeal was ever made to this Department, and I might well disregard it, were it not for the expressed wish of all parties concerned to have the matter fully and finally settled.

All allegations of protest, except the one embracing the matter of re-location, have been considered and decided in the above entitled cause, and it therefore remains for me only to consider that question.

It will be noticed that this last protest alleges a re-location, embracing a portion of the Trueworthy mining claim, on January 25, 1892. At that date, the said Trueworthy claim had been held for cancellation four days previous, but the order or judgment of cancellation was not made until April 12, 1892.

During the period covered by the order holding said claim for cancellation, all intervening claims to the land were necessarily subject to such rights as might be finally accorded the entryman, either on review before your office, or on appeal before the Department; and a re-location of the land by an adverse claimant during said period would not give the re-locator such an interest as would entitle him to be heard as against the right of the entryman.

The protest made on behalf of the said Lookout Lode mining claim, against the said Trueworthy Lode mining claim, is hereby dismissed.

SCHOOL LAND—INDEMNITY SELECTION—SWAMP LAND.

STATE OF CALIFORNIA *v.* MOCCETTINI.

Swamp land within a school section does not afford a proper basis for a school indemnity selection.

*Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 30, 1894. (J. L.)*

I have considered the case of the State of California *v.* Natale Moccettini, upon the appeal of the State from your office decision of March 11, 1892, rejecting the application of the State for selection of the SE. $\frac{1}{4}$ of section 12, T. 30 S., R. 28 E., M. D. M., Visalia land district, California, to be taken as indemnity for a like quantity of land in section 36, T. 20 S., R. 22 E., M. D. M., alleged to have been lost to the State as school land, by reason of the fact that said section 36 was swamp and overflowed land, rendered thereby unfit for cultivation.

On October 14, 1889, Moccettini made timber culture entry, No. 2682, of said SE. $\frac{1}{4}$ of section 12, T. 30 S., R. 28 E., M. D. M.

On September 21, 1891, V. D. Knupp, as agent for the State of California, filed his affidavit of contest against said entry, and at the same time filed the State's selection No. 3620, of the land embraced therein as indemnity for the deficit of school lands in section 36, T. 20 S., R. 22 E., M. D. M.

On October 5, 1891, before notice of said contest had been issued, Moccettini relinquished said timber culture entry, and made homestead entry, No. 8221, of the same land; and the State was notified.

On November 16, 1891, the State filed a motion, asking the local officers to approve the State's selection aforesaid, and declare Moccettini's homestead entry void and of no effect: which motion was on the same day denied, and the State appealed to your office.

On December 16, 1891, your office directed the local officers to call upon Moccettini to show cause, within thirty days, why his homestead entry, No. 8221, should not be canceled on account of its conflict with the right of the State of California.

On March 11, 1892, your office rejected the State's school selection No. 3620 aforesaid, "for the reason that the proffered basis is held to be invalid; no land being lost to the State in school section 36, T. 20 S., R. 22 E., M. D. M."

On March 23, 1892, the State filed a motion for review, on the ground that "the tract assigned as basis, is swamp and, and it is error to hold that it does not constitute a loss to the school grant." And on April 17, 1893, your office adhered to its former decision, "admitting that the basis of the proposed selection is swamp land, but denying that it furnishes a basis for school indemnity."

The State has appealed to this Department, claiming only, that it was error to hold that the presence of swamp land in a school section does not constitute a deficiency in area.

This question was carefully considered and decided by this Department in the case of the State of California, reported in 15 L. D., 10; see also, "Instructions" published in 17 L. D., 576.

Your office decision of March 11, 1892, is hereby affirmed.

SPECULATIVE CONTEST—PREFERENCE RIGHT.

PACK *v.* MOSES.

A contest instituted for the purpose of protecting an interest sought to be obtained through a fraudulent entry is speculative in purpose, and confers no right upon the contestant.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (W. F. M.)

The subjoined brief and succinct history of this case is rendered necessary to the clear apprehension of the issues pending between the present parties litigant.

On May 27, 1884, Jacob B. Mitchell made timber culture entry of the NE. $\frac{1}{4}$ of section 11, township 26 S., range 65 W., of the land district of Pueblo, Colorado.

On October 27, 1888, Mitchell filed a relinquishment of his entry, which was canceled, and on the same date soldier's additional homestead entries were made, by Samuel Baily for the north half, and by William P. Fick for the south half of the quarter section thus restored to the public domain.

On May 4, 1889, William E. Moses filed an affidavit of contest against Fick's entry charging that the latter's original entry was made at Salina, Kansas, on August 12, 1874, subsequent to the adoption and approval of the Revised Statutes, on June 22, 1874, and, therefore, illegal.

On May 15, 1889, Herbert E. Pack also filed an affidavit of contest, making the same charge, and on May 20, thereafter, he filed a supplemental affidavit, reciting, *inter alia*, that at the time of the presentation of his initial affidavit he was not aware of the application to contest by Moses until he was so informed by the register; that he did not obtain his information of the illegality of the entry from or through Moses, nor by or from any papers filed by Moses, but from other and entirely independent sources; that the application of Moses to contest ought not to be allowed to stand, but ought to be denied and refused, for that his affidavit was and is wholly uncorroborated or substantiated under oath by any other witness or person, as required by law and the rules of practice; that it was at the instance, request and procurement of Moses that Fick came to Pueblo, on October 27, 1888, and on that day made his entry pursuant to a contract theretofore made between Moses and Fick whereby the latter bound himself to convey the land embraced in his entry to Moses, or to such person as Moses should designate, and that on the same day that the entry was made the land was accordingly conveyed to Mrs. Dorliska P. Mitchell; that the contest of Moses is collusive, speculative and illegal, and is made wholly for the benefit and protection of Fick and his grantees, and that if allowed to contest said entry, and should the contest result in the cancellation of the entry, Moses would not attempt to exercise a preference right for himself, but would procure an additional homestead to be filed on the land in order to save Fick harmless. Other more specific allegations in support of the general charge of collusion and speculation follow, and the affidavit concludes with a prayer that the application of Moses to contest be denied, and that affiant's application be allowed.

These applications to contest, with the affidavits and counter affidavits, were forwarded by the local officers to your office where it was held, from the evidence there of record, that Fick's entry was invalid, but Moses' application to contest was rejected for want of corroboration under the rule, and the preference right was awarded to Pack,

On appeal to this Department the decision of your office was affirmed in so far as it held for cancellation the entry of Fick, but, upon its being made to appear that the affidavit of Moses was corroborated by a letter from the receiver of the Salina, Kansas, office, where Fick's original entry was made, this was held to be sufficient, the contest of Moses was re-instated, and the case remanded for a hearing upon the charge of Pack that Moses' contest was brought in bad faith, and for a speculative purpose. *Vide Moses et al. v. Fick et al.*, 13 L. D., 333.

Accordingly, and pursuant to that departmental decision, a hearing was had before the local officers, who held that Pack had "failed to show by a fair preponderance of evidence that he is entitled to the judgment asked," and recommended that the "preference right of entry be granted to Moses and the contest of Pack be dismissed."

I have now before me, on appeal, the decision of your office reversing that of the register and receiver, dismissing the contest of Moses, and awarding the preference right to Pack.

The contention of the appellant is fairly presented by the following assignments selected from the six specifications of error contained in his appeal:

1. Error in holding that the contest of Moses was fraudulent and speculative and not in good faith for the purpose of procuring the cancellation of the entry.

2. Error in holding that Moses, having contested the entry in good faith and procured its cancellation under the second section of the act of May 14, 1880, did not thereby acquire the preference right of entry.

3. Error in according the preference right of entry to Pack without any authority of law, in view of the fact that he did not contest and procure the cancellation of Fick's entry, the said result having been obtained by the contest of Moses.

The facts of the case, about which there is scarcely any dispute or conflict, are fully and faithfully stated in the decision of your office. The real controversy arises out of difference of view in the construction of the law applicable to those facts, the question being whether or not the admitted acts of Moses and his connection with the entry from its inception are of such a character as to deprive him of the benefit assured by the law to the successful contestant.

It seems to me to have an important bearing upon the case that neither contest was prosecuted to a successful issue in the common way. The allegations of both affidavits were substantially identical, and the entry was canceled as a result of a suggestion of illegality contained in both, proof of which was matter of record in your office. There was no hearing before the local office and no recommendation proceeded therefrom. Moses admits having procured Fick's entry in pursuance of a speculative scheme of his own, and he admits that, having been apprised of the illegality of the entry, he brought the contest with the view of covering the land with another scrip entry in order to carry into effect the

contract previously made with Mitchell. His first interest lay with Fick's entry and the maintenance of its validity, but finding this impossible, his efforts were logically directed to the cancellation of the entry in furtherance of his original speculative enterprise. While practically admitting this much, Moses professes at a later stage of the proceedings to have conceived an honest purpose to conduct the contest in good faith for the purpose of securing the land as a homestead in the event of success. His change of heart came too late.

His personal identification with Fick's fraudulent entry at its inception, and his connection with its subsequent history, as fully detailed in the decision appealed from, render it so clear that he was without the good faith contemplated by the law as to preclude argument or the citation of authorities.

The decision of your office is, therefore, affirmed.

JURISDICTION—TOWNSITE—CERTIFICATE OF RIGHT—OCCUPANCY.

BENDER v. SHIMER.

The action of the local officers in accepting final proof and payment does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and canceling the entry, if obtained through fraud, or allowed in violation of law.

A purchaser of land prior to the issuance of patent therefor takes only the equity of the entryman charged with notice of the law and the supervisory control of the Commissioner over the action of the local officers.

A certificate of right, issued to a lot claimant by the municipal authorities of a town, is *prima facie* evidence only of the claimant's right, where there is an adverse claim at the time the case is considered by the townsitc board.

Under the townsitc laws there can be no such thing as constructive occupancy of a town lot. The occupancy required is an actual bodily presence of the claimant, or some one for him, on the lot or lots for which he seeks to secure title; or a purpose to enjoy, united with, or manifested by such visible acts, improvements, or enclosures, as will give to the claimant the absolute and exclusive enjoyment of the possession thereof.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 30, 1894. (G. B. G.)

The property involved herein is lot No. 17, block 52, in the town of El Reno, Oklahoma Territory.

May 23, 1892, townsitc board No. 4 of Oklahoma Territory made cash entry No. 553, at Oklahoma City, for the NW. $\frac{1}{4}$ of section 9, T. 12 N., R. 7 W., "in trust for the several use and benefit of the occupants of said land", according to their respective interests, it being a part of the townsitc of El Reno, and therefore including the lot in controversy.

This entry was made in accordance with instructions from your office, contained in letter "G", of May 3, 1892, and on January 7, 1893, patent issued to the townsitc trustees.

Antedating this, on May 11, 1889, one John A. Foreman made homestead entry for the above described quarter section, and on August 9, 1890, filed his application to purchase said land under section twenty-two of the act of May 2, 1890, and on December 16, 1890, he submitted proof on said application. There were a number of protests filed, but upon considering the proof and protests, your office, on May 19, 1891, allowed Foreman's application, and directed final certificate to issue, which was accordingly done May 28, 1891.

On appeal of one of the protestants in that case, it came to this office, and on February 6, 1892, resulted in a decision here, cancelling Foreman's entry for the following reasons.

It was admitted by him on cross-examination in that case, that within eight days from the date of his homestead entry, he entered into a contract of lease with the Oklahoma Homestead and Townsite Company, a corporation organized under the laws of Colorado, transferring thereby, for townsite purposes, three fourths of the land embraced in his said homestead entry.

It was understood between the parties to this agreement, that the land was to be platted and the lots "sublet" until Foreman should perfect title, after which he was to make deeds for the lots to those holding under the company.

In said opinion (14 L. D., 146-154) it was held that Foreman was disqualified by the plain provisions of the statute, from making an entry under the second provision of section twenty-two of the act of May 2, 1890, and directed that the homestead and cash entry of Foreman be canceled, and held that the land might be entered under the provisions of the townsite law applicable to the Territory of Oklahoma.

Foreman filed a motion for review of said decision, which was denied by the Department on April 21, 1892, (14 L. D., 423), and the case closed.

Whatever difference of opinion may have existed, or may now exist, as to the jurisdiction of the Department to cancel a homestead entry after the issuance of final certificate, and payment accepted for the land, that question is, so far as this case is concerned, *res judicata*.

Not only this, but from a careful examination of departmental decisions on this question, it would appear that the rule *stare decisis* should be invoked as well.

It has been the uniform holding of this Department, and of the courts, that the action of the local officers in accepting final proof and payment, does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and cancelling the entry, if obtained through fraud, or allowed in violation of law, and that a purchaser of land prior to the issuance of patent therefor, takes only the equity of the entryman, charged with notice of the law, and the supervisory control of the Commissioner over the action of the local officers, and that a sale of land after issuance of final certificate

does not entitle the purchaser to the benefit of a patent, unless it shall appear that the entryman has complied with the law, and is, in his own right, entitled to patent. *Traveler's Insurance Company, ex parte*, and cases cited, (9 L. D., 316-322).

Whether this rule is at variance with the doctrine, also well settled, that a duplicate receipt is equivalent to a patent, will not be inquired into. Suffice it, that the Department is committed to the doctrine of the case of *Traveler's Insurance Company* (*supra*), and the question will not be re-opened.

The rule *stare decisis* is recognized and followed in departmental adjudication. *Knight v. Hoppin et al.* (18 L. D., 324).

It follows that any, and all claim or claims based on a title derived from Foreman, either directly or through intermediate assignors, by virtue of the homestead entry and final certificate of the said Foreman, are invalid, and the ownership of the lot in controversy must be determined on other lines.

Congress, by an act approved May 14, 1890 (26 Stat., 109), made provision for townsite entries in the Territory of Oklahoma.

The first section thereof provides *inter alia*,

That so much of the public lands situated in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as a townsite for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section 2387 of the Revised Statutes, as near as may be.

Section 2387, of the Revised Statutes, is as follows:

Whenever any portion of the public lands have been, or may be, settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

It will be readily seen that section one of the act of May 14, 1890, (*supra*) is substantially a re-enactment of the section of the Revised Statutes just quoted, the only difference being that under said section the entry is to be made by the corporate authorities of the town, if it be incorporated, or, if not incorporated, by the county judge of the county in which such town is situated. There is this further difference, that under said section of the Revised Statutes, the execution of the trust, as to the disposal of lots in any such town entered thereunder, and the proceeds of the sales thereof, is to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated, while under the

townsite law of Oklahoma, above cited, in the fourth section thereof, it is provided that all lots not disposed of, as thereinbefore provided, shall be sold under the direction of the Secretary of the Interior, for benefit of the municipal government of any such town, or the same, or any part thereof, may be reserved for public use, as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary, such reservation would be for the public interest.

Both the Revised Statutes and said act of May 14, 1890, provides that the land entered "shall be for the several use and benefit of the occupants thereof."

There are three claimants for the lot in controversy: A. C. Bender, Henry P. Shimer and the town of El Reno.

Bender's claim and application for a deed is based on the ground—

That he entered upon and occupied and made valuable improvements upon said lot and has built and is maintaining a dwelling house thereon eighteen by twenty-six feet, finished, two rooms and out-house; that he is the only occupant and that his occupancy dates from about the 29th day of March, 1892, and was not in violation of the rights or claims of any other person.

Shimer's claim and application for a deed is based upon the ground of—

Undisputed possession of said lots for more than one year and eight months; permanent and valuable improvements placed thereon; warrantee deed from John A. Foreman and wife; certificate and other paper evidence of claim duly issued by the recognized authority of said town.

The claim of the town of El Reno is based on the contention that said lot was not occupied at the time the townsite entry was made, and that it should be sold for the benefit of said town as provided by said section four of the act of May 14, 1890, *supra*.

Shimer's claim, so far as it is based on a deed from Foreman and wife, has been already disposed of, and the only question to determine is that of prior occupancy. It is contended by Shimer that a "certificate and other paper evidence of claim duly issued by the recognized authority of said town," issued at a time when there was no other claimant for the lot, must be accepted as conclusive proof of prior occupancy, and that the issue of such certificate is a final adjudication over which the Secretary of the Interior has no supervisory control.

In a letter from I. R. Conwell, Acting Commissioner, to H. C. St. Clair, Esq., chairman of Board No. 3, Hennessey, Oklahoma, of date September 5, 1892 (15 L. D., 270), it was said:

In order to be a beneficiary of a trust created under the act of May 14, 1890, a party must either be an actual occupant of the townsite at the date of entry, or a constructive occupant thereof under the second section of said act, which provides—"That in the execution of such trust, and for the purposes of the conveyance of title by said Trustees, any certificate or other paper evidence of claim, duly issued by the authority recognized for such purpose by the people residing upon any townsite the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse

claim to said property such certificate shall only be *prima facie* evidence of the claim of occupancy of the holder.' In accordance with this clear and explicit language of the statute you should issue deeds where the proper showing is made that a certificate, deed or other paper evidence of title was issued by (a party or parties where authority to issue the same was recognized by the people residing upon the town-site), and in case of adverse claim you should hear and determine the rights of the respective claimants.

This letter is cited in support of the contention aforesaid. It is a confused and misleading statement of the policy of the Department on the question of town lot occupancy. It clearly holds that the occupancy required by law may be either actual or constructive, and inferentially, that the holder of a certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon the townsite on which the town is situated, is a constructive occupant.

If constructive occupancy is all that is required under the law, such an occupancy can not be ousted by one who takes actual possession thereafter, and it would follow that the contention of the defendant is sound in that it would, under the facts in this case, make him the first legal occupant of the lot in contest, by virtue of a certificate from the recognized authority of the town, and such constructive occupancy, if it exists as a matter of law, has never been abandoned.

But this question has recently been fully considered by the Department, and the conclusion reached that a certificate of right issued to a lot claimant by the municipal authorities of a town, puts an adverse claimant on his defense, as to priority of occupation, but is not conclusive, and, if shown to have been issued without due basis therefor, loses all value as evidence. *Ellis v. Sneed* (18 L. D., 547).

Such a certificate is then only *prima facie* evidence of a fact which may be rebutted by competent testimony. The law expressly makes the certificate *prima facie* evidence only where there "is" an adverse claim to the lot, the word "is" implying a present condition, at the time the case is considered by the townsite board.

What is the meaning of the word occupancy as a term of real estate law, and who is an occupant within the meaning of the townsite law?

The meaning of the term may differ very materially, it seems, in its application to different kinds of property, according to the use which, from the nature of it, it is commonly designed. "Occupied" always implies a substantial and practical use of a building for the purposes for which it is designed. In insurance law, the terms of a policy contemplate that a dwelling house is occupied when human beings habitually reside in it, and unoccupied, when no one lives or dwells in it; that there be in the house the presence of human beings, as at their customary place of abode, not absolutely and uninterruptedly continuous, but the house must be the 'place of usual return and habitual stoppage.'

Within the meaning of a tax law, the owner of land may be in occu-

pation of it by his tenant. See Anderson's Law Dictionary, page 725, title "occupy," and cases therein cited.

An occupant within the meaning of the town-site law is one who is a settler or resident of the town and in *bona fide* actual possession of the lot at the time the entry was made. One who has never been in actual possession of a lot can not, therefore, be said to be an occupant of it, the occupancy must be actual and can not be begun by an agent. It must be for residence or for business or use, and the residence, business or use must be by the claimants. There must be a subjection of the land to his will and control. (See American and English Encyclopædia of law, title "Townsites," note "occupant." Vol. 19, page 364, and cases therein cited.)

The authorities, however, are uniform that actual settlement is not required to constitute actual possession. "Actual possession as much consists of a present power and right of dominion as an actual corporal presence." Minton *v.* Burr (16 Cal., 107-109).

By actual possession is meant a subjection to the will and dominion of the claimant and is usually evidenced by occupation, by a substantial enclosure, by cultivation or by appropriate use, according to the particular locality and quality of the property. Coryell *v.* Cain (16 Cal., 567-573).

Actual possession of land is the purpose to enjoy united with or manifested by, such visible acts, improvements, or enclosures as will give to the locator the absolute and exclusive enjoyment of it. Staminger *v.* Andrews (4 Nev., 59-631.)

It is actual also where one having the title is in possession of lands by his tenant, agent or steward. Fleming *v.* Madden (30 Iowa, 240).

It follows from these authorities that there can be no such thing as constructive occupancy under the townsite laws, but there must be an actual bodily presence of the claimant or some one for him, on the lot or lots for which he seeks to acquire title. Or a purpose to enjoy united with or manifested by such visible acts, improvements, or enclosures, as will give to the claimant the absolute and exclusive enjoyment of it.

It remains to apply these conclusions of law to the facts of the case at law.

From the evidence submitted in behalf of Bender, your office gleaned the following material facts which statement is born out by the record.

That on February 8, 1892, about 10 P. M., Mrs. Sada Montgomery and a Mrs. Howard, in company with their husbands, went to the lot in dispute, then without improvements thereon of any sort, and the men proceeded to build for Mrs. Montgomery (as is shown) a "fence" across the east end of it, said fence consisting of a number of pieces of scantling driven in the ground with a single string of scaffolding boards, slit into twelve feet lengths, fastened thereto; that no other work was done for or by Mrs. Montgomery, on the lot in question at any time, nor was any use ever made by Mrs. Montgomery of said lot; that some time in March, 1892, A. C. Bender bought whatever right Mrs. Montgomery had in the premises though it is not shown what consideration passed; that at that time the "fence" was still standing on the east

end of the lot but after the sale the said "fence" was "taken down" and part of it removed by Montgomery, of that remaining Bender used some later underpinning his house; that on March 29, 1892, Bender placed a house which he had built and moved from Frisco, O. T., on to the lot in question, at which time there were no other visible improvements on said lot, or signs of actual possession, save the destroyed fencing mentioned; that said house was one eighteen by twenty-six feet area, having two rooms, both plastered and with brick flue, being intended and used as a dwelling house; that Bender staid on said lot for some time after he put his house there, and then, about a month afterwards, rented it to one Jackson; that at the date of trial said house was unrented, and no one was living on said lot. Claimant swears that his object in making "improvements" on the lot in question was to thereby acquire title thereto; that he is a farmer and resides on the SW. $\frac{1}{4}$ of Sec. 27, in El Reno Township. He is not a resident of the townsite of El Reno.

In behalf of Shimer it appears that on the 29th of February, 1892, he had the lot in controversy, together with lot 18, enclosed by a two-strand wire and post fence—posts being eight feet apart—he being present when the work was done; that at the time said fence was built the Montgomery "fence" on the east end of lot 17 was standing and was not removed; that on the night of February 29, 1892, the post and wire fence built that day was destroyed, the posts removed, and posts and wire cast into the streets and on the adjoining lots; that the said fence was destroyed by unknown parties, there being no evidence on this point, except hearsay evidence to the effect that said fence was removed by a man and a woman.

It appears further that prior to February 29, 1892, there were no visible improvements on lot 17, except the Montgomery "fence," nor did Shimer himself ever go upon said lot and assert such claim thereto by placing any improvements thereon; "never occupied the premises, only long enough to put the fence there."

In the light of the authorities cited, I am of opinion that the first occupancy of the lot in controversy was initiated by Shimer February 29, 1892, the date he had said lot enclosed with a wire fence. The "fence" built by Mrs. Montgomery was not of such a character as to indicate good faith in a present intention to occupy or an ultimate design to improve said property. Nor can it be said that it was such an improvement as would operate as notice to others of a prior claim. When Shimer enclosed the lot it was not in violation of the legal or equitable claim of Mrs. Montgomery, or any other person, and I am of opinion that such enclosure was a legal occupancy within the meaning of the townsite laws.

As has been seen, actual possession may be evidenced by a substantial enclosure, and actual possession is all that is necessary to constitute occupancy, so far as the word relates to the issue here involved.

It appears, however, that said fence was torn down and removed the night of the same day that it was built, and that the same was never rebuilt, nor was there ever any effort on the part of Shimer to rebuild the same, nor was there any evidence of occupancy thereon on March 29, 1892, when Bender moved his house on it. Shimer's occupancy may be said to have been abandoned. It is true that his fence was removed by force in the night time, and in violation of his rights and the law, but he to whom title to property vests in occupancy, and who elects to rely on such frail evidence as was relied on in this case, must use due diligence to keep up such evidence, which cannot be said to have been done in this case.

It does not appear that Bender knew the lot had ever been fenced, or that the fence had been removed. That he knew as a matter of fact of Shimer's claim on the property may or may not be true; in either event, there being no such legal evidences visible, as required by law, the lot was vacant, and he had a right to and did establish a legal occupancy thereof.

It appearing that Shimer in good faith purchased this lot from the recognized authorities of the town, and that he was not in any moral sense a party to Foreman's fraud against the government, the equities of the case are with him; but there is no escape from the plain terms of the statute.

Shimer was not an occupant, and Bender was an occupant, of the lot in controversy at the time it was entered by the townsitc board "for the use and benefit of the occupants thereof." The contention that Bender was a trespasser when he moved his home on the lot, and that such act was not and could not have been the initiation of a claim against the government, is, under the peculiar circumstances of this case, immaterial.

Admitting that a settlement or occupation of land covered by a home, stead entry confers no right so long as the entry remaius uncanceled and that no right could have thereby been initiated against the government which the Department is bound to respect, still, it is the well settled ruling of this Department that a settlement on land covered by an entry takes effect *eo instanti* on the cancellation of the same, and in the case at bar, Bender's settlement took effect on the cancellation of the Foreman entry and was, therefore, before the townsitc entry was made, and his occupation was a legitimate one at the date of the said townsitc entry, and he is, therefore under the law entitled to a deed.

It is so held. The decision appealed from is affirmed.

ADDITIONAL HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

HAGLER v. PARRISH.

The right to make an additional homestead entry under the act of March 2, 1889, can not be exercised in the presence of an intervening adverse claim arising through the negligence of the homesteader to assert his additional right within the statutory period.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (J. I. H.) (J. L.)

I have considered the appeal of Solomon W. Hagler from your office decision of December 30, 1892, in the case of Solomon W. Hagler v. Eli H. Parrish, reversing the decision of the local officers, and dismissing Hagler's contest against Parrish's homestead entry.

The land involved is the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 14 S., R. 5 W., Huntsville land district, Alabama.

On November 17, 1891, Parrish made homestead entry No. 21,966 for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 31.

On January 30, 1892, Hagler filed an affidavit of contest in which he alleged:

That he is well acquainted with the tract of land embraced in Parrish's homestead entry and knows the present condition of the same; also that the said Eli H. Parrish never did live or make any improvements and that he, Solomon W. Hagler, has a prior and better right to homestead said land as he has improvements on said land, and has tried to homestead the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 14 S., R. 5 W., the part he claims.

A hearing was had on May 25, 1892, on testimony taken on May 23 and 24, 1892, at Jasper, before John B. Shields, judge of probate for Walker county, Alabama, in the presence of both parties and their attorneys.

On June 28, 1892, the local officers rendered their joint decision recommending that Parrish's homestead entry be canceled as to the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 31, and that preference right to enter the same be awarded to Hagler. And Parrish appealed to your office.

On December 30, 1892, your office reversed the decision of the local officers, and Hagler appealed to this Department.

In this case there is no dispute about the facts. In the year 1866, Hagler, a freedman, settled upon the quarter-quarter section in contest. He first occupied a house that had been built by a former settler. Afterwards he built another house about one hundred yards north-east of the other. His improvements consist of a dwelling-house containing three rooms, a blacksmith shop, a well, a horse lot, an orchard, and five or six acres of cleared land which he has cultivated for more than twenty years. On March 16, 1868, he made homestead entry of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 31, believing that the last named forty-acre tract included his improvements aforesaid. He made final proof in the year 1874 and on June 15,

1875, he received a patent for the two forty-acre tracts described in his entry; still believing that his patent included the tract on which all his improvements (except a part of his orchard) were, and on which he had constantly resided since 1866, and has resided ever since.

In January, 1892, Parrish caused his homestead to be surveyed and the lines fixed; and then for the first time it was ascertained that Hagler's improvements were not on his patented land, but on the west half of Parrish's homestead; and Hagler initiated his contest.

After April 23, 1884, the tract in contest was withdrawn from entry in accordance with the act of Congress of that date granting lands to the State of Alabama for university purposes (23 Stat., 12). On March 6, 1889, it was restored and made subject to entry, upon cancellation of the State's selection. During that period of nearly five years, Hagler made several fruitless efforts to make additional entry of said forty-acre tract, believing that part of his orchard was included therein.

The act of March 2, 1889 (25 Stat., 854), authorized Hagler, who had exhausted his homestead right in the year 1875, to enter other and additional land; and under the act of May 14, 1880 (21 Stat., 140), he had the right to file his homestead application for the forty-acre tract in contest, within ninety days after March 6, 1889, or before the initiation of an adverse entry. For more than two years and eight months before Parrish made his entry, Hagler failed and neglected to file his application. He has lost the right and privilege offered him by Congress, by his own procrastination and negligence. His contest must be dismissed.

Therefore your office decision is affirmed.

PUBLIC SURVEY—CONTRACT—APPROPRIATION.

OPINION.

All contract liabilities for public surveys are legitimately payable only out of the appropriation, or the unexpended portion thereof, made for the service of the fiscal year during which the contract was signed by the contracting parties, unaffected by any extension of time for the completion of the work, or the date of approval, so long as the obligation imposed constitutes a lawful claim against the government, and the work is completed during the life of the appropriation.

Secretary Smith to the Secretary of the Treasury, November 27, 1894.
(J. I. H.) (W. M. B.)

I have the honor to transmit herewith a letter from the Commissioner of the General Land Office of date May 24, 1894, calling the attention of this Department to certain rulings of the First Comptroller of the Treasury Department, therein related (as evidenced by various office letters of said Comptroller herewith transmitted), respecting the expenditure—under varying circumstances and conditions—of annual

appropriations, and the unexpended balances thereof, made by Congress to meet the requirements of the service of public surveys.

The decisions of the Comptroller's office of which the Commissioner complains and takes issue—properly formulated—are as follows:

1. That where work is performed or completed under a surveying contract, the liabilities accruing thereunder are properly payable from the appropriation made for the use of the fiscal year during which the work is actually done, instead of from that made for the service of the fiscal year during which such contract is awarded.

2. That where a contract is signed and properly executed in all respects by the United States Surveyor General, representing the government, and a United States Deputy Surveyor, during one fiscal year, and the approval of such contract by the Commissioner of the General Land Office is *given* in the fiscal year *following*, that, in such case, liabilities thereunder are properly chargeable to the appropriation made for the fiscal year during which the approval was given, and not from that of the former year.

3. That where work embraced in a contract has been completed under an extension of time granted after the expiration of the period stipulated therein for its execution, that such extension forms a new contract, and thereby being a new contract, the expenses arising thereunder must be paid from the appropriation made for the fiscal year during which the extension was granted, instead of that for year contract was awarded.

The Commissioner in his said letter of May 24, 1894, referring to, and commenting upon the above stated rulings, says—

I have the honor to state that the new and forced construction of existing law therein set forth will, if continued completely overthrow the usages and practices of this office with reference to public surveys, and award of contracts therefor, which have been in operation for many years past; in fact, since the system of public surveys were first introduced.

Prior to the incumbency of the office of First Comptroller by the late incumbent (A. C. Mathews), during the preceding administration, no technical questions of the character therein set forth were ever raised, and all of the accounts submitted by this office were promptly adjusted without the continued friction which has since been the almost universal rule.

Germain to and regulating the expenditure of balances of all annual appropriations is a provision contained in section 5, of the act of July 12, 1870 (16 Stat., 251). This section, which is embodied without material change in section 3690, Revised Statutes, is in words as follows—

All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year, and such balances not needed for the said purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations.

Congress, by provision contained in section 5, of the act of June 20, 1874 (18 Stat., 110), prescribed the length of time in which balances of appropriations designated in section 5, of the act of July 12, 1870, could be used, thus creating a uniform and definite rule in relation thereto, whereby balances of appropriations of the different classes—save those excepted—after remaining upon the books of the Treasury Department for two fiscal years were to be carried to the surplus fund and covered into the Treasury.

In the covering in process prescribed by provision of said act of June 20, 1874, is included all annual appropriations (the class under consideration), the balances of which could be used during the length of time named in the act mentioned for the payment of obligations incurred under contract stipulations, where such contract was made during the fiscal year for the use of which the appropriation was intended.

Comptroller Lawrence, in the James case (1 Lawrence, 2nd Ed., p. 381), in passing upon the use of that class of appropriations, laid down the following rule—

When, in an annual appropriation act, money is appropriated for official, *quasi* official, or personal services, it can as a general rule be paid therefor only when rendered within the year. (Wood's Case Ante 1.) Under the appropriations in such acts making compensation for the performance of work under contracts, the money appropriated can generally be paid for work done during the year; or, to the fulfillment of contracts properly made during the year, and to be completed within two years thereafter.

The distinction drawn respecting the use of annual appropriations for payment of services of a personal or official nature (the character of those for which payment was claimed in the Wood's case), or, on the other hand, for work done under contract, is very clear; a different rule obtaining respecting the use of those appropriations, or their balances, for the payment of liabilities incident to such services and those accruing under contract. By the word contract used in this connection, and in contemplation of law—is meant a written contract. The reason and usefulness of such a rule is too obvious to require any explanation for the information of those who are familiar with the doctrine applicable to the expenditure of appropriations of the various classes for the objects and purposes designated by Congress.

In giving expression to his view (Synop. Opin., Treas'y Department, p. 143), respecting the use of the class of appropriations known as annual for the payment of accrued claims presented for payment within the time contemplated by provision of section 5 of the act of June 20, 1874, Secretary Sherman, on April 20, 1877, held that—

This section was adopted, after the fullest consideration by Congress, expressly to cut off the payment of accrued claims, by covering into the Treasury, after two years, the balances of the appropriations from which they might have been paid. The plain purpose of this act was to confine the officers of the government to the allowance and payment of liabilities *within three fiscal years*. During that period the appropriation was available, and not afterwards.

Attorney General Cushing (7 Op., p. 3), on the 9th of October, 1854, in giving his opinion upon the unexpended balances of appropriations, held—

that, as a general rule, where a contract or other claim of the government is a continuous one, and still current, then the balance of appropriations made for one year for such service laps over in the following year, and is continuously applicable to the same object. No room for controversy on the point can exist unless by the lapse of time the balance be alleged to belong to the surplus fund in the Treasury.

Attorney General Akerman, on July 27, 1887 (13 Op., p. 289), in construing sections 5, 6 and 7 of the act of July 12, 1870, gave utterance to the following—

I am of the opinion that balances of appropriations made for the fiscal year 1869-70 of any description, even if contained in annual appropriation bills, and made specifically for that fiscal year, may be applied to the service of the year 1870-71, so far as, first, to pay in the current year expenses properly incurred in the former year, even if the contracts be not performed until within the latter or current year. This is plainly allowed (by express exception to prohibitions) in the very terms of section 5.

The above opinion was rendered in a case involving the question of payment from the balance of an annual appropriation made specifically for the service of a former fiscal year where work under contract was not completed until during a fiscal year subsequent to that for the service of which the appropriation was made.

Passing upon a similar question Attorney-General Williams on July 13, 1872 (14 Op., p. 58), held—

that under the fifth section of the act of July 12, 1870 (16 Stat., p. 251), it (an annual appropriation made specifically for the service of a designated fiscal year) can only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

In a matter involving the use of balances of general appropriations for a specific service under a continuous contract, Attorney-General Garland, in his opinion (18 Op., p. 569), quotes with approval the extracts above made from the opinions of Attorneys-General Cushing and Akerman, as containing a proper construction of the law upon the subject. In concluding that opinion he asserts that balances of such appropriations can be used for the period stated in those opinions "in the discharge of the obligations imposed by a lawful continuous contract." He, however, does not say that they cannot be used for the same length of time for the liquidation of expenses under a contract which is not continuous.

In this connection it might be well to refer to the ruling of Comptroller Lawrence upon this particular branch of the question (11 Lawrence, 2nd Ed., p. 248), holding that—

There is a class of appropriations denominated annual, which are of a continuing nature; or rather, where the supplies or services appropriated for, have a future continuing value and purpose, and a contract is made in the fiscal year for which the

appropriation is made, the contract may be extended even after that year, and the supplies or services furnished or rendered in pursuance thereof may be paid for at any time within the two years limited by the act of June 20, 1874 (18 Stat., 110), after such fiscal year.

A service which extends through many years, with an indefinite limit as to the time respecting its completion, must be regarded as a continuous one. Of such a nature, undoubtedly, is the service embracing the system of public surveys, for as early as September 4, 1841 (5 Stat., Sec. 6, p. 454), it was provided that not less than \$150,000 should be appropriated annually (with proviso in Sec. 5, *idem*), that said act should continue and be in force until otherwise provided by law for defraying the expenses incident to that service. The very terms of that act show that the provision was intended for a service which was considered—and necessarily was—of a lengthy and indefinite duration, and consequently continuous.

The expense of that service since that time to the present has been paid for out of annual appropriations, varying in amount from year to year, as the requirements of the service seemed to demand, and any contract made for the completion of any part of that service, cannot be regarded otherwise than a continuous one until the execution of the work therein stipulated for is fully completed.

The term continuous—used in connection with a service or a contract—is too comprehensive and indefinite to determine the precise length of time during which available balances of appropriations may be used therefor. Attorneys-General Akerman and Williams and Secretary Sherman who rendered their opinions subsequent to the passage of the act of July 12, 1870, made no such distinction. The opinion of Attorney-General Cushing was rendered prior to the passage of that act. Attorney-General Garland incorporated into his opinion the general rule laid down by both Cushing and Akerman. Contracts made for the public surveys can be brought within either rule.

After the passage of the acts of July 12, 1870, and June 20, 1874, it was no longer necessary to have reference to any continuous nature which a service or a contract might or might not have in determining the period during which an appropriation, or any part thereof, could be used for the payment of liabilities thereunder.

Under the provisions of those acts, so long as a contract was awarded during the fiscal year for the service of which the appropriation was made, Congressional declaration is clear in this,—that balances of such appropriations endure to the payment of liabilities thereunder, unaffected by work under contract being completed subsequent to the fiscal year for which the appropriation was intended and the contract executed, provided the work be completed during the life of the appropriation.

Referring to the ruling made by Comptroller Mathews in his letters to the Commissioner of the General Land Office of March 7, and April

30, 1892, adjusting the account of Frank S. Peck (holding, *inter alia*, that payment should be made from the appropriation made for the use of the fiscal year during which the work was actually completed), the present Comptroller in his letter of May 8, 1894, states that—

The rule seems to have been well laid down by Secretary Lamar, in the Baker case (4 Land Dec., 451). The principles in that case, in my opinion, conform to the law as contained in section 3690, R. S., as construed by the Attorneys-General in 13 Opin., A. G. 289, and 18 Opin., A. G., 569.

Rulings contained in opinions of Attorneys-General referred to above do not sustain the position of the Comptroller, nor do they interpret provision of section 3690, Revised Statutes as it appears to be understood by him.

The ruling evidently referred to in the Baker case is contained in the italicized words (not so emphasized in the original) of the extract from said decision quoted below, to wit :

The failure to complete the work within the time specified in the contract does not authorize you to approve and certify the account for the amount properly due thereon. Such failure does not impair its validity, except that payment can not be claimed from the appropriations for surveys for that year.

The rule thus laid down above is identical with the decision of the Comptroller on the same point. Such a ruling can not be accepted as correct in the light of the authorities hereinbefore cited. It is clearly in contravention to a long line of decisions—unbroken by a single adverse ruling in accord with the spirit and letter of the law.

The question as to what appropriation payment should be made from, for services actually completed after the expiration of the fiscal year in which said contracts were made, was not involved in the Baker case; hence any expression upon this question in the decision of Secretary Lamar was mere *dictum*. The sole question involved in that case was as to the rate of payment that should be allowed for work completed after the fiscal year in which the contract was made, and after the expiration of the time limited by the contract, and where the time had not been extended by the Commissioner.

In a decision rendered by this Department, reported in 18 L. D., 195, the Baker case was referred to and considered; and it was held that the balance of any apportionment of an annual appropriation made specifically for the services of a fiscal year for the survey of the public lands can be used in paying the expenses of a survey completed during a subsequent year, provided such payment be for the discharge of liabilities incurred in the fulfillment of a contract, properly made, during the fiscal year for which such appropriation was made, even if the work under the contract be completed after the expiration of the period specified therein.

More copious extracts from the opinions of the Attorneys-General have been made and commented upon than might be deemed necessary for a proper understanding of the question under consideration, but

the Comptroller refers to and relies upon some of these same opinions to sustain the position taken by him, and the quoted extracts are employed for the purpose of showing that they are not in harmony with, but adverse to his office rulings.

I do not think the Comptroller is sustained by legislative intent, nor by the usage of his office prior to the incumbency thereof by A. C. Mathews, in his contention that—where a contract is signed and in all other respects completed (save the approval of the Commissioner) during one fiscal year, and the same is not approved by said Commissioner until within a subsequent fiscal year, that, under such condition, payment of liabilities thereunder can only be made from the appropriation intended for the service of the fiscal year during which such approval was given, instead of the former year; and also in his ruling that,—where work is completed under an extension of the time named in a contract for its performance—when such extension is made after the expiration of the period so stipulated for its completion—that, in such event, the extension forms a new contract, with liabilities arising thereunder payable from the appropriation for the fiscal year during which said extension was allowed, and not from that made for the year during which the contract was awarded by the surveyor-general.

There is no authority in law for the rules laid down above, and the observance of a uniform practice, directly opposed thereto, existed so long in the Treasury Department and the General Land Office prior to the decisions complained of by the Commissioner, that the practice ripened into a well recognized usage.

The authority for the Comptroller's statement that a contract is not a completed contract, until approved by the Commissioner, is to be found in section 2398, Revised Statutes. Though these contracts are awarded in obedience to instructions from the Commissioner, still the work designated therein cannot be commenced or completed under the same—so as to create a valid claim against the government—without his approval. There are several good reasons for the law and the rule established thereunder, which are not necessary to be given here. For many years it has been the uniform practice of the General Land Office not to affix any date to the approval of a contract, and when, as a mere formality, a date was attached thereto, said approval, notwithstanding, related back (as formerly) to the date the agreement was signed by the contracting parties, which said date has always been considered as the true and lawful date of the contract.

Regarding an extension of the time specified in a contract for its full and proper execution—whether made *prior* to or after the expiration of the period limited therefor—it may be safely stated that any such extension does not constitute a new contract when time is not considered of the essence of the agreement; and it is only where the parties intended to make time an essential element of the agreement

that it will be deemed of the essence of the contract. (A. and E. Encyc. of Law, p. 915, note, Par. 3.)

Though it be the custom to specify the time within which the work under surveying contracts should be completed, the rule is, however, respecting contracts generally, "that the agreement of the parties themselves upon a certain time is not conclusive evidence that it belonged to the essence of the contract." (Parsons on Contracts, 2 Vol., 2nd Ed., p. 542.)

As stated by the Commissioner (in his letter herewith) in the adjustment of surveying accounts by his office, and settlement of the same by office of the Comptroller, during the long period prior to the preceding administration, no particular reference was had to the time of completing the work under contract for the purpose of determining from what appropriation the liabilities incident thereto were legitimately payable.

Nor has a failure to perform the work designated in these contracts, within the time specified, been held to invalidate the same, or in a way to affect the right of the contracting deputy to compensation, so long as the right to such compensation constituted a lawful claim against the government in other respects. Thus it appears that *time* has not been (in the practice of the departments) considered of the essence of these contracts, and that the extension of the same for their completion, under conditions stated, cannot—in the absence of any change in the essential conditions therein—be deemed as constituting a new contract, with a different source of payment from that specified in the contract, or intended by law.

In directing the award of a contract the Commissioner must necessarily observe restrictive provision of section 3679, Revised Statutes, in the following words—

No department of the government shall expend in any one fiscal year any sum in excess of appropriation by Congress for that fiscal year.

The award of a contract by any department of the government whereby such a charge is made against any appropriation as to necessitate the disbursement, at a future time, of a portion thereof, is considered within the intent of provision of the above section an expenditure of the appropriation to that extent, and if there should be any doubt of the correctness of the proposition that the liabilities under such contract were not intended to be paid out of an appropriation made subsequent to the fiscal year during which the contract was awarded (so long as the claim be presented during the life of the appropriation) a correct solution of that question should be found in the plain intendment of the unequivocal language of section 3732, Revised Statutes, as follows—

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments.

The mandatory provisions of the above quoted sections disprove the correctness of the Comptroller's rulings upon all the questions in controversy.

It frequently occurs that work under surveying contracts is not completed until within the second or third fiscal year after they are awarded, approved or extended, and the Comptroller's ruling that the appropriation from which liabilities are properly payable, in certain stated instances, is determined by the date of such approval or extension—and in all cases by the time the work is actually completed—is directly opposed to the spirit and letter of provisions found in said sections 3678 and 3732.

Under manifest intent and requirements of those sections the Commissioner cannot award a contract with expenses incurred thereby payable from an appropriation made during a subsequent fiscal year, the amount of which was necessarily unknown to him at the time of making the contract.

The only correct rule, as hereinbefore stated, is,—that in every case all contract liabilities are legitimately payable only out of the appropriation (or the unexpended portion thereof) made for the service of the fiscal year during which the contract was signed by the contracting parties, unaffected by any extension of time for the completion of the work, or the date of approval, so long as the obligation imposed constitutes a lawful claim against the government, and the work is completed during the life of the appropriation.

Such a rule is not only sanctioned and supported by law, but is sustained by long usage, such usage being recognized as "a kind of executive common law." (*United States v. McDaniel*, 7 Peters, p. 380.)

Where work under this class of contracts has been completed after the balance remaining of the appropriation, from which the expense thereof was originally made payable, has been carried by operation of law to the surplus fund and covered into the Treasury, in such case said expense must be paid from a specific amount appropriated by a yearly or other deficiency bill for such object, as held in letter of instructions of this Department, of date February 19, 1894 (18 L. D., 196).

I have the honor to request that should you not concur in my view of the law as herein expressed, you will consent that the questions herein submitted may be referred to the Attorney-General for his opinion thereon.

TIMBER LANDS—ACT OF MARCH 2, 1889.

JAMES L. VAUGHN.

The limitation of the right to purchase under the timber land act to "unoffered" lands is not removed or modified by the provisions of section 1, act of March 2, 1889.

The provisions of the act of June 3, 1878, include lands that at the date of the passage of said act had not been offered at public auction at the price then fixed by law.

Lands falling within the indemnity limits of a railroad grant are not by such fact increased in price.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (J. I. H.) (J. L. McC.)

Your office, by decision dated March 28, 1893, held for cancellation the timber-land entry of James L. Vaughn for the NE. $\frac{1}{4}$ of Sec. 2, T. 9 N., R. 10 W., Vancouver-land district, Washington, on the ground that the above described land was "offered"—the same having been offered at public sale on August 3, 1863.

Vaughn has filed an appeal, alleging that your office was in error—

(1) In holding that said land was not subject to timber-land entry at the date when Vaughn entered it.

This allegation is not sufficiently specific to warrant consideration.

(2) In not holding that, by reason of the provisions of the act of March 2, 1889, repealing all laws providing for private cash entry, the distinction between "offered" and "unoffered" land had ceased to exist at the date of his entry.

The Department has held that the limitation of the right to purchase, under the timber land act, to "unoffered" lands, is not removed or modified by the provision of section 1 of the act of March 2, 1889 (25 Stat., 854). See Instructions of February 21, 1893 (16 L. D., 326); case of Norman L. Crockett (*ib.*, 335).

(3) In not holding that the status of the land at the date of entry should control.

The timber and stone act of June 3, 1878 (20 Stat., 89), includes lands that, at the date of the passage of said act (not at the date of entry) had not been offered at public auction at the price then fixed by law. (*Ward v. Montgomery*, 17 L. D., 332.)

(4) In overlooking the fact that this land is within the indemnity limits of the grant to the Northern Pacific Railroad Company, and in not taking into account the effect of said fact.

The fact that the land is within the indemnity limits of the Northern Pacific road has under the circumstances no effect whatever, there having been no increase in price because of that fact. Its condition not having been changed since the offering (of August 3, 1863), it is still "offered land."

Being "offered" land, it is not subject to entry under the timber-land law.

The decision of your office is affirmed.

DESERT LAND CONTEST—COSTS—RECLAMATION.

SMITH v. KING.

A preferred right of entry may be secured through a successful contest directed against a desert land entry, but the contestant in such case must pay the costs of the contest.

During the pendency of a departmental order suspending a desert land entry the claimant is not required to proceed with the work of reclamation.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (G. C. R.)

On April 7, 1877, William King made desert land entry No. 91 for Sec. 20, Tp. 30 S., R. 29 E., Visalia, California.

On June 22, 1891, B. M. Smith filed his affidavit of contest against the entry, alleging non-compliance with the law in the matter of reclamation, and that the land was not as a matter of fact desert in character, but would produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons; that it would at all times produce barley or other agricultural crops without irrigation in amount to make the cultivation reasonably remunerative.

This contest was dismissed March 8, 1892, for want of prosecution, and on October 3, 1892, your office set aside that action and remanded the case for trial.

The case finally came on for hearing January 28, 1893, when contestant introduced his first witness; after he had finished his examination in chief, and was being cross-examined by claimant's attorney, contestant announced that he would not pay the cost of the cross-examination; the taking of further testimony was then suspended, and when contestant still persisted in his refusal to deposit the necessary fees for reducing the testimony to writing, the case was dismissed.

On appeal, your office by decision dated March 29, 1893, sustained the local officers in their ruling that contestant should pay the cost of both the direct and cross-examination of the witnesses, it appearing to your office, however, that contestant is prosecuting his contest in good faith, the case was again remanded for a hearing.

From that action contestant has appealed to this Department.

The question as to whether a hearing should be granted is a matter resting in the sound discretion of the Commissioner, and an appeal will not lie from your office decision ordering a hearing. *Reeves v. Emblen*, 8 L. D., 444; Practice Rule 81.

The 2d section of the act of May 14, 1880, 21 Statutes, 140, provides 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 and allowed thirty days from date of such notice to enter the lands.

It was held in the case of *Fraser v. Ringgold* (3 L. D., 69), that desert

land entries are included within the act of May 14, 1880 (*supra*), and as such held subject to the rules of practice in the matter of hearings and contests as in pre-emption claims.

Rule 54 of Practice requires parties contesting pre-emption, homestead or timber-culture entries, and claiming preference rights of entry under the act of 1880, *supra*, to pay the costs of contest, and the Department has uniformly held that a successful contestant of a desert land entry is entitled to a preference right. *Welch v. Duncan*, 7 L. D., 186; *Jefferson v. Winter*, 5 L. D., 694.

Rule 54 of Practice is, therefore, directly applicable to this case, and contestant, if he secures the right of entry by virtue of his contest, must pay the cost.

While this is the rule, the local officers should not permit a course of examination which is irrelevant, resulting in unnecessary expense to the contestant; if, however, the claimant should persist in such conduct, the examination may, in the discretion of the local officers, proceed at the sole cost of the claimant, and this rule should be strictly followed.

It appears that this entry is among those which were suspended on September 12, 1877, and a question arose whether during the suspension the claimant was required to reclaim the land. Your office properly held that he was not. *United States v. Haggan*, 12 L. D., 34; *Sharp v. Harvey*, 16 L. D., 166; *Adams v. Farrington*, 15 L. D., 234.

The decision appealed from is affirmed, and the case will be remanded for hearing.

FOREST RESERVATION—EXECUTIVE WITHDRAWAL.

JONATHAN GANT.

An order of the President withdrawing lands for the purposes of a forest reservation is effective upon lands formerly embraced within the Ute reservation but restored to the public domain by act of Congress June 15, 1880.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 30, 1894. (G. C. R.)

Jonathan Gant has appealed from your office decision of May 25, 1893, affirming the action of the register and receiver in rejecting his application to make desert land entry for the W. $\frac{1}{2}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22; the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ NW. $\frac{1}{4}$; the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 23, T. 7 S., R. 93 W., Glenwood Springs, Colorado.

His application was rejected because the tracts applied for, together with other tracts, are included in the Battlement Mesa forest reserve, created by the President's proclamation of December 24, 1892, said lands not being excepted from the force and effect of said proclamation prior to the date thereof by being "embraced in any valid entry or covered by any lawful filing duly made in the proper United States Land Office."

It is insisted that the forest reserve is a part of the Ute Indian reservation,

set apart by act of Congress for the benefit of said Indians, and that the same under the provisions of said act would have to be sold, and the proceeds of said sale used for the benefit of said Indians and any act of the President attempting to withdraw said territory so embraced in said Ute Indian reservation, or any part thereof, from said sale and disposal, as provided in said act of Congress, is illegal and void.

On examination I find that said forest reserve was in fact a part of the Ute Indian reservation. By act of Congress approved June 15, 1880 (21 Stat., 199), an agreement submitted by the confederated bands of Ute Indians in Colorado for the sale of said reservation to the United States was accepted, and thereafter the lands were held and deemed to be public lands of the United States, and "subject to cash entry only in accordance with existing law."

While the proceeds from the sale of said lands were to be paid to the Indians after the government had been reimbursed for certain moneys paid in behalf of them under the terms of said agreement (*supra*), still the lands are public lands of the United States, and any question as to the rights of the Indians incident to creating the forest reserve, and the consequent postponement of the sale of the lands, does not concern the appellant.

It is a sufficient answer to claimant's contention that the lands he applied to enter were withdrawn from disposal by proper authority at date of his application.

The decision appealed from is therefore affirmed.

OKLAHOMA TOWNSITE—COMMUTED HOMESTEAD—CONTEST.

PARKER ET AL. v LYNCH.

A contest against a homestead entry, commuted for townsite purposes, will not be allowed after the issuance of final certificate, except upon a clear showing of facts that necessarily call for action on the part of the government.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 30, 1894. (C. W. P.)

August 11, 1894, your office forwarded to this Department the papers in the application of John W. Parker to contest the homestead entry of James W. Lynch for the SW. $\frac{1}{4}$ of section 27, T. 26 N., R. 2 E., Perry land district, Oklahoma Territory.

It appears from the record that Lynch's final proof was accepted by the Department on July 19, 1894, and your office was directed to issue to said Lynch a patent for the land embraced in the townsite of Lynchville.

On August 10, 1894, the attorneys for J. W. Parker filed in your office a petition, addressed to this Department, making charges against the homestead entry of said Lynch, with affidavit of said Parker

attached, accompanied with an affidavit of George Worth, and a petition, purporting to be signed by several parties, but without verification.

On the 24th of September, 1894, J. S. Walton filed a protest against said entry, on which he asked for a hearing.

The instructions to the registers and receivers, contained in clauses six and seven of the circular of July 18, 1890, (11 L. D., 68), regulating contests of cash entries for townsite purposes, were intended to prevent the harassment of claimants, and the extortion of money from them under a compromise, and should be strictly enforced, except under extraordinary circumstances.

What circumstances are there in this case which would justify a departure from the rules laid down in the circular referred to? And why should these parties be allowed at this time to contest a claim which has passed to final certificate?

Parker's petition to be allowed to contest the entry, is verified by his affidavit, but is without corroborating witnesses. An affidavit of George Worth is attached to a copy of the protest, in which he swears that he has read the statement made in the enclosed copy of the affidavit of John W. Parker, forwarded to the Hon. Secretary of the Interior, and is acquainted with the contents thereof, and he knows the statements made therein, concerning the homestead application and alleged disqualification of J. W. Lynch, who entered the south-west quarter of section 27, T. 26 N., R. 2 E., are true.

Parker's affidavit is "upon information and belief," and Worth's corroborating affidavit is of the most general character. He does not state a single fact within his knowledge, which would support any of the charges.

Had it, however, been filed with the register and receiver, with the protest, it would have been considered sufficient to warrant a hearing.

But conceding that the affidavit of contest is now sufficient, I see no good reason for allowing so irregular a contest.

Still less reason is there for allowing Walton's application to contest Lynch's entry. The record shows that only on June 30, 1894, he filed with the register and receiver at Perry, a dismissal of his protest against the final proof of Lynch, and a relinquishment of all claim to the land in question, duly acknowledged on June 28, 1894, before G. B. Barnes, notary public for K. county, Oklahoma Territory.

For these reasons, the petitions of Parker and Walton are denied and dismissed.

RAILROAD RIGHT OF WAY—EASEMENT.

PENSACOLA AND LOUISVILLE R. R. CO.

A statutory grant of a railroad right of way is a grant of an easement, and the lands over which the right of way is located may be disposed of by patent to others, subject to whatever right the company may have in the same.

Secretary Smith to the Commissioner of the General Land Office, November (J. I. H.) 30, 1894. (G. B. G.)

By letter of July 26, 1893, your office submitted to the Department, for consideration and instructions, a question as to the proper action to be taken by your office in the matter of the right of way granted to the Pensacola and Louisville Railroad Company over public lands, by the act of June 8, 1872.

On October 17, 1893 (17 L. D., 430), the Department, by letter of that date, held that:

The lands in question are shown to have been reserved for the benefit of the company by statutory mandate. This being so, such reservations can be revoked only by judicial proceeding, or legislative enactment. . . . In my opinion, relief in the premises can be best obtained through judicial proceedings (and directed your office) to forward to this Department, the record in an actual case, to the end that a letter may be prepared, requesting the Attorney-General to institute suit to revoke and set aside the reservation made, as aforesaid, under the act of June 8, 1872, *supra*.

In accordance with said direction, your office has transmitted the papers in the matter of homestead entry No. 19725, final certificate No. 11464, in the name of Isham Jordan, covering the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 14, T. 2 N., R. 7 E., Montgomery land district, Alabama, which entry is in conflict as to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, with the selection of lands for station purposes by the Pensacola and Louisville Railroad Company, under said act of June 8, 1872.

The act of June 8, 1872, (17 Stat., 340), so far as material to the issue, is as follows:

That the right of way through the public lands be, and the same is hereby, granted to the Pensacola and Louisville Railroad Company of Alabama, for the construction of a railroad. And the right is hereby granted to said corporation to take from the public lands adjacent to the line of said road, material for the construction of said road. Said way is granted to said company to the extent of one hundred feet on each side of said road, where it may pass through the public lands; also the necessary lands for stations, buildings, depots, workshops, machine-shops, side-tracks, switches, turn-tables, and water-stations, not to exceed forty acres in any place. The acceptance of the provisions of this act by the said Company, and a map of the location of the road, and the lands to be reserved for buildings and uses of said road, shall be filed with the Secretary of the Interior, within one year from the passage of this act; and the road shall be finished within five years from the passage of this act.

The uniform rule of the supreme court has been that, "such an act was a grant *in presenti* of lands to be thereafter identified." *Railway Company v. Alling* (99 U. S., 463); *Noble v. Union River Logging Railroad Company* (147 U. S., 165-176).

It appears that said railroad company accepted the provisions of said act, and filed a map of the location of the road, and the lands to be reserved for buildings and uses of said road, as provided therein, which was approved by the Secretary of the Interior. This action of my predecessor is binding on me. "One officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." *Moore v. Robbins* (96 U. S., 530); *Noble v. Union River Logging Railroad Company* (147 U. S., 165-167).

It appears further that said road was never built, but there is no penalty attached to the granting act, for failure to perform its conditions.

On further consideration of the case, however, I am of opinion that the Department is not, by reason of said grant, embarrassed in patenting these lands to settlers under the public land laws.

By the common law, where a public road is established over lands, the use of the road is in the public, but the fee in the soil remains in the original owner.

The rule is laid down by Washburn, substantially, that the character of the estate conveyed, must depend largely on the use and nature of the thing granted. "If it be used only occasionally, like a way, the grant creates only an incorporeal hereditament, an easement, and not the land." *Washburn on Easements*, page 40.

Referring to a railway, a right of way is a mere easement in the lands of others, obtained by lawful condemnation to the public use, or by purchase. *Anderson's Law Dictionary*, page 1108, Title "Way." (Cases cited).

In regard to railways in particular, it has been repeatedly decided in the different States, that they take only an easement in the land condemned for their use. *Redfield on Railways*, pages 267-268. (Cases cited).

If this be true of lands condemned for their use, it follows *a fortiori* that a grant of lands, in effect a donation for their use, would fall within the same rule. In condemnation proceedings, the company would be forced to pay the full value of the land; and to say that under such circumstances they take less than under a donation by grant, would be to say that they take less by purchase than by voluntary conveyance.

Again it may be stated as a general proposition, that if an easement is granted for a particular purpose, when that purpose ceases to exist, there is an end of the easement.

The general doctrine is stated to be that

Where a right, title or interest is destroyed, or taken away by the act of God, operation of law, or the act of the party, it is called an *extinguishment*, and an easement is one of the rights which may be extinguished or destroyed.

See *Washburn on Easements*, pages 654, 655, 656.

The language of the act of June 8, 1872, is: "that the right of way through the public lands be, and the same is hereby, granted," etc. It is not the fee but the right to use the public lands for railroad purposes which was granted, and, in my opinion, an easement only was intended to pass to the railroad company.

The question as to whether the company's easement in these lands has become extinguished, by its own acts, by lapse of time, and operation of law, or from any cause, is one upon which I need not express an opinion.

Be this as it may, the lands covered by their grant may be patented to others, subject to whatever rights the railway company may have in the same.

A similar question was discussed by the supreme court in the case of *Smith v. Townsend*, 148 U. S., 490. The act granting the right of way to a railroad company over Indian lands was under consideration, and the act was construed to give only an easement to the railroad company. After concluding that the act of Congress merely conferred an easement upon the railroad company, the court said, as to the disposition of lands over which there may be such right of way:

Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company; and if ever the use of that right was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land.

It is true that the act of Congress granting a right of way over Indian lands provided that the same should revert to the nation or tribe of Indians from which it was taken, whenever it ceased to be used for railroad purposes; while in the act of Congress under consideration there is no such provision. But I do not see that this could make any difference, because this act confers only an easement, and the failure to provide for a reversion of the grant for non user could not enlarge the interest which the railroad company took under the act.

If the grant is of an easement, then we have the high authority of the supreme court of the United States for holding that the lands across which a right of way is claimed by a railroad company may be disposed of by patent, subject to such rights as the railroad company may have to the right of way.

The patentees will take the servient tenement, subject to whatever servitude may exist, and they will find ample protection in the courts, should any attempt be made to deprive them of the use or occupancy of their land, by any party or parties claiming under, or by virtue of, the aforesaid grant of right of way.

Departmental letter of October 17, 1893, is modified, in so far as it conflicts with the views hereinbefore expressed, and your office is advised to issue patents for the land affected by the Louisville and Pensacola Railroad grant, reserving in general terms such rights as the company may have in the same by virtue of said grant.

TIMBER AND STONE LANDS—ACT OF MARCH 3, 1883.

JAMES BEAN.

The act of March 3, 1883, making special provisions with respect to the disposition of Alabama lands returned as valuable for coal or iron, is not repealed by the act of August 4, 1892, extending the provisions of the timber and stone act to all the public land States.

*Secretary Smith to the Commissioner of the General Land Office, November
(J. I. H.) 30, 1894. (E. M. R.)*

This case involves the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 31, T. 15 S., R. 9 W., Montgomery land district, Alabama.

The record shows that on February 6, 1893, James Bean made application to enter the above described tract under the act of August 4, 1892 (27 Stat., 348), which was rejected by the local office because the land had been reported to be mineral, and had not since been offered, and was not, therefore, open to entry (act of March 3, 1883).

Upon appeal, your office decision of April 18, 1893, was made, wherein you affirmed the holding of the local officers and, upon a motion for review on July 5, following, your office re-affirmed its former position.

Upon further proceedings had, the case is now before the Department for final adjudication.

The record shows that this land was offered October 29, 1821. In 1879 your office marked the land, upon report by a special agent, as mineral, being valuable for its coal.

It is well here to give the acts relative to stone entries, in order that the question presented may be the better understood.

Section one, of the act of June 3, 1878 (20 Stat., 89), which was amended by that of August 4, 1892, is as follows:—

That surveyed public lands of the United States within the States of California, Oregon, Nevada, and Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions of becoming such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of \$2.50 per acre, and lands valuable chiefly for stone may be sold on the same terms as timber lands.

The second section of the act of August 4, 1892, provides:—

That an act entitled "An act for the sale of timber lands in the States of California, Oregon, and Nevada and Washington Territory, approved June 3, 1878, be and the same is hereby amended by striking out the words 'states of California, Oregon, Nevada and Washington Territory,' where the same occur in the second and third lines of said act, and inserting in lieu thereof, the word 'public land states.' The purpose of this act being to make said act of June 3, 1878, applicable to all public land states.

The act of March 3, 1883 (22 Stat., 487), was a special act applicable only to the State of Alabama and was as follows:—

That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands; Provided, however, that

all lands which have heretofore been reported to the General Land Office as containing coal and iron, shall first be offered at public sale. And provided further, that any *bona fide* entry under the provisions of the homestead law of lands within said State heretofore made, may be patented without reference to an act approved May 10, 1872, entitled 'An act to promote the development of the mining resources of the United States, in cases where the persons making application for such patents have in all other respects complied with the homestead laws relating thereto.'

The contention is that the act of March 3, 1883, is in effect repealed by the amendatory act of August 4, 1892. It is maintained that as the act of June 3, 1878, was made of general application by that of August 4, 1892, the act of March 3, 1883, has no status as to lands in Alabama, and is of no effect and entitled to no consideration in determining the merits of the cause now at issue. In other words, that it was in effect repealed.

The act of March 3, 1883, was a special act having application only to the State of Alabama under certain circumstances. The act of August 4, 1892, did extend the act of June 3, 1878, to all public land states, and it is of force and effect in the State of Alabama, as in any other; nor is the act of March 3, 1883, inconsistent with this conclusion. That act had reference only to land in the State of Alabama in which it was reported that there was coal or iron, and with this exception, the amendatory act of 1892 has full force and effect. To hold otherwise, would be in effect, to say that a special act was repealed by implication, by a general act with which it was not in conflict.

I see no necessity for such a conclusion, and therefore the decision appealed from is affirmed.

FINAL PROOF—EQUITABLE ACTION.

FRANK H. DEVORE.

In making substituted final proof, to supply testimony lost through no fault of the claimant, the testimony of said claimant may be taken before a clerk of a court of record outside of the land district in which the land is situated, and the testimony of his witnesses taken within said land district, with a view to equitable action on the entry, if the proof so submitted is found satisfactory.

Secretary Smith to the Commissioner of the General Land Office, November 30, 1894. (J. L. McC.)

Frank H. Devore, on December 11, 1885, made homestead entry of the NW. $\frac{1}{4}$ of Sec. 23, T. 18 S., R. 35 W., Wa-Keeney land district, Kansas.

On December 11, 1886, one Thomas Weaver instituted contest against Devore's entry. Said contest was closed in favor of the defendant by your office letter of October 24, 1889.

Prior to the last-named date, however—to wit, in June, 1888—he made commutation proof before the clerk of the district court at Leoti, Wichita County, Kansas. Said proof was suspended in the local office

at Wa-Keeney to await the result of the contest. The local officers state that his attorney was notified of such result, but that they have no evidence of such service.

After having made his final proof, Devore—alleging that he was compelled by drouth and failure of crops to work elsewhere in order to maintain himself and family—found employment in the States of Ohio, Pennsylvania, and West Virginia; and according to his own affidavit never received any notification of the decision of your office in his favor in the case of the contest against his entry.

He now alleges that, although he never withdrew said proof, nor procured or authorized the withdrawal of the same, it can not now be found.

The facts above stated are borne out by the records and reports of the local office. Opposite his entry on the tract-book of that office appears the notation: "Proof suspended June 16, 1888, awaiting action on case;" and the local officers report that they are unable to find the proof testimony.

In view of the facts thus set forth, Devore has applied for permission to execute new commutation proof testimony and affidavit in support of his entry aforesaid before a notary public at Sistersville, West Virginia—the testimony of his witnesses to be taken at Leoti, Kansas (within the land district in which the tract in question is situated).

To this application your office, by letter of July 20, 1893, replied that it was "through his own neglect" that Devore remained ignorant of the dismissal of Weaver's contest; that "he abandoned the land and is now residing in a distant State;" that "the proof alleged to be made was worthless under then existing rulings, having been made pending a contest;" and that "he is now attempting to acquire title" to the land "without compliance with law."

There seems to be no question that Devore offered final commutation proof. That such proof was sufficient is to be inferred, rather than the contrary, from the fact that your office found that the charge brought against it was without foundation, and dismissed the contest. If he had fulfilled the law prior to the time of his offering final proof, his removal from the land afterward was not such an abandonment as would work its forfeiture, or show his bad faith. (See Peter Gaughran, 6 L. D., 224, and many cases since.) The proof, if sufficient, ought to be accepted, notwithstanding it was offered while contest was pending. (See McNamara v. Orr *et al.*, 18 L. D., 504.) I find nothing to show that he is attempting to acquire title to the land without compliance with law.

The proof having been lost through no fault of the claimant, he may be permitted to submit duplicate proof without republication (George F. Reed, 6 L. D., 794). In making such substituted proof the claimant's testimony may be taken before a clerk of the court outside of the land district in which the land is situated, and the witnesses' testimony

within said land district; then, if compliance with the law is satisfactorily shown, the entry may be submitted to the Board of Equitable Adjudication (Rebecca C. Williams, 6 L. D., 710; William H. Bowman, 7 L. D., 8; Nancy J. Crews, 14 L. D., 687).

The decision of your office is therefore reversed, and action will be taken as above indicated.

ABANDONED MILITARY RESERVATIONS—ACT OF AUGUST 23, 1894.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 1, 1894.

REGISTER AND RECEIVER,

United States Land Offices:

GENTLEMEN: Attached is a copy of the act of Congress approved August 23, 1894, entitled "An act to provide for the opening of certain abandoned military reservations, and for other purposes."

The first section of the act opens to settlement under the public land laws of the United States, all lands not already disposed of in any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposal under the act of July 5, 1884, the disposal of which has not been provided for by subsequent act of Congress, where the area exceeds five thousand acres; such legal subdivisions as have government improvements thereon and such other parts as are now or may be hereafter reserved for some public use being excepted. It also gives a preference right of entry for a period of six months from the date of the act to bona-fide settlers who are qualified to enter under the homestead law and have made improvements and were at date of said act, residing upon any agricultural lands in such reservations, and also for a period of six months from the date of settlement when that shall occur after the date of this act. It also provides that persons who make homestead entries for such lands shall pay not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of entry, and that such payment may be made, at the option of the purchaser, in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

The second section refers to lands hereafter to be placed under the control of the Secretary of the Interior and provides for the manner of appraisements.

Under the terms of this act, settlement may be made on any of these reservations, whether surveyed or not, where the area exceeds five thousand acres. Where the lands in such reservations have been surveyed and the triplicate plats filed in your office, you will allow

homestead entries to go to record therefor, if the entrymen are duly qualified to make entry, as in the case of other surveyed public lands. But where entry is made under this act, the entryman will be required to pay for the lands at the value heretofore or hereafter determined by appraisement, and the payments may be made at the option of the purchaser, in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

Appraisements of such lands will be ordered by the Secretary of the Interior at such times as the public interests demand, and to the extent permissible under the appropriations made or to be made by Congress for this purpose.

In some instances instructions have been issued to you to allow homestead entries, under the act of July 5, 1884, where the lands have been surveyed, in abandoned military reservations the area of which exceeds five thousand acres. Such of these lands as have not been entered under said act of July 5, 1884, are now subject to the provisions of the act of August 23, 1894, but this latter act does not apply to any abandoned military reservations whose area is five thousand acres or less, and settlement except as provided by said act of July 5, 1884, on any such reservations will not confer any rights upon the settlers.

It will be observed that this act grants a preference right of entry for a period of six months from its date to all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and also for a period of six months from the date of settlement when that shall occur after the date of this act. Where the lands have been surveyed, there will be no difficulty in the operations of this provision of law, but in cases in which the lands have not been surveyed, the equitable construction of this act seems to be that the preference right of entry shall extend to a period of six months from the date of the filing of the triplicate plats of survey in your office.

Definite instructions as to the price of the land the dates of payments and the rates of interest to be paid thereon, will be issued in relation to each reservation, when the appraisement thereof shall have been made and approved.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

HODE SMITH, *Secretary.*

(PUBLIC—No. 209.)

AN ACT To provide for the opening of certain abandoned military reservations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public-land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal instalments, at times and at rates of interest to be fixed by the Secretary of the Interior.

SEC. 2. That nothing contained in this act shall be construed to suspend or to interfere with the operation of the said act approved July fifth, eighteen hundred and eighty-four, as to all lands included in abandoned military reservations hereafter placed under the control of the Secretary of the Interior for disposal, and all appraisements required by the first section of this act shall be in accordance with the provisions of said act of July fifth, eighteen hundred and eighty-four.

Approved, August 23, 1894.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. v. ST. PAUL, MINNEAPOLIS AND
MANITOBA RY. CO.

Failure to designate a loss in support of an indemnity selection, in limits common to two grants, can not be taken advantage of by the company claiming under the conflicting grant, where all the lands in said limits are required to make up the deficiency existing in the grant under which said selection is made.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (F. W. C.)

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of October 22, 1892, rejecting the application by said company to select the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 13, T. 129 N., R. 36 W., St. Cloud land district, Minnesota, and permitting the selection of the same tract by the St. Paul, Minneapolis and Manitoba company to remain of record.

The land involved is within the indemnity limits common to the grants made to aid in the construction of both roads and was excepted from the withdrawal made on account of both grants by a pre-emption filing of record *prima facie* valid at the dates of the orders making such withdrawals, and was applied for by the Northern Pacific Railroad Company in August, 1883, and again in December following, same year, both applications being rejected. From such action the company appealed.

The Manitoba company also applied to select this land on May 18, 1885, which application was rejected; from which it appealed and again applied to select the land in October, 1890, which was accepted by the local officers and permitted to go of record.

This case arises upon the application of one Duncan G. Smith to enter the land in question under the homestead law, but your office decision found against him and he has failed to appeal, so that the matter is solely one between the two companies.

The Northern Pacific Railroad Company, as before shown, was prior in time in the matter of selection, but your office decision finds against said company because in its application to select no designation was made of a loss as a basis for such selection, and, as held in said office decision, as the land was excepted from the withdrawal, the company's selection was, under the decision in the case of said company against Miller (11 L. D., 428), not protected by departmental order of May 28, 1883, permitting the Northern Pacific Railroad Company to make selection without designation of loss.

I learn upon inquiry at your office, however, that said company did, on April 26, 1892, make designation of a loss as a basis for the tract in question. The requirement that a loss be specified in making selection under these grants made to aid in the construction of railroads, is designed for the protection of the United States and the interest of set-

tlers who may desire to question the company's right of selection in any particular instance. As between the United States and the company, its purpose is to ascertain whether a loss exists, unsatisfied, to support the selection, and for the protection of settlers, it has been required that a particular loss be specified for each selection made.

In the case decided by the supreme court (139 U. S., page 1), between these same parties, it was held—

As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated.

In view of that decision I am of the opinion that the Northern Pacific Railroad Company has the prior right in the premises under its selection made, as before described, and that its failure to designate a loss at the time of its attempted selection of this land in 1883, can not be taken advantage of by the Manitoba company, and I have therefore to direct that the selection made by said last mentioned company on October 20, 1889, be canceled, and that the application by the Northern Pacific Railroad Company be permitted to go of record upon the payment of the required fees, as in other cases made and provided, upon the presentation of a new application.

Your office decision is therefore reversed.

PRIVATE CLAIM—CONFIRMATION—SURVEY.

TIERRA AMARILLA GRANT.

A statute confirming a private land claim "as recommended for confirmation" by the surveyor-general passes the title of the United States as effectually as if it contained in terms a grant *de novo*.

A suit to set aside a patent for a private claim on the ground of fraud in the survey will not be advised, where said survey was regularly made, duly reported and approved, and held for a term of years prior to the issuance of patent, and where no fraud is in fact shown in connection with said survey and its approval.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (V. B.)

On the recommendation of your office my predecessor, Secretary Noble, requested the Attorney-General to cause to be instituted a suit to secure the cancellation of the patent theretofore issued for the Tierra Amarilla private land grant, situated mostly in New Mexico. No action seems to have been taken in the matter by the then Attorney-General. Upon the change of administration the present Attorney-General, on July 17, 1893, returned the papers here, requesting a further consideration of the matter, and intimating a doubt as to the probable success of

such suit. Upon a careful examination of the whole case, on February 14, 1894, the Attorney-General was advised that for reasons stated, in an opinion approved by Mr. Shields, the late Assistant Attorney-General for this Department, but not adopted by Secretary Noble, I declined to concur in the action of my predecessor, requesting that a suit be brought; and it seems proper that I should state in reply to the recommendation of your office, the reasons which control my judgment.

The grant in question was made to Manuel Martinez, by the Mexican authorities on July 20, 1832; was reported on favorably by the surveyor-general of New Mexico, under the provisions of section eight of the act of July 22, 1854 (10 Stat., 308), and confirmed as claim No. 3, by the act of June 21, 1860 (12 Stat., 71); surveyed in July, 1876, and patent issued February 21, 1884.

The area of the grant as patented is 594,515.55 acres, upwards of nine hundred square miles, and the land lies partly in the State of Colorado and largely in the Territory of New Mexico; the recommendation of your office seems to be based upon statements made by the surveyor-general of Colorado and of New Mexico, respectively.

The report of the surveyor-general of Colorado referred to asserts that the claim as surveyed and patented contains "within its lines more than 60,000 acres of public lands, lying within the State of Colorado;" it asserts that the east boundary of the grant was the range of mountains in which are the "Banded and Brazos peaks, and not the high plateaus lying behind this range, because they are not visible from" the valley of the Chama river, on the banks of which the land is said to be situated in the original petition for the grant; this it is said is confirmed by the fact that the Nutria river—the southern boundary—has its source in the first range of mountains east of the Chama river, running thence westerly, which source is fully seven miles from the second and most easterly range on the crest of which the eastern boundary was established by the official survey. Further, it is said that the grant in Colorado should not extend further north than to "where the Navajo river bends suddenly from due east to due north," and from which point a line should be run to the nearest peak on the first mountain range. The official survey adopts the Navajo river as the northern and western boundary to its source, to which a north-westerly course is run from the second mountain range; whilst the grant makes the Navajo river the northern boundary only.

Unquestionably, if the views of the surveyor-general of Colorado are correct, a large amount of land in the State, not originally granted, has been patented to the confirmees of the grant.

The above report of the surveyor-general of Colorado was referred by your office to the surveyor-general of New Mexico for investigation and report.

The last named officer, considering the subject, expresses the opinion that, independent of the matters set forth by the surveyor-general of

Colorado, there are other sufficient reasons for instituting proceedings to secure the cancellation of the patent.

The two principal reasons urged by him, as stated in your office letter, are—

1st. That the patented survey including the pastures, woods and watering places which under the grant were left free and common to all, with the fee reserved to the Mexican government.

2nd. That the grant was made under the Mexican colonization law of 1824, and regulations thereunder of 1828, which limited it to eleven square leagues.

In view of the foregoing, it seems necessary to refer to the history of the grant and the confirmation thereof.

On April 23, 1832, Manuel Martinez, "together with eight male children and others who may voluntarily desire to accompany him," appeared before the political chief, and stated, "that having registered a tract of land for cultivation and pasturage, situated on the banks of Chama river, known as the Tierra Amarilla, bounded on the east by the range of mountains, on the west on a line with the mouth of the laguna de los Caballos, on the north by the Navajo river, and on the south by the Nutrias river," he prayed that said tract might be granted to him.

The petition was referred to the corporation of Abiqui, which, on May 13, 1832, reported favorably "on the petition of the citizen Manuel Martinez, in reference to the lands he desires to possess with his children and other residents who may accompany him;" that the land is of excellent quality, "with abundance of pasture, water and wood, and capable of supporting five hundred families without property and without any injury to third parties, leaving the pasture and watering places free to all inhabitants of this jurisdiction of Abiqui, the pastures common."

On July 18, 1832, Martinez protested against "leaving the pasture and watering places free to all the inhabitants of Abiqui;" and he renewed his application for the grant, stating that—

The land I solicit in fee being distant several leagues more than less from Abiqui and its environs, it would be more injurious than beneficial to me, as what is reduced to private property can not be common for this purpose. The boundaries of the land are established without preventing the use of pastures, watering places, roads and highways, to any individual who may journey with his stock, &c., to other vacant places that may not be held as private property by one or more individuals as that I have petitioned for. It would certainly be unjust that the stock raisers of Abiqui should proceed to establish permanent stock ranges within the limits of the property I seek to obtain, under the guarantee that the grant was made on condition that the pasture and watering places should be common with those of Abiqui to be freely used to the injury of the proprietors, which will have no other tendency than that of causing endless disputes and difficulties—that which is held in common being of no one individual.

On July 20, 1832, the Territorial deputation of New Mexico, "in view of the foregoing petition," approved the grant as follows—

1. The tract of Tierra Amarilla is granted to the petitioners with the boundaries set forth by them.

2. The constitutional justice of Abiqui will proceed to make said grant, delivering to each one of those who may unite with the petitioners a certain number of varas, in which, in his opinion, they can sow, by a prudent calculation, four or five fanegas of wheat, executing to them a grant therefor.

3. That the pastures, watering places and roads, shall be free, according to the custom prevailing in all settlements.

On August 25, 1856, Francisco Martinez filed his petition in the office of the surveyor-general of New Mexico, wherein he recites the previous application of his father, Manuel Martinez, for the grant of the tract of land known as the Tierra Amarilla, "bounded on the north by the Navajo river, on the south by the Nutrias river, on the east by the mountain range, on the west by the line of the Puerto de los Caballos."

The petition further recites the reference of the original application to the corporation of Abiqui, its report "recommending the propriety of acceding to the request of the petitioners;" the subsequent grant by the territorial deputation, "with the boundaries therein set forth;" the direction of the justice to place grantees in possession; "that the justice of Abiqui proceeded to place them in possession, but before arriving at the place they were turned back on account of a war breaking out between the citizens of New Mexico and the Navajo Indians;" that in consequence of said war, possession was not delivered in accordance with law; that after the war, grantees took possession of the land, with their stock, and have so been in possession ever since. The petition then states that believing the grant to be a good and lawful one under the laws of Mexico, it is prayed the same "may be investigated and confirmed to your petitioner and associates in fee, the same being, in our opinion, according to law and equity." And in conclusion it is stated that said tract contains "from north to south six leagues more or less, and from east to west four leagues more or less; that they can not furnish a plot of survey of said land, as no survey has ever been made."

On September 10, 1856, after hearing testimony and considering the case, the surveyor-general finds the facts as hereinbefore recited, and further that "the original grantee and the present claimant have been in peaceable and quiet possession of the land for the period of twenty-one years."

In conclusion the surveyor-general says—

The provisional deputation was authorized by the laws of the republic of Mexico to make donations of land to individuals; and this case being covered by the treaty of Guadalupe Hidalgo, and the decision of the supreme court of the United States in the case of J. C. Fremont *v.* United States, the grant made to Manuel Martinez, of which Francisco Martinez is the present claimant, is deemed by this office to be a good and valid grant; and the Congress of the United States is hereby respectfully recommended to confirm the same, and cause a patent to be issued therefor by the proper department, and the land embraced in the boundaries set forth in said grant to be observed.

This report was duly transmitted to Congress and the grant was confirmed, by act of June 21, 1860, *supra*, "as recommended for confirmation" by the surveyor-general of New Mexico.

Repeated decisions of the supreme court have declared that such a statute, as the last quoted, passes the title of the United States as effectually as if it contained in terms a grant *de novo* (*Ryan v. Carter*, 93 U. S., 82). And since the decisions of the supreme court, in relation to the Sangre de Cristo grant, reported in the case of *Tameling v. U. S. Freehold Company* (93 U. S., 644), and the Maxwell grant, found in 121 and 122 U. S. Reports, reaffirming said doctrine—both being cases in which grants were confirmed by the same words in the same act of Congress which confirmed the Tierra Amarilla grant—it is unimportant to inquire whether there is anything to be found in the record of the latter grant to restrict the quantity to the eleven leagues limits of the Mexican law, or whether the “pastures, woods, and watering places were left free and common to all, with the fee reserved to the Mexican government.”

With full power and authority to do so, the grant was confirmed by Congress, “as recommended for confirmation” by the surveyor-general of New Mexico. “The confirmation,” says the court in *Tameling v. U. S. Freehold Company, supra*, “being absolute and unconditional, we must regard it as effectual and operative for the entire tract.”

As to the survey, it is possible errors were committed and probably more land was included therein than either your office or this Department would now allow, if that survey were presented for approval.

The errors, if any, and consequent enlargement of the grant, are to be found in the location of the north, south and east boundaries in the official survey—the west boundary being the only one about which there seems to be no question. This last line is run in a due north and south course from the Navajo river through the laguna de Caballos or Puerto Cavallos to a point about five miles due west from the junction of the Chama and Nutrias rivers.

The Navajo river is fixed as the north boundary in the grant, and the mountain range as the eastern. That river has its source to the north of the mountains of Colorado. Leaving the mountains to the east, the river courses along west of and parallel to them, in a course a little west of south for about fourteen miles. It then turns abruptly to the west and runs an east and west course for about five miles, when it passes outside of the west line of the patent.

It is claimed that the northern boundary of the grant should only go as far as this river runs east and west and thus describes the northern boundary called for—a line which would be only five miles long. Instead of doing this the survey runs with the course of the river, from its source on the western slope of the mountain range, whose general course here is from northwest to southeast; said source being found at the northeast corner of the grant. The survey runs with the course of the river for about twenty miles until it intersects at the northwest corner—the western line of the grant.

It is by this alleged improper line the area of the grant is said to be increased 60,000 acres within the limits of the State of Colorado.

The southern boundary described in the grant is the Nutrias river. This stream has its origin in the westernmost range or spur of mountains which contains the Brazos and Banded Peaks, and it flows westward beyond the grant. It is adopted at the point of its junction with the Chama river, about five miles east of the intersection of the western line; thence eastwardly to its source in the mountains last mentioned; thence a straight line is run to the east for about seven miles until it intersects the east line of the survey as carried into patent.

The eastern line runs along this last mountain range in a north-westerly and southeasterly course until it reaches the source of the Navajo river, at the northeast corner, as before described.

With his said report of October 31, 1885, the surveyor-general of Colorado forwards a diagram of the grant, whereon he locates this eastern line upon the "summit of the main chain of Chama mountains."

The assertion thus made as to the location of this line is not based upon any examination thereof in the field by that officer, or anything in the record, or on the allegation or information of any other person; but is stated by that officer to be the result of a comparison of the plat of the official survey with the topography of the country as shown by the geological surveys of Hayden, Wheeler and others. The diagram forwarded is on a reduced scale, and purports to show the topography on the same scale. The correctness of the topography as thus shown is denied by the grant claimants, who have also filed a diagram, claimed to be a correct showing of the topography as taken from Hayden and Wheeler's map. This last diagram is on the same scale as the plat of the official survey, and locates the east line, as therein; that is on the west side of the mountain range.

Which diagram delineates correctly the topography of the country, I am unable to say, but there is considerable difference between the two.

But beyond the assertion, on the face of the diagram of the surveyor-general of Colorado, that said line is on the top of the mountain range, there is nothing whatever in the topography as thus shown by him, or in the record of the case to sustain said assertion. On the contrary, everything in the case goes to show that the said line was located at the west base of said mountain range.

The original instructions were to run the east line "along the west foot" of the mountain range. Afterwards, the surveyor-general of New Mexico made application for a modification of this instruction and that he be permitted to run the line along the summit of the mountains; this modification was denied by your office letter of May 24, 1876, and it was there said "where one of the calls for the boundary of a grant is a mountain, the foot of such mountain is the true boundary;" and the former instructions were adhered to.

The official field and descriptive notes of survey contain the following statement: "From the southeast corner of the grant I run thence

along the west foot of the main range of mountains and along the east boundary of the grant," and thereafter are given the courses and distances for fifty-six miles, until the head of the Navajo river is reached, where is established the northeast corner. There is nothing whatever in these courses, measurements, or descriptive notes to show that the course "along the west foot" of the mountains was departed from and run on the top of the mountains. But, on the contrary, the official plat of survey returned with said notes, and approved by the surveyor-general, shows that said line was not located on the mountain ridge, but on the west side of the mountains. In May, 1878, a protest was filed by the grant claimants against said survey, because "the eastern boundary was located at the foot hills of the mountains instead of the top or summit thereof." This protest, however, was afterwards withdrawn.

There is also found among the papers an affidavit by one William E. Avery, made November 21, 1885, in which he states that he has long been a resident on the grant, that his house was the initial point of the survey; that he is well acquainted with said tract and the natural object called for as boundaries to said grant; that he went with the surveyors, when the official survey was made, "along the whole eastern boundary, and in fact around the whole survey, and knows that said survey was made along the western side of the Cordillera de la Sierra," or mountain range.

In the face of all this I do not find that, as matter of fact, the east line was located on the summit of the mountains as stated on the diagram of the surveyor-general of Colorado; there being not a scintilla of evidence in the record to sustain the assertion, I do not think any action should be taken thereon, and I dismiss the subject from further consideration.

It is claimed that the east line should have been run from the source of the Nutrias river on the western side of the first mountains; thence coursing northwesterly along the base and with the trend of said mountains until it reached a point opposite the bend in the Navajo river, before described, then to and with said river to the northeast corner as located; that thus the grant would have been bounded, along its whole length on the north by the Navajo river; on the south by the Nutrias; on the east by the mountain range, and have embraced the land lying on both sides of the Chama river as described in the petition. All calls, it is asserted, would have been answered, no rules violated and no undue amplification of the grant made to its present enormous proportions.

Unquestionably, if the lines had been thus located, the area of the grant must have been greatly reduced—probably by one-third, I should think. The theory which would lead to the deduction is plausible, but seems debatable. The east boundary, as described in the original of the grant, is the "Cordillera de la Sierra," which is translated by the

surveyor general as "the range of mountains." But the expression means something more than the translated words imply in their ordinary acceptation. The Spanish expression is tautological and literally translated is "the ridge of the mountains of the ridge of the mountains," and may be safely accepted as meaning here a continuous chain (cordillera) or range of mountains.

On the diagram submitted by the surveyor-general of Colorado, the range of mountains which is adopted as the eastern boundary is described by him as the "main chain of Chama Mountains," whilst the other mountains, along which he thinks the eastern boundary should have been run, are apparently not a continuous range, but off-shoots or spurs, from the Chama or main range, scattered and disconnected, three or four of them are very lofty; one of the latter, the Banded Peak as it is called, being located in Colorado, about five miles north of what, he says, should be the true north line of the grant; another is situated twelve miles southwest from the Banded Peak, and about five miles east of the undisputed western boundary; another, the Brazos Peak, is about thirty miles further to the southeast, and within about five miles of the eastern boundary as surveyed; and yet another about twelve miles further to the south and also within about five miles from said eastern boundary, and about three miles from the southern boundary. If the matter were presented for the first time it would be questionable whether mountains scattered about in this irregular manner would be adopted as satisfactorily answering a call for a continuous range of mountains. This being so, I cannot, with the light before me, and in the exercise of my best judgment, after a most careful consideration, say that the official survey is clearly wrong.

The enormous size of the grant as surveyed—nine hundred and thirty square miles—is startling, and involuntarily the question presents itself, did Congress really ever intend knowingly to confirm a grant of such size? But apart from this indefinable, or perhaps instinctive hesitancy, I find in the record nothing on which to base a reasonable or judicial doubt that Congress intended this grant should have any restrictions as to quantity, except so far as the same was limited by the recommendation of the surveyor-general. Nor is there such doubt that the grant has been surveyed with boundaries "as recommended."

But even if I were of the opinion that a survey in accordance with the views of the surveyor-general of Colorado and New Mexico would have more nearly accorded with the lines of the original grant, this opinion would not be sufficient, even when supported by that of those two officers, to justify me, under the circumstances, in recommending suit to cancel the patent in this case.

This survey was regularly made by officers of the land department sixteen years after the confirmation of the grant by act of Congress; it was duly approved and reported in July, 1876, and laid in the

land office until February, 1881, when patent was issued—a period of nearly five years, during the whole of which time it was subject to exception by any one interested. But the only exceptions filed were by those claiming under the confirmees who objected because the survey did not embrace enough land. No fraud, imposition or deception was practiced upon the Commissioner; but that officer, deliberately and after four years, according to the dictates of his best judgment, approved the survey and caused the same to be carried into patent; and I am unable to say, upon the whole showing made, that in this he erred.

No fraud is shown in connection with the survey or its approval. None is alleged, save that the surveyors-general of New Mexico and Colorado, in a general way say the survey was "fraudulent," that too much land was "fraudulently included within its lines," etc. But no facts whatever are stated tending in the slightest degree to show fraud or even to create in the mind a suspicion thereof in relation to the action of any of the officers of the government or any one else in connection with said survey.

The charge of fraud seems to be based upon nothing whatever except the opinion of the surveyors that the grant has been patented for entirely too much land, and therefore they think the survey which brought about the patent must have been fraudulent.

In the Maxwell grant case, *supra*, an assault was made upon the survey as fraudulent and much was said there, as here, about the lines being so improperly and "fraudulently" run as to exaggerate the area of the original grant. In response to these charges and others alleging errors and mistakes, on page 381 of Vol. 121, the court declared with much emphasis its views of the law, which should govern such cases; it said:

We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that efforts to set them aside, to annul them or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.

Applying the rules, here so clearly laid down, to this case, it was not proper to recommend to the Attorney General that suit be brought to secure the cancellation of the Tierra Amarilla patent, inasmuch as I do not think such suit can be successfully maintained on the record presented to me.

Since the matter has been pending here the Hon. Antonio Joseph, the Delegate from the Territory of New Mexico, has filed in the case, a memorial from a large number of persons who represent themselves to be the descendants of those who originally went upon said grant with Martinez and who complain that they are being deprived of their rights to free pasturage to wood and watering places by the present grant owners.

These are matters with which this Department cannot deal, but said parties must obtain redress, if entitled to any, from the courts. If they are entitled to such rights under the law the patent of the United States could not and did not deprive them of those rights. The grant was confirmed to Martinez by Congress and the patent is a conveyance by the United States to him of the title thus confirmed and does not take away or affect the rights of any third parties.

PRACTICE—NOTICE—PERSONAL SERVICE.

PARRISH *v.* JAY.

Notice of a contest by registered letter is not personal service, and confers no jurisdiction on the local office.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (J. I. P.)

The question presented by the appeal of Frank E. Jay from your office decision of February 21, 1893, transmitted here by your office letter of April 10, 1893, is, whether a notice of hearing by registered letter, to a party, confers jurisdiction on the local office.

The land involved is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 27 N., R. 20 W., Missoula, Montana, land district, the township plat of which was filed in the local office July 17, 1891.

September 4, 1891, the defendant, Jay, made homestead entry of said tract, with other lands. September 21, 1891, the plaintiff filed in the local office a corroborated affidavit, alleging settlement on said described tract, on October 13, 1887, which she averred was long prior to the settlement of the defendant; that she had made valuable improvements on said tract, and a hearing was asked to determine the priority of her claim.

September 22, 1891, the local office notified the parties by registered letter that the testimony would be taken October 23, 1891, at Holt, Missoula county, Montana, before one John G. Dooley, and that the

hearing before the local office would occur November 11, 1891. The registered letter to the defendant was addressed to him at Holt, Montana, where the testimony was to be taken, and was received by him, as shown by the return receipt, September 27, 1891. He did not appear at the taking of testimony October 23, nor at the hearing November 11, 1891. The plaintiff appeared at both of said times and places, and on the testimony introduced by her the local office recommended the cancellation of the defendant's homestead entry as to the tract here involved.

On appeal to your office, the defendant also moved to dismiss the case, for want of jurisdiction. Your office overruled said motion, and directed that should said decision become final, the plaintiff should be permitted to file for the tract described.

The appeal of the defendant to this Department is substantially upon the ground that your office erred in overruling his motion to dismiss the case, and presents the question stated at the beginning of this decision.

It is urged that the notice given the defendant by registered letter, conferred no jurisdiction on the local office, that Rule 9, of the Rules of Practice, require that personal service shall be made in all cases where the party to be served is a resident of the State, and shall consist in the delivery of a copy, and that registered letters are legitimate only as a part of the requirements in notice by publication, and of interlocutory motions, proceedings, orders and decisions; and the case of *Farrier v. Falk* (13 L. D., 546) is cited as conclusive of the question presented.

In seeking to show the inapplicability of *Farrier v. Falk*, *supra*, to the question involved, your office, in its decision, draws a very nice distinction between hearings ordered by the local office on an affidavit of contest, and hearings ordered on its own motion to determine the rights of conflicting claimants, and the notice necessary in each instance to confer jurisdiction on the local office. Without further reference to that distinction, I call your attention to the case of *Chesley v. Rice* (16 L. D., 120, at p. 122), where it is stated that "notice of contest and hearing must be served personally," as provided by Rule 9, of the Rules of Practice. In the case of *Farrier v. Falk* it is held that "service of notice in contest proceedings cannot be legally made by registered letter, and that notice thus served confers no jurisdiction on the local office."

The case at bar is an adversary proceeding. Those proceedings were invoked by the affidavit of the plaintiff, and the result will virtually determine the rights of one party or the other to the land involved; hence it is in the nature of a contest proceeding.

The rule of the Department, as established by numerous decisions and the Rules of Practice, in effect is, that where an individual resides in the same State where the land claimed by him lies, and proceedings adverse to his interests in said land, requiring an adjudication, are instituted, jurisdiction of his person by the local office can be acquired

only by personal service of notice, on him, and that notice by registered letter is not personal service, and confers no jurisdiction on the local office. In view of this fact it is evident that in the case at bar the local office acquired no jurisdiction over the defendant. (*Elting v. Terhune*, 18 L. D., 586.)

Your decision is therefore reversed, with instructions to return the case to the local office for proceedings *de novo* on the affidavit of the plaintiff.

HOMESTEAD CONTEST—LEAVE OF ABSENCE.

TAYLOR *v.* HENRY.

A leave of absence procured by an entryman, who in fact had not established residence on the land, will not operate to defeat a subsequent contest in which abandonment is charged against the entry.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (F. W. C.)

I have considered the appeal by Fred C. Taylor from your office decision of February 14, 1893, dismissing his contest against the homestead entry made by Henry L. Henry on June 24, 1891, embracing the SE. $\frac{1}{4}$, Sec. 21, T. 3 N., R. 1 E., Boise City land district, Idaho.

Said contest was filed December 29, 1891, alleging abandonment and the notice issued thereon was served the next day.

With the said entry papers is an affidavit for leave of absence under the third section of the act of March 2, 1889 (25 Stat., 854), which bears the following endorsement:

Filed December 28, 1891, and leave of absence granted for six months from date hereof.

CHAS. S. KINGSLEY, Register.

The hearing upon Taylor's contest was set for February 8, 1892, but, upon motion by Henry, was continued to March 8, 1892.

On that day Henry appeared with Alfred A. Frazier who, acting as Henry's attorney, moved to dismiss the contest, but after the motion had been argued, it was denied.

A stipulation as to the facts was then drawn up and signed by Frazier, in which it was admitted that Henry had never established a residence upon the land, but had placed improvements thereon, consisting of a house valued at \$400, which was only partially completed.

It was agreed in said stipulation that the contestant might offer further testimony if he desired.

The case was continued from time to time until February 15, 1892, when the local officers called Frazier's attention to the fact that he had never qualified as required by the rules and regulations governing the recognition of attorneys before the local office, and had never filed written authority to represent Henry.

He thereupon complied and witnesses on both sides were examined, the case being continued to next day.

On the following day he moved to strike the stipulation from the record, and in the decision of the local office upon the case, said motion was granted, their decision stating:

That the facts, as stipulated, do not agree with those developed by the examination of the witnesses, and all parties having been allowed a full opportunity to testify in the case, the said stipulation is not considered in the matter of this decision.

Their decision recommended that the contest be dismissed. Said decision was sustained by your office decision of February 14, 1893, an appeal from which brings the case before this Department.

From a careful review of the entire record, I deem it unnecessary to consider the question as to whether the defendant is bound by said stipulation, for its only effect would be to strike out the testimony subsequently offered in his behalf, a consideration of which does not affect the disposition of the case.

In the case of *Yarneau v. Graham* (16 L. D., 348) it was held that—

Leave of absence granted to a homesteader under section three, act of March 2, 1889, does not preclude the initiation of a contest during such period on account of non-compliance with law prior thereto. (Syllabus.)

And in the case of *Sylvester Gehr* (14 L. D., 95), it was held that—

Section three, act of March 2, 1889, permits, under certain circumstances, a leave of absence after settlement, but does not authorize an extension of time for the establishment of residence. (Syllabus.)

It is shown that Henry, prior to the initiation of these proceedings, resided in an addition to Boise City, distant about seven miles from the land in question, where he was engaged in the lumber business.

He had a house, consisting of three rooms, built upon this land, which was without chimney and otherwise incomplete at the time of the filing of this contest.

During the absence of his wife, on a visit east, he, on October 10th or 11th, 1891, visited the land, and began a residence, the nature of which is shown by his own testimony:

Direct examination.

Q. Did you ever since filing upon this land go upon it for the purpose and with the intention of taking up your residence there and making it your home? If so, when?

A. I did; I went onto the land some time between the 5th and 15th of October, I think it was the tenth or eleventh, 1891.

Q. Were you ever on these premises and remained there over night since you have filed upon the land?

A. I was, I think it was the 10th or 11th of October, 1891.

Q. Where was your family at the time you went upon this land for the purpose of making it your residence?

A. They were in Michigan.

* * * * *

Cross-examination.

Q. What is the condition of the house on the land as to being completed?

A. The house is all completed except the papering, ceiling up under the porch one little place, building a chimney, and painting it.

Q. Were the shavings ever cleared out after the carpenters left it?

A. No.

Q. Did you ever put any furniture into it?

A. Nothing but a bunk there; that is all.

Q. What did you do when you first went upon that land on the 10th or 11th of October?

A. I went there and picketed my horse and built a fire and went to sleep.

Q. Where did you build the fire?

A. Outside, between the house and the ditch.

Q. About what time a day was this?

A. This was in the evening.

Q. Your family went east partly on a visit did they not?

A. Yes sir.

His wife returned later in October, but did not go to the land on account of sickness, the nature of which is shown by defendant's testimony:

Q. What was the matter of your wife during the time you say she was in ill health?

A. Nervous trouble brought on by a felon.

Q. Where was the felon?

A. On her right thumb.

He admits that prior to the filing of this contest he had heard that such contest was likely to be filed, and when asked: "Was it before you filed the affidavit for a leave of absence?" he replied, "I could not say as to that."

It is plain that Henry had never begun an actual residence upon this land prior to the initiation of this contest, and that the application for leave of absence was filed with a view to forestalling contest.

The facts, as disclosed by the testimony, show that there was no ground for granting the leave of absence, and his intentions are made plain by his subsequent acts in relation to the land.

The decision of the local officers recommending the dismissal of the contest was rendered July 16, 1892, and on the 21st of same month he relinquished his homestead and on the same day made desert entry of the land.

From a review of the entire matter, I must hold that the homestead entry was subject to contest on December 29, 1891, and that upon its cancellation Taylor should have been accorded a preferred right of entry.

I must, therefore, reverse your office decision, and direct that Taylor be advised of his rights, and if he make entry within the thirty days granted him as a preferred right, Henry's desert land entry will be canceled.

RAILROAD GRANT—MINERAL LANDS—PATENT.

COURTRIGHT v. WISCONSIN CENTRAL R. R. CO.

Under a railroad grant which provides that "all mineral lands be and the same are hereby reserved and excluded from the operation of this act," a patent issued for lands, "excepting and excluding all mineral lands should any such be found to exist," does not reserve to the Department the power and authority to subsequently inquire into the character of the lands embraced in said patent.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (J. I. H.)

The E. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ of Sec. 33, T. 46 N., R. 2 E., Wausau, Wisconsin, is within the indemnity limits of the grant to the State of Wisconsin in aid of the Wisconsin Central Railroad Company.

By the terms of the granting act (13 Stat., 67, Sec. 6), all mineral lands were reserved and excluded from the operation of the act, except so much thereof as was embraced in the right of way through such reserved mineral lands.

October 21, 1882, patent was issued to said company, conveying this and other lands, described by legal subdivisions, selected within its defined indemnity limits, but excepting and excluding therefrom "all mineral lands, should any such be found to exist in the tracts embraced in the foregoing description."

August 22, 1889, John B. Courtright, by William H. Jacobs, his attorney in fact, applied to make soldier's additional homestead entry for the tract. With his said application, he filed the following paper:

I, John B. Courtright, do hereby offer to prove, in connection with and in support of my application herewith made to enter the east half of the north west quarter of section number thirty-three (33) of township No. forty-six (46) of range No. two (2) east, containing eighty acres, that on the 5th day of May, 1864, and ever since, the said land was, has been, and now is mineral land, containing extensive and valuable mines of iron ore in every part of the same, and valuable chiefly or altogether for such mines, and that the said lands were expressly reserved and excluded from the operation of the act of Congress, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May 5, 1864, and expressly reserved and excepted from the patent to the Wisconsin Central R. R. Co., and are now public lands of the United States, subject to my entry as applied for.

S. E. Thayer, register of the Wausau office, rejected his said application, as follows:

Application rejected, for the reason that the land applied for is within the indemnity limits of the grant for the Wisconsin Central R. R. Co., and was patented to the company October 21, 1882, and the same is not therefore subject to entry.

Entry fees duly tendered.

Courtright appealed, and by your decision of October 30, 1890, you affirmed the action of the local officers, and he now further prosecutes his appeal to this Department, and asks that a hearing be allowed him to show that the land is mineral, and, in the event he does, that his entry may be allowed. In the paper accompanying his application, he

does not offer to prove that the tract in question was known to be mineral at the date the grant took effect, but in his brief, filed in the case, counsel for applicant (Hon. William F. Vilas) offers, in the event that such showing is deemed necessary, to amend his statement of facts so as to show, that "in fact, before the Wisconsin Central Railroad Company acquired any right or title to the land, large quantities of iron ore were regularly taken from the mines upon the lands, and shipped to market, which the agents of that company very well knew, but concealed from the Department," and asks to be allowed to do so.

Elaborate briefs have been filed by counsel in the case.

It is contended by counsel for the company that the land, having been patented by the executive department of the government, this Department has parted with its jurisdiction, and can not entertain the application; that if the patent was issued in violation of the granting act, resort must be had to the court to set aside and vacate the patent, so far as it embraces the land in controversy; that the reservation and exclusion of mineral lands in the granting act had reference to lands known to be mineral at the date of the grant, and that the discovery of mineral years after the grant had attached and patent had issued could not defeat the title; also, that iron is not mineral within the meaning of the words of reservation in the granting act.

On the part of counsel for the applicant, it is contended, in substance, that iron is mineral within the meaning of the act; that the act, having expressly "reserved and excluded" mineral land from the grant, the executive department properly excepted such lands from the patent, and having so excepted them, they are not patented lands, but remain a part of the public domain and subject to the jurisdiction of this Department.

When a patent has issued for any portion of the public domain, the jurisdiction of this Department ceases as to the land so patented. This has been so repeatedly decided by the courts and this Department that it has long since ceased to be a question in dispute, but has become a maxim of the law pertaining to the disposal of the public lands.

It is pretty well settled that if the patent to the company contained no words of exception or reservation as to mineral lands, such a patent would have deprived the Department of jurisdiction over all the land so patented, and left to the courts the determination of the rights of the company, in case they were disputed.

But counsel for the applicant insists that under the terms of the exceptions contained in the patent, the mineral lands within the limits of the grant have never been patented to the railroad company, and that the Department still has jurisdiction over these lands.

On the other hand, counsel for the company contend that, because the grant can not be affected by any words of reservation in the patent, such words must be regarded as superfluous, and the patent consid-

ered as conveying—whether rightfully or wrongfully—all the lands described therein, and, before the company's right thereto can be disturbed, the patent must be set aside as to lands improperly conveyed by a court of law or equity.

Thus the issue upon the main question in the case is clearly and sharply defined.

Are these words of exception superfluous, or did they serve to except the mineral lands from the patent to the company? For, if they did, the land in dispute has not been patented to the company, but is still a part of the public domain, and subject to disposal by this Department.

The granting clause in said patent is as follows:

Now, know ye, that the United States of America, in consideration of the premises, and pursuant to the said acts of Congress, have given and granted, and by these presents do give and grant, unto the Wisconsin Central Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing, yet excepting and excluding all mineral lands, should any such be found to exist in the tracts embraced in the foregoing description.

In this case, the legislative grant fixes the rights of the railroad company, i. e., contains all the terms of the contract between the government and the railroad company. The grant passes title, and patent is unnecessary for that purpose. The patent is issued by the officers of the government to define and identify the lands granted by act of Congress, and is a convenient mode of placing in the hands of the grantee a written evidence of his title. The patent must follow the granting act, and cannot add to or take from the grant, nor can terms or restrictions be rightfully inserted in the patent which are not authorized by the granting act.

The exception of mineral lands in the patent in question could not rightfully go any further than "give expression to the intent of the statute." Does the exception in this patent perform its proper office? That is, is it confined to giving expression to the intent of the statute? The exception in the patent excludes all mineral lands "should any such be found to exist" in the tracts embraced therein. The mineral reservation in the granting act is in the following language: "all mineral lands be and the same are hereby reserved and excluded from the operation of this act."

The granting act is silent as to the time when the character of the land shall be determined; while it would seem that the language of the patent which excepts mineral lands leaves the character an open question after patent.

The supreme court of the United States recently decided in the case of *Barden v. Northern Pacific Railroad Company* (152 U. S., 288), in construing a similar grant, that the Department of the Interior had jurisdiction to determine the character of lands within the limits of the grant up to the issuing of patent, but not afterward. After stating that the Department had jurisdiction to inquire into the character of

lands up to the date of patent, and that it was its duty to do so, and see to it that lands other than those granted should not pass to patent, the court said:

It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them.

Thus, it will be seen that after patent has issued, the Department loses jurisdiction of the lands included in the patent, although no investigation of the character of the land be made. The issuing of patent is a determination by the Department that the lands embraced therein are of the character described in the grant.

In the same opinion, the court further said, as to the effect of a patent (p. 330):

The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

This decision construes a grant similar to the one now in question, and decides that the Department loses jurisdiction to decide the character of the land after issuing patent. If this is a proper construction of the granting act, then the exception in the patent "yet excepting and excluding all mineral lands, should any such be found to exist," cannot confer upon or reserve to the Department the power and authority to inquire into the character of the lands embraced in the patent. If it was the intention of the officers of the government to leave as an open question the character of the lands embraced in the patent, then they acted without authority, for when patent issued, that was the end of the jurisdiction of the Department over the lands. The exception contained in the patent went beyond "giving expression to the intent of the statute," as construed by the supreme court, and added a restriction upon the grant which is not to be found in the granting act.

I am therefore of the opinion that the Department has not jurisdiction to determine the character of the land in controversy after issuance of patent. If it be true that the lands in question contain minerals in paying quantities, and that this fact was known to the officers or agents of the company at the date of selection, or date of patent, and they failed to make the fact known to the Department, such conduct was a fraud upon the government, and the courts can grant relief.

The cases cited by counsel as to the effect of similar exceptions in

deeds and patents are, I think, distinguishable from the one at bar; but I place my decision in this case on the ground that under the decision of the supreme court in the Barden case (*supra*), the Department was, by the issuance of patent, deprived of jurisdiction to hear and determine any question respecting these lands.

The decision of your office is therefore affirmed.

RAILROAD GRANT—MINERAL LANDS—PHOSPHATES.

TUCKER ET AL. v. FLORIDA RY. AND NAVIGATION CO.

Lands otherwise of the character to pass under the railroad grant made by the act of May 11, 1856, are not excepted therefrom by the fact that they are shown to contain phosphate deposits.

The word "mineral" as employed in the act of June 22, 1874, can not be construed to mean phosphate deposits, hence lands containing such deposits are not excluded from selection under said act.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (F. W. C.)

I have considered the appeals filed from your office decision of November 7, 1892, in the matter of the protests filed by James F. Tucker *et al.*, against selections made by the Florida Railway and Navigation company, now known as the Florida Central Peninsular Railway company, of lands alleged to contain valuable deposits of phosphate.

The sections in question embraced lands within the indemnity limits of the grant to said company selected under the provisions of the act of May 17, 1856 (11 Stat., 115), and also selections made in lieu of tracts relinquished under the act of June 22, 1874 (18 Stat., 194).

Your office decision found in favor of the company as to selections made under the act of May 17, 1856, *supra*, being its regular indemnity selection, because there was no express exception of mineral lands from the grant made by said act, but held that selection could not be made under the act of June 22, 1874, *supra*, of lands containing phosphate, because, by said act, the company was restricted in its selection to lands that are not mineral.

From your first holding Tucker *et al.* filed an appeal, and from the latter part, the company has filed an appeal to this Department.

We will first consider the selections made under the act of May 17, 1856, *supra*.

In the appeal by Tucker *et al.* it is claimed that although the act making this grant did not specifically except mineral lands, yet it expressly excepted from the operation of said act "any and all lands heretofore reserved to the United States for any purpose whatsoever," and that all mineral lands were at that date reserved from sale under the general policy of the government, and hence did not pass under said grant.

In the first place it must be remembered that

from the period of 1785 to the discovery of the great gold fields of California, in 1848, the legislation of the Congress of the United States, as to survey, lease, the sale of mineral lands had been for lead, copper and other base metals, and applied to the territory in the region of the Great Lakes and the present State of Missouri. Public Domain, page 320.

By the act of September 26, 1850 (9 Stat., 472), Congress ordered the mineral lands in the Lake Superior and Chippewa districts, Michigan, to be offered at public sale in the same manner, at the minimum price, and with the same rights of pre-emption as other public lands, but provided that the same should not interfere with leased rights.

In January, 1848, gold was discovered in California, the territory recently acquired from Mexico, and the discovery being of such great value necessitated a change in the matter of the disposition of mineral lands, to the end that they might be kept under government control for the public good.

The means, however, was not provided for acquiring title to such lands until the passage of the act of July 26, 1866 (14 Stat., 25), which provided for acquiring, by patent, title to "veins or lodes of quartz, or other rock, in place, bearing gold, silver, cinnabar or copper."

The act of July 9, 1870 (16 Stat., 12), provided for the allowance of placer claims of lands including valuable minerals in other forms of deposit than veins of quartz or other rock in place.

The act in question, under which said company claims, namely, the act of May 17, 1856, *supra*, granted lands to the States of Florida and Alabama, and, as before stated, contains no reservation of mineral lands.

Prior to the passage of said act there had never been an act of Congress, or executive order, recognizing or classifying phosphate lands as mineral lands. The result of an analysis made by Francis Wyatt of the Laboratory of Industrial Chemistry, of New York, of the Florida phosphates, which is furnished by the company's appeal, shows the composition of the material to be practically identical with that of animal bones and Peruvian guanos, and the question arises, were lands containing such deposits reserved under the general policy of the government, as evidenced by its legislation in relation to mineral lands, at the date of the passage of the act in question.

I fail to find evidence of such policy in my investigation of the laws relating to mineral lands.

As before shown, the legislation prior to the year 1848, was directed toward the baser metals, which were at first leased and afterward exposed for sale, and by the legislation embodied in the act of September 26, 1850, *supra*, it would seem that the purpose of Congress was to put such lands on an equal footing with, and to dispose of them, the same as other public lands.

I am therefore of the opinion that at the date of the passage of the

act in question, it was not the policy of the government to reserve lands containing the baser metals, and as there had been no legislation prior to this time, giving recognition, or classifying lands containing phosphates as mineral, that even if it be conceded that such lands are correctly classed as mineral lands, they are not entitled to a higher classification than that of baser metals, and were, consequently, not reserved to the United States at the date of the passage of the act in question.

I must, therefore, affirm your office decision in so far as it held that lands otherwise of the character to pass under the grant made by the act of May 11, 1856, *supra*, are not excepted therefrom by the fact that they are shown to contain phosphate deposits.

As to the land selected under the act of June 22, 1874, *supra*, said act gives to the railroad upon relinquishment of title to land entered after their right was held to have attached to the same, the right to select an equal quantity "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 sole question presented by this legislation for consideration, is whether the restriction contained therein limiting the selection to public lands not mineral, excludes from the right of selection lands containing deposits of phosphate?

The act of July 22, 1874, is a remedial act and is applicable to all land grant railroads. It is necessary, therefore, in considering the scope of the word mineral, as employed in said act, to refer to the legislation making the several land grants to aid in the construction of railroads.

The early land grants, notably the one under which this company claims, as before stated, contain no specific exception of mineral lands. The grants made during the year 1864, and subsequent grants, being the corporation grants, do contain an exception of mineral lands, but it is provided that the word mineral, as there used, should not be construed to include coal and iron. It would seem, therefore, that the word mineral is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word mineral, as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar, and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state or advancement of science which makes known its uses.

I am clearly of the opinion that the word mineral, as employed in the act of June 22, 1874, *supra*, can not be construed to include lands containing deposits of phosphate.

It may be proper in considering this question to refer to the act of October 1, 1890 (26 Stat., 663, entitled "An act for the protection of actual settlers who have made homestead or pre-emption entries upon the public lands of the United States in the State of Florida upon which deposits of phosphate have been discovered since such entries were made."

It appears that as soon as the knowledge of the discovery of phosphate lands and their value was brought to the attention of your office, all entries made for lands containing such deposits were at once suspended, and the legislation referred to directed that those entries made in good faith prior to April 1, 1890, where the entryman had no knowledge of the deposit at the time of his settlement, might pass to patent upon showing compliance with law.

Whatever may be the effect of such legislation as bearing upon the question as to the *present* classification of lands containing valuable deposits of phosphate, it can not have any bearing upon the question in issue in this case.

Your office decision must therefore be reversed in so far as it holds that selection can not be made on account of the act of June 22, 1874, of land containing deposits of phosphate.

The selection for the company will therefore remain intact, and the protests against the same will be dismissed.

PRIVATE CLAIM—PUBLIC SURVEY.

RANCHO CAÑADA DEL CORRAL.

The owners of a patented private claim will not be heard to dispute the correctness of a public survey, closing the lines thereof on said claim, where such survey excludes from the public domain the full amount of land covered by the patent issued for the private claim.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (I. D.)

The owners of the Rancho Cañada del Corral appeal from your office decision of May 19, 1893, accepting a survey of public lands adjoining said rancho on the north, made December 31, 1890, by Deputy-Surveyor Harrington, of California.

October, 1840, Don José Dolores Ortega made written request to the prefect of the jurisdiction of Santa Barbara, California, for a grant to him of "the place known as the Cañada del Corral which is vacant and belongs to the mission of Santa Barbara."

In November, 1841, the grant was made as prayed for for the land known as the Cañada del Corral, bounded by the rancho of Don Antonio Ortega, by the gulch known as the Llagas by the Sierra and the sea Third, the land herein granted is of two square leagues, more or less, as shown by the sketch annexed to the respective expediente. The judge who shall give possession shall have the land measured agreeable to ordinance leaving the surplus to the nation for its proper use.

Juridical possession was given January, 1845, and the grantee continued in possession ever after.

May 30, 1866, patent issued to said Ortega from the United States and, so far as this case is concerned, that patent concluded the jurisdiction of this Department as to the land embraced therein and as to all questions antedating the patent.

In 1890, the then surveyor-general for California, ordered the survey of public lands on the north of this tract, which survey necessitated the closing in of the public land with the Ortega grant on its northern line. This survey was approved by the then surveyor-general of California in 1891, and the owners of the grant covered by the patent aforesaid, protested against the survey on the ground that the old grant, the Terrell survey of 1860, and the patent that issued upon said survey, constituted a grant by boundary and not one of quantity.

The contention is whether the original grant, survey, and patent, covered lands simply known as the Cañada del Corral, bounded by the Sierra on the north and the sea on the south (the side lines being undisputed always) and supposed to contain two square leagues within those named boundaries.

The owners maintain that the Cañada del Corral, the old survey, and the patent, give them to the top of the mountains on the north. The then surveyor-general of California held the grant and patent to be one of quantity and limited to two square leagues, and ordered the survey of public lands on the north to be closed in on that theory, and your office decision sustains that position.

An examination of the records of the proceedings, from the prayer of Ortega in 1840 to the confirmation of the grant on his petition therein by the court, show that the owners of the lands covered by the grant can not complain of this holding, because under it the grant is held to be one of quantity and for two square leagues, while the description given by the commissioners appointed to fix the original grant, is one by measure and is as follows:

Commencing at the north-west point of said place on the brow of the hills and measured along the edge of the hills from the bijia to the beach, the distance of 2500 varas; thence easterly up to the stream of the Canada de las Llagas, the distance of 6000 varas; then in a northerly direction to the *foot of the range* of mountains, the distance of 2100 varas; and thence to the place of beginning, containing in all 1 sitio, 3500 varas. (One sitio is a square league.)

And the patent recites the decree of the United States district court of December, 1855, as follows:

It is ordered, adjudged, and decreed, that the decision of said commissioners be affirmed, and that the claim of the said José del Ortega to the rancho Canada del Corral described in the original grant and the map in this case, situate in the county of Santa Barbara, is a good and valid claim, and the same is hereby confirmed to the extent of two square leagues.

The very able brief of the contestants urges strongly that the words "from the Sierra to the sea" reaches to the top of the mountains; and

relies much upon the words found in the field notes of the Terrell survey, wherein the north-east corner is described as "a mound of rocks, station on top of the mountains," and also because the plat of that survey marks the northern boundary as the "top of high mountain range cut by deep ravines and canons," but an examination of the expediente in the original grant conclusively negatives the theory that the grant was one of boundary and ran to the crest of the ridge upon the north; for the description therein of the north line, as well as in the judicial proceedings, was "in a northerly course up to the base of high range of mountains" and again in recapitulating the boundaries, it gives, as the north line, "the base of the high range of mountains of Santa Ynez," and gives by varas the dimensions and says: "This measurement being concluded there resulted to be contained therein one sitio (square league) and 3500 varas."

The Terrell corners have been obliterated and lost; the survey now in issue was made, and gave the Ortega grant the full amount of two square leagues and closes the public lands on the north on that line.

The owners of said rancho have left to them, by this survey, the full amount of their grant covered by their patent, whether considered as a grant of quantity, or a grant by boundary.

Your office decision is affirmed.

HOMESTEAD ENTRY—REINSTATEMENT.

BAGLEY v. MITCHELL.

A homestead entry, canceled for failure to submit final proof within the statutory period, cannot be subsequently perfected in the presence of an intervening adverse right.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (C. W. P.)

The land involved in this case is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 2, T. 18 S., R. 2 W., Montgomery land district, Alabama.

The record shows that on September 9, 1873, Charles Mitchell made homestead entry of the said tract.

November 27, 1886, Nancy Bagley made additional homestead entry of the same tract, on which final certificate was issued on the same day.

June 23, 1881, upon a report of the register and receiver at Montgomery, Alabama, that certain persons who had made homestead entries, therein named, of whom the said Charles Mitchell was one, had permitted the statutory period to expire without making the required proof, and that they had been notified, and had failed to show cause why their entries should not be canceled, your office directed the entries to be canceled on the records of the land office. Mitchell's entry was thereupon canceled.

May 2, 1887, Mitchell made final proof.

May 2, 1887, Nancy Bagley protested against Mitchell being allowed to make proof on said entry, upon the ground that the records of the land office show that he made homestead entry September 9, 1873, and that his entry was canceled June 23, 1881; that November 27, 1886, protestant entered the land as an additional homestead entry, and holds final duplicate No. 18,700 therefor; and also because the same is not an official or legal proceeding, the register and receiver having official knowledge that Mitchell had no entry or claim upon the land, and that it was covered by the legal entry of protestant.

No action appears to have been taken on this protest, but by your office letter of February 11, 1893, Mitchell's final proof was held to be satisfactory, and Nancy Bagley's additional homestead entry held for cancellation.

Nancy Bagley appeals to the Department.

The case is in a state of inextricable confusion. The letter of the Acting Commissioner of the General Land Office, of June 23, 1881, states that Mitchell had been notified to show cause why his entry should not be canceled. But in your office letter of February 11, 1893, it is said that there is no evidence in the case showing that Mitchell received notice prior to the cancellation of his entry.

The entry of Bagley was, however, properly allowed, and could only have been vacated at the instance of Mitchell upon showing cause why his entry should not have been canceled. The land at the date of Bagley's application, was subject to entry, and no second entry could properly have been allowed therefor until her entry had been canceled. Mitchell's final proof was improperly allowed, for the reason that there was no entry existing in his name at the date when he offered final proof, and for the further reason that no second entry should have been made (as before stated) until the entry of Bagley had been canceled. If Mitchell allowed the statutory period to expire before offering final proof, without sufficient cause therefor, his entry was properly canceled by the land office, and the entry of Bagley could not be vacated at the instance of Mitchell, although he had not received notice of the cancellation, unless sufficient cause was shown why the entry should not have been canceled.

Although Mitchell had no notice of the order to show cause why his entry should not be canceled, he had ample opportunity to make such showing when the protest was filed by Nancy Bagley against the submission of his final proof, and it not appearing from the record that his entry was improperly canceled, the entry of Nancy Bagley should remain intact.

Your office decision is reversed.

HOMESTEAD CONTEST—SETTLEMENT RIGHT.

RICKERS v. TISHER.

The failure of a settler to assert his settlement right within the statutory period, and consequent loss of priority as against an intervening entry, does not preclude the assertion of his right as against a subsequent entryman, where said settler remains on the land and the intervening entry is canceled.

Secretary Smith to the Commissioner of the General Land Office, December 1, 1894. (C. W. P.)

I have considered the case of Richard Rickers against Zach Tisher, on appeal of the latter from the decision of your office of March 25, 1893, holding for cancellation his homestead entry of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 24, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 25, T. 33 N., R. 39 E., Spokane land district, Washington.

The record shows that April 15, 1892, Zach Tisher made homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 24, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 25, in said township and range; that one Charles Herrington made homestead entry October 19, 1891, for the same tracts; that Herrington having died, his entry was canceled April 15, 1892, on relinquishment of his heir at law; that on the same day Tisher made his homestead entry, as aforesaid.

It also appears that January 12, 1892, Richard Rickers applied to enter the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 24, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 25, alleging that he commenced settlement on said tracts in January, 1891, and that his improvements consisted of two frame houses, one sixteen by sixteen, and the other thirty-four by thirty-eight, two miles of rail fencing, and forty acres cleared and broken, the whole of the value of \$1,500; which application was rejected by the local officers for conflict with the entry of Herrington, and because it was not presented within three months of his alleged settlement.

April 26, 1892, Rickers filed in the local office his duly corroborated affidavit, alleging that he had settled on the land claimed by him in his application for homestead entry, long before Herrington's entry, etc., and asking a hearing for the purpose of showing that his right to the land was superior to the right of Zach Tisher, in so far as concerned the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 24, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 25. This application was denied by the local officers, but on appeal to your office, a hearing was ordered.

On the hearing, the local officers decided in favor of Rickers. Tisher appealed. Your office affirmed the judgment of the local officers.

The testimony taken at the hearing shows that Rickers continued to reside on the land with his family, after the rejection of his application to enter, and was residing thereon at the time of the relinquishment of Herrington's entry. There is no force in the contention that because Rickers had forfeited his right of prior settlement as against Herring-

ton, his settlement, as against Tisher's entry, after Herrington's relinquishment, is also forfeited. For while the land was segregated by Herrington's entry, and until the relinquishment by his heir at law, Rickers could not make entry, but he continued to reside upon the land, with his family, intending to contest Herrington's entry. He was residing thereon at the date of relinquishment, and his settlement right attached *eo instanti* upon the filing of the relinquishment, and could not be defeated by Tisher's entry.

Agreeing with you in your views of the law governing this case, I affirm the decision appealed from.

RAILROAD GRANT—INDEMNITY SELECTION—HOMESTEAD.

OREGON AND CALIFORNIA R. R. Co. v. SMALL.

A railroad indemnity selection, of land excepted from withdrawal, is no bar to subsequent appropriation of the land under the homestead law, where such selection is not accompanied by a designation of loss.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (J. L. McC.)

The Oregon and California Railroad Company has appealed from the decision of your office, dated June 26, 1893, holding for cancellation its selection (as indemnity) of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 25, T. 4 S., R. 6 W., Oregon City land district, Oregon.

The tract is within the limits of the indemnity withdrawal of February 17, 1870. It was excepted from the operation of said withdrawal, however, by an unexpired pre-emption filing of record at that date. Subsequently, when these filings expired, the land became subject to entry under the public land laws, or to selection by the company—whichever was the first legally qualified applicant. The company selected the tract (List No. 13) on March 30, 1880. On July 23, 1887, D. C. Small applied to enter the tract; and his application was allowed. Subsequently, he made commutation proof, which was held sufficient, and final certificate issued January 10, 1890. The company's selection of the tract is held for cancellation because of failure to designate what land had been lost, in lieu of which the selection was made, in accordance with the requirements of departmental circular of November 7, 1879, relative to the adjustment of railroad grants. In the case at bar no such designation was made; but the company afterward filed an amended list No. 13, from which the entry now in controversy was omitted. Therefore the only claim (if any) which the company now has to the tract is such as it may have acquired under its original selection. Your office held that said selection was invalid, by reason of the company's failure to designate the lands lost, citing the case of *Hoeft et al. v. St. Paul and Duluth Railroad Company* (15 L. D., 101).

Counsel for the company contends that the case cited "gives a construction to the circular of 1879" (relative to the adjustment of railroad grants) "which the facts do not warrant" and in any event that "it has no application to the case at bar."

In the able argument of counsel for the road I find nothing that convinces me that the case of *Hoeft et al. v. St. Paul and Duluth Railroad* gives an erroneous construction to the circular of 1879. Said case appears to me to be in all essential respects similar to the case at bar. In the Hoeft case the railroad company made selection in December, 1881. In the case at bar the company made selection in March, 1880. On both dates the instructions contained in said circular of 1879 were in force. In the Hoeft case the Department said:

At that time, before valid selections could be made, losses were required to be designated. No losses were designated; said selection was therefore no bar to the rights of settlement. If the tracts involved were not claimed by others, of course the railroad could be allowed to designate the losses and thus perfect its selection. It would be inequitable, however, to allow it this privilege *in the face of an adverse claim*. The railroad company should be allowed no greater privilege in amending its selection than will be accorded to a homestead claimant to amend his entry.

If the railroad company could not be allowed to designate losses and perfect its selections after the initiation of a settlement claim, much less could a selection for which no loss has ever been designated be allowed to defeat such a claim.

The departmental decision in the Hoeft case is unquestionably applicable to the case at bar. The decision of your office is correct, and is hereby affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—PRE-EMPTION.

ERICKSON v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An indemnity selection of land protected by statutory withdrawal will not defeat the perfection of a subsequent pre-emption claim, where said withdrawal is afterwards revoked and the company fails, after due opportunity given, to specify a loss as the basis for its selection.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (F. W. C.)

I have considered the appeal by Halvor Erickson from your office decision of June 7, 1893, holding for cancellation his pre-emption cash entry No. 18662, covering the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 126 N., R. 40 W., St. Cloud land district, Minnesota, for conflict with the prior selection of said tract on account of the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway.

The record shows that this tract is within the indemnity limits of the grant for said company and was included in the list of selections presented July 28, 1885.

This list was rejected as to certain tracts therein contained, from which action the company appealed.

Pending action upon said appeal, to wit, on May 23, 1887, Erickson was permitted by the local officers to file pre-emption declaratory statement for this land, and in said filing he alleged settlement on the first day of that month.

In accordance with published notice, Erickson made proof upon said filing on January 11, 1890, upon which cash certificate issued January 24, 1890.

The company did not appear at the time of the offer of proof, but it does not appear that notice of the intention to offer proof was ever served upon the company.

As his settlement was subsequent to the selection by the company, the only question for consideration is as to the company's rights under such selection.

In its list of July 28, 1885, the company failed to specify a loss as the basis for the selection as required by the circular of 1879.

The act making the grant for this company provides for the withdrawal of the indemnity lands and such withdrawals continued until revoked by departmental order of May 22, 1891 (12 L. D., 541).

In departmental order of August 4, 1885 (4 L. D., 90), it was directed that no further selections be allowed by any railroad company until losses had been specified for all previous selections.

This was the only penalty provided by said order, but in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), you were directed to call upon all railroad companies, having pending indemnity selections, to revise their lists within six months from the date of such call, so that a proper basis will be shown for each and all lands still claimed as indemnity, informing said companies that all lands formerly claimed, for which a particular basis has not been assigned in the manner prescribed at the expiration of said period, will be disposed of under the terms of the order restoring indemnity lands without regard to such previous claims.

In answer to a call, your office reports, under date of October 5, 1894, that said company has failed to specify a loss as a basis for the selection in question.

In view thereof, I must hold that said selection is no bar to the approval of Erickson's entry, and your office decision holding the same for cancellation for conflict with said selection is reversed.

PRACTICE—APPLICATION TO ENTER—APPEAL.

BERGELAN v. SIMPSON.

The failure of a contestant to appeal from the rejection of his application to enter, filed on relinquishment of the entry, will not defeat his preferred right, as against an intervening entryman, who is at the same time prosecuting a contest, involving the same tract, in which the disqualification of said contestant is charged but not proven.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (F. W. C.)

I have considered the appeal by James M. Simpson from your office decision of March 23, 1893, holding for cancellation his homestead entry covering the SW. $\frac{1}{4}$ of Sec. 2, T. 9 N., R. 2 W., Oklahoma land district, Oklahoma, for conflict with the prior right of Anders Bergelan for said tract.

This land was formerly covered by homestead entry No. 566, Guthrie series, made May 1, 1889, by one Wm. Auld.

On June 1, 1889, Bergelan initiated a contest against said entry, alleging that Auld had violated the law and the President's proclamation in entering the Oklahoma Territory during the prohibited period, and that he, Bergelan, was a settler upon said tract.

An amended affidavit of contest was filed on November 7, 1889, by Bergelan, charging an abandonment by Auld.

On December 5, 1889, Simpson also filed an affidavit of contest against the entry by Auld, charging abandonment and alleging that Bergelan, the prior contestant, was himself disqualified from making entry of the land in question by reason of having entered the Oklahoma country during the prohibited period.

It appears that hearing was ordered upon Bergelan's contest, in which Simpson was allowed to interplead, the day for the hearing being set for January 8, 1891. Auld made default but upon motion by Simpson the case was continued to March 23, 1891, and was again continued on that day, upon motion by Bergelan, to April 27, 1891, on which day both Bergelan and Simpson appeared and submitted testimony in support of their respective claims.

Prior to the time of the hearing, however, to wit, on February 16, 1891, Simpson presented Auld's relinquishment of his homestead entry, which was canceled, and on the same day Simpson was allowed to make homestead entry of the land.

On February 20, following, Bergelan tendered an application to make homestead entry of the land, the same being rejected for conflict with the prior homestead entry by Simpson.

From this action Bergelan did not appeal, but appeared upon the day set for hearing, as before stated, on April 27, following, when the hearing was regularly proceeded with.

Upon the testimony adduced at said hearing, both your office and

the local officers found that Simpson had failed to sustain the charge in which it was alleged that Bergelan had entered the Oklahoma country during the prohibited period, and after a careful consideration of the record I see no reason to disturb this finding. As Auld's relinquishment was held to have been the result of Bergelan's contest, Simpson's entry was held for cancellation by your office decision, evidently with a view of permitting Bergelan to make entry of the land under his preferred right.

In the appeal from your office decision it is urged that whatever rights Bergelan may have gained by his settlement and contest of Auld's entry were lost by his failure to appeal from the action of the local officers on February 20, 1891, in rejecting his application to make homestead entry of the land for conflict with the prior entry by Simpson. This same ground of error was urged in the appeal from the local officers' decision to your office, but does not appear to have been considered in your office decision now under consideration.

From a careful review of the matter, however, I am unable to agree with the contention of counsel for Simpson as set forth in this ground of error, for it must be remembered that Simpson was allowed to interplead in the contest begun by Bergelan against Auld's entry, and that after Auld had defaulted the case was continued upon the motion by Simpson.

Simpson, in his affidavit of contest, charged that Bergelan was disqualified to make entry of the land in question and the hearing to determine this question was pending at the time of the presentation of Auld's relinquishment, and was afterward concluded as herein set forth.

Under these peculiar circumstances I do not think it was incumbent upon Bergelan to appeal from the rejection of his application presented after the cancellation of Auld's entry upon relinquishment, in order to preserve his rights. I therefore affirm your office decision and direct that Bergelan be advised of his right to make entry of the land in question, and, upon completion of the same, that the entry by Simpson be canceled.

PRACTICE—COSTS—RULE 55—SPECULATIVE CONTEST.

GRAHAM v. FERGUSON ET AL.

In a hearing ordered to determine whether a contest is speculative, as charged by an intervening entryman each party must pay his own costs as provided in Rule 55 of Practice.

A preferred right of entry is not acquired through a speculative contest.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (G. C. R.)

J. Buell Ferguson has appealed from your office decision of October 17, 1892, wherein you deny to him a preference right of entry on his contest initiated against the homestead entry of Lewis M. Spencer,

made June 17, 1889, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Lots 1, 2, 5 and 6, Sec. 33, Tp. 17 N., R. 7 W., Kingfisher, Oklahoma Territory.

Ferguson filed his contest against said entry December 23, 1889, alleging abandonment. On January 2, 1890, Spencer, the entryman, applied for a leave of absence until the 15th day of April, 1890, which was allowed by the local officers.

On May 6, 1890, Allie Washburn filed his contest against Spencer's entry, alleging abandonment, also that the contest commenced by Ferguson is "fraudulent and collusive."

On June 2, 1890, John M. Graham filed his affidavit of contest against said entry; he also alleged abandonment, and further alleged that the contests filed by Ferguson and Washburn were fraudulent, collusive and made for speculative purposes and to enable said Spencer to sell his relinquishment for the land involved.

On December 20, 1890, Graham filed his amended affidavit of contest, alleging Spencer's abandonment for more than six months, and repeating his charges of collusion and speculation between the entryman and Ferguson.

The hearing upon Ferguson's contest was had on July 21, 1890; the entryman made default, and the register and receiver decided that he had abandoned the land, and accordingly recommended that the entry be canceled. It does not appear that either Washburn or Graham was present at that hearing, or that either one had been notified.

The record was transmitted to your office, not on appeal (as you have it), but in the regular way, when your office, by letter "H" of December 9, 1890, dismissed Ferguson's contest under Practice Rule 48, on the grounds that Spencer had been granted a leave of absence on the very day that the notice of contest had been served on him, and that the showing made by Spencer was sufficient.

On January 5, 1891, Ferguson filed a motion for review of your office decision dismissing his contest.

On April 29, 1891, Graham presented Spencer's relinquishment, and his entry was canceled; thereupon Graham made entry of the land, with the exception of said lots 5 and 6.

Your office letter "H" of August 21, 1891, passed upon Ferguson's motion for review, holding that there were not sufficient facts before your office to warrant the action taken. It was further decided that Ferguson had sustained his contest, but inasmuch as Graham had entered the land, a hearing was ordered, with instructions to your office to allow Graham sixty days to show cause why Ferguson should not be allowed to enter the land by reason of the latter's contest against Spencer's entry, which was canceled on relinquishment pending Ferguson's contest.

Graham applied for a hearing, which was duly had, all parties being either present or represented. The issues raised at this hearing were upon Graham's averment that Ferguson's and Washburn's contests were speculative and fraudulent.

It will be noticed that Graham presented Spencer's relinquishment, and then entered the land. The evidence shows that Spencer made out his relinquishment, and deposited the same with J. C. Post, banker at Kingfisher, some time between January and August, 1890. He directed Mr. Post to turn over this relinquishment to Ferguson, on the latter's payment of \$175 for the same. Ferguson also advised Post that he had purchased Spencer's relinquishment. This relinquishment bears date May —, 1890, or nearly one year prior to the time it was presented by Graham. Between the time of its execution and filing in the local office the evidence shows that Ferguson endeavored to sell the land to various parties. To effect the sale it was necessary to clear the records of the contests of Graham and Washburn. Graham was repeatedly approached by persons purporting to represent Ferguson, and asked to withdraw his contest for a consideration.

John D. Grantham, who corroborated Ferguson's affidavit, testified in his deposition that Ferguson said that his object and purpose in filing the affidavit of contest was "to keep somebody else off until he could sell it and divide up with Louis M. Spencer."

It does not appear that Ferguson took Spencer's relinquishment from the bank, or that he ever paid the amount he agreed for the same; his failure to do so may probably be accounted for in his disappointment in getting the records cleared of the subsequent contests, for his desired purchaser. This left the relinquishment in the bank, and Graham, learning of the same, purchased it.

Ferguson was given an opportunity, at his own expense, of refuting the testimony tending to show that his contest was speculative, but he declined to testify, on the ground that Graham should pay for all the testimony under Practice Rule 54.

The hearing was the result of a contest arising upon Graham's averment that Ferguson's contest was speculative and not one wherein Graham was claiming a preference right, for his entry was then of record; hence, the local office and your office properly held that Practice Rule 55, and not Rule 54, applied.

If he was able to do so, Ferguson, who is himself a lawyer and a practitioner before the local officers, should have been anxious to purge himself from the imputation of a fraudulent contest, even had the ruling been a doubtful one; his failure to do so, taken in connection with the undisputed testimony of his collusion with Spencer, the entry-man, leads me to concur in your office finding that Graham's allegation in that respect was sustained.

Your office directed a hearing for the purpose of acceding Graham an opportunity to overcome the presumption that Spencer's relinquishment was the result of Washburn's contest. In view of the fact that Washburn's contest was probably filed before the relinquishment was executed, and that his contest antedated Graham's, I think this the proper order.

The decision appealed from is therefore affirmed.

RAILROAD STATION GROUNDS—DECLARATION OF FORFEITURE.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

The failure to complete the road within the time prescribed in the act of March 2, 1889, worked a forfeiture of all the lands reserved to the railroad company by section 16 of said act for right of way and station purposes, dependent only upon the proclamation of the President declaring the fact of said forfeiture.

Secretary Smith to the Commissioner of the General Land Office, December 10, 1894.

I transmit herewith a proclamation signed by the President of the United States, declaring a forfeiture of certain lands in the State of South Dakota, selected by the Chicago, Milwaukee & St. Paul Railway Company, for station purposes, and directing their restoration to the public domain, for settlement under the homestead laws.

You will take such steps as may be necessary to carry this proclamation into effect.

DEPARTMENT OF THE INTERIOR,

Washington, December 3, 1894.

The PRESIDENT,

SIR: I have the honor to present herein, for your consideration, the facts in the matter of certain agreements (four in number) made between the Chicago, Milwaukee and St. Paul Railway Company and the Sioux Indians, in Dakota, for the right of way and occupation for railway purposes of portions of the lands formerly held by them and acquired under the treaty concluded between the several tribes of the Sioux Nation of Indians and the United States, April 28, 1868, and proclaimed February 24, 1869.

These several agreements were made in November, 1880, and approved by the Secretary of the Interior (Mr. Schurz) on January 3, 1881, and are fully set forth in Senate Executive Document No. 20, 48th Congress, 1st Session. Three of them related to land west of the Missouri river, and the fourth to lands east of that river.

In addition to a strip for right of way through their lands, the right was given to occupy two tracts, one on the east and the other on the west bank of the Missouri river, for freight and passenger depots, etc., for all of which due compensation was to be paid the Indians, as therein provided for.

The tracts selected were one hundred and eighty-eight acres on the east bank of the river, just to the north of the present town of Chamberlain, and the other, six hundred and forty acres, on the west bank about three miles below.

These selections were approved by this Department, and payment made, for right of way and station purposes, amounting to about \$15,000.

By the act of March 2, 1889 (25 Stat., 888), provision was made for securing the relinquishment of the Indian title to the portion of their reservation covered by the agreements before referred to, but by the 16th section of that act it was provided that said release shall not

affect any agreement heretofore made with the Chicago, Milwaukee and St. Paul Railway Company for a right of way through said reservation, and for any lands acquired by said agreement to be used in connection therewith, except as thereafter provided. Said section then goes on to grant to the company the rights attempted to be secured by said agreements, limiting the use of the property acquired to general railway use, and then provided:

That said railway companies and each of them shall, within nine months after this act takes effect, definitely locate their respective lines of road, including all station grounds and terminals across and upon the lands of said reservation designated in said agreements, and shall also, within the said period of nine months, file with the Secretary of the Interior a map of such definite location, specifying clearly the line of road, the several station grounds and the amount of land required for railway purposes, as herein specified, of the said separate sections of land and said tracts of one hundred and eighty-eight acres and seventy-five acres, and the Secretary of the Interior, shall, within three months after the filing of such map, designate the particular portions of said sections and of said tracts of land which the said railway companies respectively may take and hold under the provisions of this act for railway purposes. And the said railway companies, and each of them, shall, within three years after this act takes effect, construct, complete, and put in operation their said lines of road; and in case the said lines of road are not definitely located and maps of location filed within the periods hereinbefore provided, or in case the said lines of road are not constructed, completed, and put in operation within the time herein provided, then, and in either case, the lands granted for right of way, station grounds, or other railway purposes, as in this act provided, shall, without any further act or ceremony, be declared by proclamation of the President forfeited, and shall, without entry or further action on the part of the United States, revert to the United States and be subject to entry under the other provisions of this act; and whenever such forfeiture occurs the Secretary of the Interior shall ascertain the fact and give due notice thereof to the local land officers, and thereupon the lands so forfeited shall be open to homestead entry under the provisions of this act.

This act took effect under the proclamation of the President of the United States on February 10, 1890, and the location of the road and tracts selected on the banks of the Missouri river were approved by the Secretary of the Interior (Mr. Noble) on January 24, 1891.

Prior to the passage of the act of March 2, 1889 (*supra*), this road had been constructed to the Missouri river, ending at the town of Chamberlain, South Dakota, just to the south of the tract of one hundred and eighty-eight acres taken under the agreement with the Indians on the east bank of said river.

It is plain that the act of March 2, 1889 (*supra*), contemplated a complete construction of the road across the river and westward through the former reservation, and such construction was a condition upon the grant made in ratification of the agreements made with the Indians.

No further construction has been reported to this Department since the passage of the act of 1889, consequently there has been a forfeiture—dependent only on your declaration of the fact.

It is clear that the failure to complete the roads within the time prescribed in the act of March 2, 1889, worked a forfeiture of all the lands reserved to the railroad companies by the 16th section of said act.

I have prepared, and herewith transmit for your approval and signature, a declaration of forfeiture under the act of March 2, 1889 (*supra*), based on the views herein expressed.

Very respectfully,

HOKÉ SMITH, *Secretary.*

A PROCLAMATION.

Whereas: By the 16th section of the act of Congress approved March 2, 1889 (25 Stat., 888), the agreements entered into between the Chicago, Milwaukee and St. Paul Railway Company and the Sioux Indians, for the right of way and occupation of certain lands for station purposes in that portion of the Sioux Reservation, in the State of South Dakota, relinquished by said Indians, were ratified upon the condition that said railway company shall, within three years after the said act takes effect, construct, complete and put in operation its line of road as therein provided for, due location of which was to be made within nine months after said act took effect, and, in case of failure to so construct said road, "the lands granted for right of way, station grounds, or other railway purposes, as in this act provided, shall, without any further act or ceremony, be declared by proclamation of the President forfeited, and shall, without entry or further action on the part of the United States, revert to the United States and be subject to entry under the other provisions of this act," and

Whereas: Under previous proclamation said act took effect on February 10, 1890, and more than three years have elapsed and no construction has been reported of the said road beyond the town of Chamberlain, in the State of South Dakota, as evidenced by the report of the Secretary of the Interior, dated December 3, 1894.

Now, therefore, I, Grover Cleveland, President of the United States, do declare that the said lands granted for right of way and station purposes, to wit: that tract of land known as lots 2, 3, and 4, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, and lots 1 and 2 in Sec. 15, Tp. 104 N., R. 71 W., containing one hundred and eighty-four [eight] acres, as shown by a plat approved January 24, 1891, being the tract selected by the Chicago, Milwaukee and St. Paul Railway Company under the 16th section of the act of March 2, 1889 (25 Stat., 888), also the six hundred and forty acres in said township 104 N., ranges 71 and 72 W., 5th P. M., in the State of South Dakota, plat of which was approved by the Secretary of the Interior January 4, 1889, and now on file in the General Land Office, are forfeited to the United States, and will be subject to entry under the homestead laws, as provided by said act of March 2, 1889, whenever the Secretary of the Interior shall give due notice to the local officers of this declaration of forfeiture.

Given under my hand, at the city of Washington, this fifth day of December, A. D., one thousand, eight hundred and ninety-four.

GROVER CLEVELAND,
President of the United States.

SCHOOL INDEMNITY—ACT OF MARCH 1, 1877.

NOYO LUMBER COMPANY.

A school indemnity selection, made and approved prior to the act of March 1, 1877, in lieu of lands embraced within an Indian reservation, but which in fact at date of selection and approval had been restored to the public domain, and were afterwards by the public survey shown in place, is within the confirmatory provisions of section 2, of said act.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (G. C. R.)

On January 26, 1886, your office held for cancellation the following described indemnity school selections in the late Humboldt (now San Francisco) land district, California, viz:

The SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 23; SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$; W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 27; NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 28, T. 18 N., R. 17 W., M. D. M., made October 3, 1868, per list 2, Humboldt series, in lieu of the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and W. $\frac{1}{2}$ of Sec. 36, T. 20 N., R. 17 W., M. D. M.; also lots 2, 3, and 4 of Sec. 13, T. 18 N., R. 18 W., made October 17, 1868, per list 3, and containing 86.40 acres, in lieu of the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ (also) of Sec. 36, T. 20 N., R. 17 W., M. D. M.

This action was taken by your office

under the provisions of the 2nd section of the act of March 1, 1877, for the reason that the lands designated as bases thereof are shown by the official plat of survey, filed April 22, 1870, to be public lands, and hence have inured to the State under the act of March 3, 1853, as school lands in place.

The selections above described were approved to the State February 15, 1870, in clear list No. 3. The entire section (36, T. 20, R. 17), in lieu of which the selections were made, was found in place by the public surveys, prior to the passage of the act of March 1, 1877 (19 Stat., 267), and your office decided from that fact that the selections upon the bases thereof "are not confirmed by said act, but fall within the intent of the first proviso of the act for the perfection of title."

Your office advised the State Surveyor-General of that action, and allowed thirty days for appeal, and also directed that

should no appeal be taken, the said selections will be canceled, and purchasers from the State, if any there be, will be allowed sixty days to make proof that at the date of said cancellation he was the bona fide purchaser from the State and has not parted with his title, except to the State, in order to recover the purchase money to perfect his title under the provisions of the 2d section of the act of March 1, 1877. But if no one claiming as such purchaser shall come forward and establish his right to enter the land within such time, the land from and after the expiration of such period will be subject to disposal under the general land laws of the United States.

The State appears to have acquiesced in the action of your office, through its State surveyor-general, who in February, 1886, filed a waiver of the right of appeal, and your office, on May 28, 1886, canceled the selections, except as to certain tracts hereinafter shown.

Proof having been submitted that one Clarence E. De Camp "is the sole owner of 320 acres of the selected lands, having purchased the same in good faith from the State," and that on learning of the invalidity of the State's title to the lands, "he immediately took steps to perfect his title thereto, in accordance with the provisions of the 2d section of the act of 1877," your office allowed him to enter the lands so purchased, under act mentioned, upon payment of the price thereof.

In your said office letter ("C") of January 26, 1886, canceling the selections, the school selection for lots 2, 3 and 4 of Sec. 13, T. 18 N., R. 18 W., made October 17, 1868, per list 3, in lieu of the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 36, T. 20 N., R. 17 W., was inadvertently omitted, and on June 3, 1886, your office having observed the omission, canceled that selection and directed that the State surveyor-general be duly notified of the action taken.

On June 12, 1891, the Noyo Lumber Company filed in the local office its appeal from the action of your office of January 26, and of June 3, 1886, canceling the selections as to lots 2, 3 and 4 of Sec. 13, T. 18 N., R. 13 W. Accompanying the appeal is a certified copy of a patent from the State of California, dated September 21, 1876, conveying to A. W. Macpherson, and to his heirs and assigns, the lots last above described; also affidavits made by William P. Plummer, vice-president of the Noyo Lumber Company, Henry Wetherbee and Charles F. Wilson, attorney at law, from which the following appears:

That the lots were purchased from the State of California by A. W. Macpherson, to whom certificate was issued by the State April 22, 1870; that on June 30, 1873, Macpherson conveyed the same to Henry Wetherbee; that in pursuance of the State's certificate to Macpherson, the latter obtained patent (as shown by copy thereof, above referred to,) September 21, 1876; that Wetherbee held the land until September 19, 1886, when he sold the same to O. R. Johnson, Russel A. Alger and F. B. Stockbridge, who on March 29, 1889, sold the same for valuable consideration to the Noyo Lumber Company (appellant), which still claims the land; that said company, its officers, agents or servants never had any knowledge of any defect in the title to said land, or that said land was improperly listed or certified to the State, or any of the facts relating thereto, until May 28, 1891; nor did Wetherbee know of such defects during the period (from 1873 to 1886) in which he claimed said land; that he was never notified or had any knowledge of the action of your office canceling the entry; that Macpherson, the immediate grantee of the State died in 1889.

Mr. Wilson testifies that he was the attorney for Johnson, Alger and Stockbridge, and as such examined the title to said land for said purchasers; that he examined the tract books in the United States land office to ascertain if said land had been properly listed on February 15, 1870, and there was then no memorandum on said tract books or any attempted cancellation of such listing; that his clients had no knowl-

edge of any defects in the title as derived through the State, or any knowledge that the basis was defective, or any knowledge that the selection was canceled, until May 28, 1891.

On July 28, 1891, your office decided that said company had no right of appeal, and Mr. Wilson, attorney for the company, was notified that he would be allowed twenty days after notice within which to apply to this Department for an order in accordance with Rules 83 and 84 of the Rules of Practice.

Upon the application of the company, the Department on December 12, 1891 (Mis. L. & R., 231, pp. 238-241), directed your office to forward a report as to the lands selected, together with copies of said lists, "that the Department may consider what action is necessary in the premises."

On December 28, 1891, your office forwarded such report, together with the appeal of the company from the action of your office of May 28, and June 3, 1886, canceling the selections.

The original lists 2 and 3, filed, respectively, in the local office at Humboldt October 3, and 17, 1868, are among the files of the case; 1,720 acres were selected in list 2 and 86.40 acres in list 3, and both lists were approved February 15, 1870.

It was alleged that the bases, upon which the selections were made (Sec. 16 and 36, in Tp. 19 N., R. 17 W., and Sec. 36, in Tp. 20 N., R. 17 W.), "are in the limits of the Mendocino Reservation, recently ordered by Congress to be sold for money."

The selections, specifically designating as a basis Sec. 36, Tp. 20 N., R. 17 W., were canceled because that selection was found to be public land by the public surveys, the plat of which was filed April 22, 1870.

Prior to the cancellation of the selections based on that section, the State, as above seen, sold three hundred and twenty acres thereof to De Camp, and your office, on the State's waiver of right of appeal, allowed him to purchase the same under the first proviso to the 2d section of the act of 1877 (*supra*), and patent was issued to him for the land November 15, 1888.

The State had also sold the land in question (lots 2, 3 and 4 of Sec. 13, Tp. 18 N., R. 18 W.), which had been selected, as above seen, in lieu of a portion (one hundred and twenty acres) of the same section (36, T. 20 N., R. 17 W.), which your office in 1886 decided belonged to the State; and the selected land was by reason of that decision canceled, the State acquiescing in that judgment and accepting the interpretation of your office placed on the 2d section of the act of 1877 (*supra*).

It is insisted on the part of the Noyo Lumber Company that its title was confirmed to the State by the 2d section of the act of 1877 (*supra*), which reads as follows:

That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth and thirty-

sixth sections in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

I think the company's contention is right. The selections were made and approved to the State, and the State thereafter sold the land, and its title through mesne conveyances vests in the company.

The selections were made because the lands in place were within the Mendocino Indian reservation, which by the 6th section of the act approved July 27, 1868 (15 Stat., 223), was restored to the public domain, and the land in the reservation directed to be sold at one dollar and twenty-five cents an acre.

The selections were also made and approved before the plat of survey was filed; and, although such survey showed the lands in place and the selection for that reason defective, yet it was to confirm just such invalid selections that the act of 1877 (*supra*) was passed. The State thereby took the lands selected—however defective or invalid the selections may have been—"and the United States took in lieu of the selected land that which the State would have been entitled to but for the indemnity it had claimed and got." *Durand v. Martin*, 120 U. S., 366.

It is true that the State acquiesced in the action of your office canceling the selections, and De Camp was called upon and did purchase from the government a portion of the selected tracts; but this erroneous action can not be allowed to defeat the claim of the Noyo Lumber Company, whose title rested upon a selection made by the State and confirmed by the act. See *State of California v. Nolan et al.*, 15 L. D., 477; *Hambleton v. Duhain*, 71 Cal., 141.

The decision appealed from is reversed.

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

PIERSE v. CARTHRAE.

Section 7, act of March 3, 1891, does not confirm an entry canceled prior to the passage of said act, nor does the pendency of proceedings to show cause why said entry should be reinstated bring it within the operation of said act.

A transferee is not entitled to the benefit of said section where at the time of his purchase the records of the local office show that the entry in question was held for cancellation.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (J. L. H.) (J. L.)

The appeal of Mrs. Lena Carthrae, formerly Miss Lena Berges, from your office decisions of February 18, 1893, and November 15, 1892, in the case of *Allen Pierse v. Lena Berges*, brings before me for review

and supervision all the proceedings of your office involving the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 3 and 4 of Sec. 18, T. 16 N., R. 12 E., Lewistown land district, Helena series, Montana.

The record shows the following facts:

On December 22, 1882, Michael Ryan filed his pre-emption declaratory statement No. 4918 for said land, alleging settlement on August 23, 1882. On July 18, 1883, he made cash entry No. 1260, offering final proof which was approved by the local officers, who issued final receipt and certificate.

On April 12, 1886, Special Agent John A. Gunn reported:

That he had made a personal examination of said tract and found a log house twenty by twenty-four, built by one Thomas Farley in 1880, worth \$100. No crop was ever raised on the land. Claimant never lived on the land, and has in no way complied with the law.

Thereupon, on June 30, 1886, your office held Ryan's cash entry for cancellation and directed the local officers to give notice to Ryan that he was allowed sixty days in which to apply for a hearing to show cause why his entry should not be finally canceled.

After due service of notice to Ryan by the local officers, your office on April 25, 1888, canceled said entry and directed that the land be held subject to entry by the first qualified applicant.

On May 2^d, 1890, Miss Lena Berges filed her pre-emption declaratory statement for the land aforesaid (and also for lots 1 and 2 of said section 18 in addition thereto), alleging settlement on May 16, 1890.

On June 26, 1890, Allen Pierse filed his petition, verified by his own affidavit alone, and therein alleged:

That he is now the owner by purchase for a good and valuable consideration of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 3 and 4 of Sec. 18, T. 16 N., R. 12 E. That he purchased said land and received a deed of conveyance therefor from one Samuel Wade on the 26th day of October, 1887, and went into possession thereof. That said Wade purchased said land of the heirs-at-law of one Rosenthal, deceased, who in his lifetime purchased said land from Michael Ryan, who made cash entry No. 1260 for said land at the United States land office at Helena, Montana, on the 18th day of July, 1883. That he bought said land in good faith and without any knowledge of any defect or infirmity of title, and had no reason to suspect or believe that said Ryan had failed in any respect to comply with the provisions of the pre-emption law, until within a few days, when he was informed that said entry had been canceled by official letter "P" of April 25, 1888, upon the report of Special Agent John A. Gunn. That he at no time had any notice that any report had been made in regard to said land, or that the entry was at any time held for cancellation, though his deed and the deeds of his grantors had been duly recorded in the Recorder's office of Fergus county, Montana, where said land is situated; nor does he believe that said Ryan or any of the subsequent owners of said land ever had any such notice.

He further says that he is now informed and believes that one Lena Berges made declaratory statement No. 10,994 for said land at said land office on the 29th day of May, 1890, alleging settlement on the 16th day of the same month. That said Lena Berges at the time she made said alleged settlement and filing, well knew of the claim of the petitioner, and that said land had improvements thereon which belonged to the petitioner.

Wherefore he prayed, that a hearing may be ordered, and that he may be per-

mitted to prove the facts above set forth; and that said declaratory statement may be set aside, and said entry re-instated, and that the same may be approved for patent.

Thereupon your office, by letter "P" of October 31, 1890, held that Pierse had a right to be heard in defense of the entry, ordered a hearing after due notice to all parties in interest, including Lena Berges, and directed the local officers, pending the final determination of the case, to allow no entry or appropriation of the land in question.

No hearing has ever been had.

On April 15, 1892, Pierse, by his attorneys Messrs. Adkinson and Miller, of Helena, Montana, by letter addressed to the Commissioner of the General Land Office, reported that he had not procured the hearing awarded him by said letter of October 31, 1890, and requested your office, without regard to the hearing, to relieve Ryan's entry from such suspension and approve it for patent. There is no evidence that Lena Berges had notice of said letter and application.

Whereupon your office on November 15, 1892 (letter P) decided that "said entry falls clearly within the provisions of the proviso to section seven of said act (March 3, 1891, 26 Stat., 1095) and would be confirmed for patent, but for the conflict with pre-emption declaratory statement No. 10,994 of Lena Berges," and that "said declaratory statement No. 10,994 of Lena Berges, being in conflict with cash entry No. 1260 of Michael Ryan, is invalid." Your office then directed the local officers to advise the declarant that she will be allowed sixty days within which to show cause why her said filing should not be canceled.

On January 23, 1893, Lena Berges, by her new married name of Lena Carthrae, filed her answer to said rule to show cause. And on February 18, 1893, your office decided that Ryan's cash entry was erroneously canceled; that the land was not at any time properly subject to entry by another, and was not open for settlement thereon at the date of Lena Berges' settlement and filing.

Mrs. Lena Carthrae, *nee* Berges, has appealed to this Department.

Your office erred in holding in letter "P" of November 15, 1892, that Ryan's cash entry No. 1260, falls within the provisions of the seventh section of the act of March 3, 1891. On that day said entry was not in existence. It was canceled by your office on April 25, 1888, and has never been re-instated. Your letter "P" of October 31, 1890, did not re-instate said entry; it merely awarded to Pierse a right to be heard in defense of Ryan's entry, ordered a hearing, and directed that, pending the final determination of the case, no entry or appropriation of the land should be allowed. The hearing was allowed in order that Pierse might have an opportunity to prove the facts alleged in his petition, and enable the Land department to decide whether Ryan's entry should or should not be re-instated.

An entry canceled prior to the act of March 3, 1891, is not confirmed by section seven of said act; nor does the pendency of proceedings under permission to show cause why such entry should be re-instated, bring it within the confirmatory operation of said section. Pomoseño Campos case, 16 L. D., 430.

See also James Slocum, 15 L. D., 421; Wiley *v.* Patterson, 13 L. D., 452; James Ross, 12 L. D., 446; and many other cases.

Your office also erred on October 31, 1890 (letter "P" of that date), in holding in the presence of Lena Berges' adverse pre-emption claim, that Pierse then had a right to be heard in defense of Ryan's entry, and in ordering a hearing for his benefit. On October 26, 1887, the date of Pierse's alleged purchase, your office letter "P" of June 30, 1886, holding Ryan's entry for cancellation on the ground of fraud, reported by Special Agent Gunn, had been on file in the local office for more than fifteen months. Under the rules of the Department, Pierse had the right, and it was his duty, to file in the local office evidence of his interest and his claim to have notice of proceedings affecting his rights. The entry was not canceled until April 25, 1888, six months after his alleged purchase. Miss Berges' adverse claim was not initiated until May 29, 1890, more than two years and seven months after said purchase. During all that period he made no application to intervene and gave no notice to the public officers. He lost whatever rights he might have had by his own carelessness and negligence.

In the case of Blackburn *v.* Bishop *et al.* (17 L. D., 277-9), Secretary Smith said:—

. This entry cannot be confirmed under said seventh section for the reason that Burnham cannot claim to be a purchaser in good faith, because, at the date of his purchase, an affidavit of contest had been filed in the local office alleging the illegality of said entry, of which he was bound to take notice The transferee is bound to know the status of the land in the local office at the date of his purchase.

In the case of Wm. W. Waterhouse (9 L. D., 133) July 20, 1889, Secretary Noble said:—

. Nor is there any force in the objection that the mortgagees were not notified of the hearing, inasmuch as it is not shown that the existence of said mortgage was made known to the local officers in time, so that such notice might have been given. If parties fail to notify the local officers of the acquisition of an interest in entered lands, after proof and before patent, they can blame no one but themselves if notice is not given them of proceedings involving said lands; it being out of all reason to require those officers to examine the records of the county offices to ascertain if any assignment of or incumbrance upon said land has been therein recorded, before notice shall be issued for contest or hearing. (Citing Secretary Lainar's decision to the same effect in the case of Cyrus H. Hill, 5 L. D., 276.)

In Roberts *v.* Tobias *et al.* (13 L. D., 556-9), November 16, 1891, the same officer again held:—

That the mortgagee did not file any notice of his interest in the local office, and hence was not entitled to any notice of the cancellation of said entry. . . . He is bound to know the status of the land at the date of the sale or mortgage.

. . . . The law never intended that a man should wilfully shut his eyes to the condition of the land as shown by the record, at the very time the purchase or loan was made. (Citing Brush *v.* Ware, 15 Peters 93-111, and Mullan *v.* United States, 118 U. S., 271-277.)

I have examined Ryan's final proof, and find that his statements therein accord with Special Agent Gunn's report. On June 30, 1883, Ryan testified:—

I have not made any use of the land yet. I took it up for a hay ranch. Last year when I took it up (August 23, 1882) it was too late to cut hay, and this year it is not time yet. I intend to cut hay this season. I have not broken any land, and have raised no crop as yet.

The final proof should have been rejected. The entry was properly canceled.

Your office decisions of February 18, 1893, of November 15, 1892, and of October 31, 1890, are hereby reversed. Pierse's petition is denied. The cancellation of Ryan's cash entry No. 1260, on April 25, 1888, is affirmed. Mrs. Lena Carthrae's declaratory statement in the name of Lena Berges, will be held intact, and she will be permitted to make final proof and perfect entry within reasonable time after notice of this decision.

PUBLIC SURVEY--NON-NAVIGABLE LAKE.

LAKE MALHEUR.

In the extension of the public surveys over lands lying between the meander and shore line of a shallow lake, where the government owns a portion of the lands adjacent thereto, the dry land should be surveyed in such manner as to leave the rights of riparian owners undisturbed.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (W. M. B.)

I am in receipt of your letter of June 27, 1894, transmitting letters of the surveyor-general of Oregon of April 10 and June 6, 1894, (with accompanying blue print diagram) respecting the survey of lands lying between the meander lines run and the now existing shore line of non-navigable Lake Malheur, in Harvey county, State of Oregon.

In your said letter, above mentioned, you say—

I respectfully ask for instructions with reference to the survey of the lands between the meander and shore line of the lake, under Departmental decision of March 3, 1893 (16 L. D., 256), in view of the propositions submitted by the surveyor-general in his letter of April 10, 1894, herewith, and would recommend that all the dry land between the meander and shore line of the lake be surveyed as the most desirable solution of the problem, and any riparian rights of the owners of the fractions bordering upon the lake, who entered the lands in accordance with the subsisting plats, to any lands which might be shown to exist by the survey now in contemplation, under the supreme court decisions referred to in the departmental decision (16 L. D., 256), might be determined after the survey of said land.

In the case of *Hardin v. Jordan* (140 U. S., 371), the supreme court held that riparian proprietors owning lands bordering upon a non-navigable lake in the State of Illinois, where the common law rule

prevailed, take to the center of the lake, except in cases where the rule was rendered inoperative by conflict in the claims of different owners, in which case they could only take ratably.

It was also held in *Hardin v. Jordan* that the riparian rights of owners of lands upon such non-navigable bodies of water were subject to local law, the common law doctrine being applicable thereto, in States only where no statutory provision exists to the contrary.

By decision of the supreme court of the State of Oregon in the case of *Minto v. Delaney* (7 Org. Reports, 337), the common law rule is applied to non-navigable lakes in that State; hence owners of lands upon Lake Malheur having riparian rights take to the center of that lake, or ratably as the circumstances of the case may determine.

The first of the propositions contained in the letter of the surveyor-general of April 10, 1894, to which you refer, is in words as follows, to wit:

In my judgment the most equitable plan should be to confine each lot within the limits of the legal subdivisions of which it is a part. Lot 1 of section 24 should not include more than the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of that section, and each other lot be conformed to its subdivision.

If a lot was a fraction of two or more subdivisions then it should include those and no more.

The above plan cannot be considered, since it is opposed to the rule laid down in *Hardin v. Jordan* and *Minto v. Delaney*.

After some reference to certain propositions contained in departmental decision of March 3, 1893 (16 L. D., 256), and the suggestion of difficulties which might arise in the execution of the surveys under a different method, the surveyor-general submits a second plan, as follows—

My idea of the best solution of the problem would be to properly complete the survey of the townships involved, those south of the lake in the regular manner, and those north of the lake to be projected from the north to the south.

If this view of the situation meets with your approval, I can make out instructions in accordance therewith, but if this mode is objectionable I would respectfully request that I be instructed in regard to the matter.

The recommendation contained in your said office letter that "all dry land between the meander and shore line of the lake be surveyed as the most desirable solution of the problem,"—in conformity with the second plan submitted by the surveyor-general, in his said letter—is concurred in by this Department.

You will direct the surveyor-general of Oregon to advertise for bids to do the work under the "per diem rate under section 2411, U. S. Revised Statutes, including all expenses; also at the rates per mile allowed for the survey of the public lands in Oregon," as stated in your office letter.

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

EATON v. HOLLENBECK.

An entry falling within the confirmatory provisions of section 7, act of March 3, 1891, is confirmed as an entirety to the exclusion of all other claims to any portion of the land.

Secretary Smith to the Commissioner of the General Land Office, December 3, 1894. (P. J. C.)

The land involved in this appeal is the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 3 S., R. 4 W., Las Cruces, New Mexico, land district.

The record shows that George W. Hollenbeck filed his pre-emption declaratory statement for said tract March 6, 1884. The land was relinquished from this filing, and on September 18, 1884, he made homestead entry of the same. December 14, 1885, he made final entry.

On February 28, 1889, Ethan W. Eaton filed a protest against said entry, alleging lack of good faith in making said entry, and that the land was more valuable for mining than for agricultural purposes.

Your office ordered a hearing, which was had before a special commissioner in May and June, 1892, at which both parties appeared. Thereafter, on August 19, 1892, and before the local officers had rendered a decision, the contestant filed a motion for a further hearing, alleging under oath that at the time of Hollenbeck's filing and final entry the land was occupied as a town and used for trade and business. The motion was granted by the local officers, and a day set for the hearing, with notice to the claimant. At this hearing Hollenbeck did not appear.

As a result of these two hearings the register and receiver decided that it is very doubtful whether the evidence established the mineral character of the land, but in view of the testimony offered at the re-hearing they decided that it was not necessary to pass on this question. They therefore held that the latter charges had been sustained, and recommended the cancellation of Hollenbeck's entry.

On appeal your office, by letter of April 10, 1893, reversed their recommendation, but held that the contestant be allowed the privilege of locating on said land a millsite, under section 2337, Revised Statutes, not exceeding five acres, the location to be made so as to not include the buildings owned by the claimant.

Hollenbeck prosecutes this appeal, assigning error in allowing the contestant to locate the millsite; in requiring contestee to make the final homestead application (form 4-070) and in not confirming the entry under the act of March 3, 1891 (26 Stat., 1095).

It appears from the testimony that the claimant mortgaged the land November 1, 1886. It is shown by the evidence that the mortgage had

not been satisfied at the date of the hearing. Section 7 of said act provides, among other things, that—

all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which final proof and payment have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

The entry in question was made in 1885, and there were no adverse claims existing against it. It was incumbered prior to March 1, 1888, and to a bona fide incumbrancer, for \$1,000, and fraud on the part of the purchaser has not been found. Under these circumstances the entry must be confirmed (*United States v. Bullen*, 16 L. D., 78.)

This conclusion renders it unnecessary to discuss other issues, for the reason that the Department has no further jurisdiction over the land when it is ascertained that the entry comes within the confirmatory provisions of the statute. (*Radabaugh v. Horton*, 17 L. D., 48.)

I might add that the testimony has been examined, and I fully concur in your office judgment that the charges in neither of the affidavits are sustained. The confirmation of this entry, however, must be as an entirety; therefore the contestant cannot be permitted to make the millsite entry as ordered by your office.

The papers are returned to you with directions to call upon the transferee for the proofs required by the rules, and if found satisfactory, the entry will be passed to patent.

Your judgment is thus modified.

PRACTICE—PROTEST—CONTEST—EQUITABLE ACTION.

COOKE v. VILLA (ON REVIEW).

An application to enter, properly rejected on the ground that the land is covered by the entry of another, and appeal from such action, confer no right upon the applicant as such; nor does an order for a hearing, based on an affidavit filed in connection with said appeal, place him in the status of a contestant.

A protest should not be entertained on a charge that is at such time the subject of investigation by the government.

A stipulation between the parties that a hearing ordered on a protest shall be treated as a contest, will not give the protestant the rights of a contestant, if he has not brought himself within the rules regulating the initiation and prosecution of a contest.

An application to enter properly rejected, and pending on appeal, does not oust the local office of its jurisdiction over a subsisting entry of the land involved.

A protestant without interest does not have such an "adverse claim" to the land involved as will serve to defeat a reference of the entry to the board of equitable adjudication, if it is otherwise subject to such disposition.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (P. J. C.)

I have considered the motion for review of departmental decision of August 22, 1893 (17 L. D., 210), filed by counsel for Ramon Villa. By said decision Villa's homestead entry of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lots 2, 3, 4, 5 and 6, Sec. 26, T. 1 N., R. 14 W., S. B. M., Los Angeles, California, land district, was canceled, and Bartholomew Cooke's application to enter allowed.

I quote in full the statement of facts from said decision—

The record shows that Ramon Villa made homestead entry of said tract, December 6, 1882. On January 9, 1891, Bartholomew Cooke made homestead application for said land, which was rejected by the register "on the ground that the tract applied for is covered by homestead entry No. 1158 of Ramon Villa, filed December 6, 1882." On the same day Cooke appealed from this decision, setting up various grounds of error which are substantially that the claimant has not complied with the law as to residence and cultivation, and that he had not offered final proof within seven years from the date of his entry and asked that a hearing be ordered "as per rule one of practice." The said appeal was accompanied by the affidavit of Cooke and another.

On January 9, 1891, the register notified Villa that the homestead law required "that final proof of settlement and cultivation be made within two years after the expiration of five years from date of entry," that "the time fixed by the statute has expired," and directed him to show cause within thirty days why his claim should not be canceled. Thereupon on January 19, 1891, he applied to make final proof, and after due notice offered the same before the register and receiver on April 1, following. In the meantime on March 16, 1891, you ordered a "hearing on said appeal and affidavit."

On April 1, Cooke appeared and filed his protest against the final proof, alleging: "(1) Over seven years have elapsed since entry was made, and it is now void and expired by limitation.

(2) Said Villa has not made *bona fide* continuous residence on said tract since making entry thereof.

(3) His cultivation, improvements and use made of said tract do not entitle him to a final homestead receipt therefor.

(4) Said final proof should be rejected for want of good faith of the said Villa; protestant alleges that the tract in question has suffered in value from the occupancy of Villa—more value in wood having been removed therefrom by said Villa than he added thereto by his improvements.

(5) Said final proof should be rejected on the further ground that the protestant has made a homestead application for the tract in question, the same being now a matter of record, and a hearing ordered thereon by Commissioner's letter 'H' March 16, 1891, said allegations protestant is ready to prove at such time as you may grant a hearing therein."

The attorneys of the respective parties stipulated in writing "that the entire evidence in the matter be now taken and notice waived on the part of said Villa, and this be considered as a contest hearing as well as protest against acceptance of final homestead proof of said Villa."

The local officers recommended that the final proof of Villa be rejected because not presented within the time required by law. On appeal, your office reversed their decision, finding Cooke had not sustained his charges of failure to comply with the law as to residence

and cultivation, and on the question as to whether "the failure to submit final proof within the statutory period calls for the cancellation of his entry," your office decided in the negative, and held his entry should be submitted to the board of equitable adjudication for its action. On appeal by Cooke, the Department, without discussing any other point raised by the appeal, reversed your office decision, and held—

that Cooke's application and his affidavit filed on the same day, was tantamount to the assertion by him of a "claim" to the land within the meaning of Sec. 2456, Revised Statutes, which defines the character of the cases and the circumstances under which they may be passed upon by the board of equitable adjudication.

Review of this decision is now asked. There are several errors specified by counsel, but it seems to me that it is only necessary to consider the last to determine the motion, which is, error—

In not holding that the protest and application of Cooke did not constitute a valid adverse claim, and that the entryman, having shown compliance with all the requirements of the law, the entry should be submitted to the board of equitable adjudication.

The question presented is, therefore, whether Cooke occupied the status of a protestant or a contestant, and it is upon the determination of this that the motion must be decided.

To begin with, it may be said that Cooke never made settlement on this tract, and it will be conceded, I think, that he never filed a contest in this case. His first act in connection with the land was to present his application to enter. He did not present with his application any affidavit of contest, but he appealed from the rejection by the local office, and with his appeal, presented in your office, for the first time, an affidavit setting forth facts, which, if properly presented at the local office, would have given him the status of a contestant. Your office could not have regarded him as a contestant, for it was upon his "appeal and affidavit" that the hearing was ordered. Cooke, however, did not go into the hearing upon his "appeal and affidavit" as directed by you, but sixteen days after the promulgation of your office order, and, presumably, after he had received notice of it, he voluntarily filed a protest against Villa's final proof, and it was upon the allegations of this protest that the case proceeded. Therefore no rights could possibly accrue to Cooke under his application to enter, his appeal and affidavit, and finally your office order, because he abandoned whatever privilege your office endowed him with. By his application to enter, and his appeal from the rejection thereof, he could gain no right whatever, because his application was properly rejected, on the ground that the land was segregated by Villa's entry. (*Goodale v. Olney*, 13 L. D., 498; *Maggie Laird*, Id., 502.) So that it seems to me, viewed from any standpoint, Cooke was merely a protestant, an informer without interest, and as such, he did not have such a "claim" to the land as would defeat reference to the board of equitable adjudication of Villa's final proof.

Again, it appears to me that Cooke's protest should not have been entertained at all upon the first ground of his protest, that is, that proof had not been submitted by Villa within the statutory period, because the government had his entry then under investigation on that charge. On January 9, the day Cooke presented his homestead application, the local office directed a notice to Villa, under the circular of December 20, 1873 (1 C. L. O., 13), requiring him to show cause within thirty days why his entry should not be canceled. In pursuance of that order, Villa made such a showing as warranted the local office in permitting him to make his final proof. This was a regular proceeding on the part of the government, and was such as would preclude investigation—on this charge—by any person. (*Fargher et al. v. Parker*, 14 L. D., 83.)

It cannot be said that the local office was ousted of jurisdiction because of Cooke's appeal from the rejection of his application to enter, for the reason that the efforts of Cooke did not in anywise tend to create any right in him to the land, or abrogate the power of the government to institute the proceedings provided for by the rule cited above, or avoid the necessity therefor. As the matter stood, notwithstanding Cooke's application and appeal, it was a question solely between the government and the entryman, under rules prescribed by the Department.

The stipulation entered into by counsel, as quoted above, seems to have been the controlling element in arriving at the conclusion that Cooke was a contestant. It is true that a stipulation by attorneys as to matters of practice and evidence and other matters arising in the course of procedure are binding upon the parties; yet I do not think that by agreement the legal status of this proceeding could be changed from one instituted by the government into a contest between said parties. If Cooke had desired to appear before the Department as a contestant, the way was open for him to do so on January 9, when he presented his application to enter, and before the government initiated its proceeding. The rules define how a contest shall be initiated and conducted (Rules 1, 2, 3 and 54, Rules of Practice). A compliance with these rules fixes the status of a person attacking an entry as a contestant. If he has failed to bring himself within them, I do not think he should, by stipulation, be allowed to be placed in a better position than that he elected to assume.

Section 2457, Revised Statutes, defines the circumstances under which entries may be passed upon by the board of equitable adjudication, as follows—

Where the law has been substantially complied with, and the error or irregularity arose from ignorance, accident, or mistake, which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

Villa, in response to the requirement of the local office to show cause why his entry should not be canceled, showed that he gave notice to make final proof on November 16, 1886, but his witnesses being absent that day, and in an adjoining county, he was unable to do so; that

shortly thereafter he was taken sick and was unable to attend to it for some time; that he is a poor man with a large family to support, and was unable to hire any one to attend to it for him; that being unable to read, write or speak the English language, he was largely ignorant of the requirements of the law. An examination of the evidence in the case satisfies me that in your office decision of May 6, 1892, you have fairly and sufficiently stated the facts disclosed, and I approve the finding that the charges in the affidavit of contest are not sustained, and that the defendant has in good faith resided upon the land, and improved it to the extent of his ability.

Therefore, having determined that Cooke is a mere protestant, and the only question herein being one between the government and the entryman, on proceedings lawfully instituted by the United States, I think that Villa should be permitted to complete his entry, when it should be referred to the board of equitable adjudication. It is so ordered, and said departmental decision of August 22, 1893, is hereby recalled and revoked.

PRACTICE—MOTION FOR REVIEW—INCOMPLETE RECORD.

MOORE *v.* KELLOGG (ON REVIEW).

On motion for review the Department may reconsider a decision, rendered on an incomplete record, where jurisdiction of the land yet remains with the Department, and it appears that the rights of others, not parties to said proceedings, have been prejudiced by subsequent departmental action based on said decision.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (F. W. C.)

With your letter of January 4, 1894, was forwarded a motion filed on behalf of Kellogg in the case of Mattie Moore *v.* N. A. M. Kellogg, involving the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lot 1, Sec. 29, T. 4 N., R. 19 W., S. B. M., Los Angeles land district, California, for review of departmental decision of October 5, 1893 (17 L. D., 391), in which the application by Kellogg to purchase the said land under the act of January 13, 1881 (21 Stat., 315), was denied and the homestead entry by Mattie Moore covering said land was permitted to remain intact upon the record.

To a full understanding of the matter a brief recitation of the previous history of this tract is necessary.

This land is within the primary limits of the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific Railroad, as shown by the map of definite location filed March 12, 1872. It is also within the indemnity limits of the grant to the Southern Pacific Railroad (branch line) made by the act of Congress approved March 3, 1871 (16 Stat., 579).

As early as 1879 Kellogg sought to make entry of the land in question and adjoining lands, under the general land laws, but his applications were denied by decisions of your office in which it was held that the

Southern Pacific Railroad Company's right of selection for indemnity purposes was sufficient to defeat his applications. He exercised his rights elsewhere under the general land laws but entered into contract with the company for the purchase of the lands above referred to and, under such agreement, the company, it appears, made selection of the lands May 25, 1883.

Kellogg entered into possession of the land in question in 1887 and has since continued to reside thereon and make valuable improvements, expecting to obtain title from the Southern Pacific Railroad Company.

On August 10, 1888, Mattie Moore applied to make homestead entry of the land which application was rejected for conflict with said selection by the Southern Pacific Railroad Company. The case was prosecuted to this Department resulting in departmental decision of November 29, 1890 (11 L. D., 534), in which it was held that the lands being within the grant to the Atlantic and Pacific Railroad Company, were, by the terms of the act of March 3, 1871, *supra*, excepted from the grant to the Southern Pacific Railroad Company and its selection of May 25, 1883, was directed to be canceled and Mattie Moore allowed to make entry as applied for.

Kellogg does not seem to have been a party to these proceedings but immediately following said decision, to wit, on December 20, 1890, Kellogg made application to purchase the land under the act of January 13, 1881, *supra*, upon which application the case now under consideration arose.

In the departmental decision sought to be reviewed it was held—

The act of January 13, 1881, applies only to settlers upon lands of the railroad for whose benefit the land was so withdrawn; in other words, if the land was not withdrawn for the Southern Pacific Railroad Company it is evident that the settler could acquire no rights by reason of his application to purchase.

As the land had been treated as withdrawn on account of the Atlantic and Pacific Railroad Company in the decision of November 29, 1890, (*supra*), it was held that the Southern Pacific Railroad Company had no right to the land and that Kellogg could acquire none by his application to purchase. The rejection of his application was therefore sustained.

In the motion for review it is claimed that this land was excepted from the grant to the Atlantic and Pacific Railroad Company by reason of the fact that at the date of filing the map of definite location of said Atlantic and Pacific Railroad opposite to the land in question, the same was included with the original limits of the survey of the Sespe rancho Mexican grant, from which it was finally excluded upon the survey and patenting of said grant March 14, 1872, which was subsequent to the definite location of said Atlantic and Pacific Railroad opposite this land.

A copy of your office decision "F" of January 17, 1881, upon an application by Kellogg to enter N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said Sec. 29, is furnished, in which it is held that said tract was excepted from the Atlantic

and Pacific grant by reason of being included within the exterior limits of the Sespe rancho at the date of the definite location of said Atlantic and Pacific railroad.

It is urged that if this be so, the selection by the Southern Pacific Railroad Company was erroneously canceled upon Mattie Moore's application, and that the same should be re-instated to the end that Kellogg may be protected in his rights under his contract with said Southern Pacific Railroad Company, and if this contention be not agreed to, that further action upon Moore's entry should be suspended in view of the general suspension ordered by departmental letter of November 8, 1893, of lands within the conflict limits of the grants for said companies upon the petition of the Southern Pacific Railroad Company, pending the question of the adjudication of their rights under a case pending in the courts.

From the above statement it is plain that the departmental decision of November 29, 1890, was predicated upon an incomplete record, as there is no mention made of the fact that this land was embraced in the exterior limits of said Mexican grant at the time of definite location of the Atlantic and Pacific Railroad, and the question arises: is said decision binding upon the rights of Kellogg or can said case upon his petition in the case now under consideration be reconsidered?

In the case of *Knight v. United States Land Association* (142 U. S., 177), Mr. Justice Lamar, speaking for the court, states, in the matter of the question as to the duties of the Secretary of the Interior, that he is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

The land in question is still under the jurisdiction of this Department, and if the decision of November 29, 1890, was made without consideration of material facts, and said decision affects the rights of other parties, that upon the petition of such parties said decision can be reconsidered to the end that the rights of all parties may be protected and justice meted out to all.

I have not before me facts sufficient relative to the said Mexican claim, and its connection with this land, upon which to adjudicate the question as to the effect of said grant upon the grant of the Atlantic and Pacific Railroad Company, but if the lands by reason of said Mexican grant were excluded from the Atlantic and Pacific Railroad grant, that fact was material to the judgment in the case of the *Southern Pacific Railroad Company v. Mattie Moore*, and as Kellogg entered into possession of these lands under purchase from the Southern Pacific Railroad Company, upon his petition said case should be re-opened.

The papers transmitted with the motion are herewith returned and you are directed to investigate the matters alleged in said motion relative to said Mexican grant to the end that the whole case may be re-adjudicated. Any previous action or decision of the Department in the premises should not interfere with a complete investigation and decision of the entire matter as presented.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

REITH v. NILES.

The right to purchase forfeited railroad lands under section 3, act of September 29, 1890, by persons holding under license from a railroad company, is inheritable, and may be exercised by an administrator for the benefit of the estate, where, under the local law, he is given the control of the real and personal property of the deceased.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (E. M. R.)

The land involved in this case is the SE. $\frac{1}{4}$ of Sec. 25, T. 3 N., R. 31 E., W. M., La Grande land district, Oregon.

The record shows that Azro B. Niles made homestead entry of the above tract September 1, 1891.

July 24, 1891, Louis Reith was duly and regularly appointed as administrator of Benjamin T. Terven's estate, and on September 25, 1891, he, as administrator, filed his affidavit of contest against the above mentioned entry, alleging

That on or about the year of 1885, said Benjamin J. Terven made actual settlement in good faith upon said tract and was thereafter in the actual, continuous occupancy and in the full and peaceable possession of all of said tract to the time of his death, and had made improvements thereon to the value of \$500.00, consisting of all of said tract plowed and fenced and in good cultivation. That said settlement and improvements were made in good faith, and with a *bona fide* intent to secure a title to said tract by purchase from the Northern Pacific Railroad company, when said land should be earned by compliance with the conditions or requirements of the granting acts of Congress to said company.

The said improvements were made prior to September 29, 1890. That said tract is a part of the land forfeited by the act of Congress, approved September 29, 1890.

That on or about the 18th day of July, 1891, said Benjamin J. Terven died at Umatilla county, Oregon, leaving a widow, Susan E. Terven, and two children, each a native born citizen of the United States.

That said Azro B. Niles never settled upon said tract on or before September 29, 1890, or at any time before making said homestead entry, or had any interest in or right to said land, and had no preference right under said act to enter said land under the homestead laws of the United States. He therefore asks that said homestead entry No. 5594 be declared canceled, and that contestant, as such administrator, be allowed to purchase said land for said estate under said act of September 29, 1890.

July 5, 1892, the local officers rendered their decision sustaining the contest and recommending the cancellation of the entry of Niles.

Upon appeal your office decision of February 16, 1893, affirmed the finding below. Upon further appeal by Niles the case is now before the Department for final adjudication.

At the trial before the local officers, an agreement was entered into by the parties to the suit, as follows:

That whereas a contest is now pending between Louis Reith, as administrator of the estate of Benjamin J. Terven, deceased, contestant, and Aaron Vinson, contestee, involving the SW. $\frac{1}{4}$, Sec. 25, T. 3 N., R. 31 E., W. M., the facts in relation to which, and upon which the rights of the respective parties depend, are similar to the facts

in the above entitled contest, except as hereinafter stated; it is therefore mutually agreed that the testimony in said case of Louis Reith, as administrator of the estate of Benjamin J. Terven, deceased, v. Aaron Vinson, a copy of which is hereto attached, shall be taken and used as testimony in this case upon the trial of this case in lieu of the introduction of testimony herein. That the settlement made by Benjamin J. Terven, deceased, in his lifetime, upon the south-east quarter of said section 25, was made in the same manner and at the same time, as shown by the testimony in said case, in regard to the SW. $\frac{1}{4}$, of said section; and that the improvements upon the said south-east quarter are equal in value, except that the whole of the south-east quarter of said section 25, was under fence and in cultivation long prior to September 29, 1890.

That said south-east quarter of Sec. 25, T. 3 N., of R. 31 E., W. M., prior to the settlement of Benjamin J. Terven, deceased, to wit, on or about the 22d day of November, 1879, was settled upon by one A. M. Ross, a citizen of the United States, in good faith, with a *bona fide* intent to secure title to said tract by purchase from the Northern Pacific Railroad company, if said land should be earned by said company. That said A. M. Ross about said time, made application to said Northern Pacific Railroad company to purchase said land, and received a license from said company under its seal, which license or certificate is hereto attached, and marked exhibit "B," plaintiff's proof. That said Ross occupied and held possession of said land under said license, until on or about the 30th day of December, 1882, at which time said Ross sold, assigned, transferred and conveyed all his right, title, and interest in and to said land to Samuel Rothchild, who thereafter occupied and held possession of said land, under said license, and sold and conveyed the same to said Benjamin J. Terven, at the same time that he did the south-west quarter of said section 25, T. 3 N., R. 31 E., W. M., as shown by the testimony herein referred to, and that thereafter Benjamin J. Terven occupied and held possession of said land, under said license, in the same manner that he did the SW. $\frac{1}{4}$ of said section 25, T. 3 N., R. 31 E., W. M., as shown by the testimony herein referred to.

The record in the case referred to shows that Terven, in consideration of the sum of \$1,250 purchased the possessory right of Rothschild and that he settled upon the land in question in the year 1885; that this settlement was with the *bona fide* intent to secure title thereto by purchase from the railroad company; that he has built a house thereon and made other valuable improvements; that he has made no purchase of land under the act of September 29, 1890, and that he cultivated the same up to the time of his death in July, 1891; that there is left surviving him a widow and two children, who are native-born citizens, and that the children are minors.

No settlement is claimed by the entryman, and the only rights that he alleges are those under his entry of September 1, 1891.

There are two questions raised by the appeal:

First. Was the right acquired by Terven an inheritable one: and second; is the administrator authorized to purchase for the heirs?

The act under consideration is the act of Congress approved September 29, 1890 (26 Stat., 496). Section three of said act provides, *inter alia*—

That in all cases where persons, being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any

such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from the State or corporation to which such grant was made, or its assignees, executed prior to January 1, 1888, or where persons may have settled by purchase from the State or corporation, when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payments, to receive patents therefor, and where any such person in actual possession of any such lands, and having improved the same prior to the first day of January, 1890, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments, he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid and not more, credited to him on account of, and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases and make claim on said lands under the homestead law and as provided in the preceding section of this act.

In *Eastman v. Wiseman* (18 L. D., 337), it was held, *inter alia*, "That the right of the licensee in such case" (the act of September 29, 1890), "is assignable and may be exercised by an assignee who is in possession of the land by an agent."

The assignor of Terven having received a license from the Northern Pacific R. R. Co., and as the right conferred by the license has been held to be assignable, the question for consideration now is, whether it is inheritable. Terven was alive at the date of the passage of the act, and had complied with all of its requirements, and was entitled to secure the land by purchase, and such being the case, in view of the further consideration that the section is remedial, I am led to conclude that his rights had so attached, that the interest became an inheritable one, and that the power to purchase passed to his heirs and legal representatives.

The rights acquired by Terven being inheritable, it brings up the second question raised by the appeal; is the administrator authorized to purchase for the heirs?

Section 1120, page 720, of Hill's Annotated Laws of Oregon, Vol. I., is as follows:

The executor or administrator is entitled to the possession and control of the property of the deceased both real and personal.

Such being the case, I am of the opinion that the administrator may properly apply to purchase for the benefit of the estate, and that therefore the application should be allowed.

For the reasons stated, your office decision appealed from is affirmed.

RAILROAD GRANT—TIMBER CULTURE CLAIM.

NORTHERN PACIFIC R. R. CO. v. WHITE.

Possession and occupancy of a tract, at date of definite location, with intent to subsequently enter the land under the timber culture law, do not serve to except it from the operation of the grant.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (J. L.)

I have considered the appeal of the company from your office decision of February 16, 1893, in the case of Northern Pacific Railroad Company against Alexander White, in which you rejected the company's application per list No. 107, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 13 N., R. 20 W., Missoula land district, Montana, and permitted White's timber-culture entry No. 1305 of said land to remain intact.

Said land was clearly excepted from the withdrawal of February 21, 1872, upon general route, by the then subsisting pre-emption claims of August Schultz and John Sexton, filed in 1870 and 1871, respectively.

On March 26, 1885, Alexander White filed his application to make timber-culture entry of said land. On March 28, the local officers served the company with notice that said application was made, and that said entry would not be allowed for thirty days, to enable the company to file a protest should they desire so to do (as required by circular of November 7, 1879, section III. 6 Copp's Land Owner, 142).

On April 2, 1885, the company, by its attorneys, filed a written protest, which the local officers, on motion of White, decided to be insufficient and rejected. Notice of said decision and of the right of appeal therefrom was served upon the company, and no amendment of the protest was made and no appeal was taken. Whereupon on July 15, 1885, White was allowed to make his timber-culture entry.

On March 10, 1887, the company made application for said land as being within the primary limits of its grant, by filing list No. 107, which was rejected by the local officers on April 20, 1888; and the company appealed to your office from said decision. White was not a party to this proceeding, and had no notice of it.

On April 28, 1890, your office directed a hearing to be had, to ascertain the true status of the land at the date of definite location, July 6, 1882; whether the land was settled upon, occupied, and claimed at the date mentioned; and also the nature and extent of the improvements thereon, and the qualifications of the parties claiming at that date.

After the hearing, which was attended by the company and White, the local officers jointly decided that the land was excepted from the grant to the railroad company.

No appeal to your office appears to have been taken from said decision.

Nevertheless, your office on February 16, 1893, upon consideration of the record and the testimony, affirmed said decision, rejected the company's application, and held White's timber-culture entry intact.

The company has appealed to this Department.

The failure of the Northern Pacific Railroad Company to appeal from the decisions of the local officers in 1885 and 1891, respectively, did not deprive your office of jurisdiction to consider and decide the questions involved under Rule of Practice 48. And the company's appeal brings the whole subject before me for review.

The testimony proves that on October 1, 1877, White made pre-emption filing on one hundred and sixty acres of land in section 14, and at the same time took possession of and occupied the eighty acres of land in section 11, now in controversy, adjoining his pre-emption claim, intending to make timber-culture entry of it. In the year 1879 he fenced the whole of the two tracts together. He plowed about forty acres of said eighty acres, sowed grain, cultivated the land, and has raised crops thereon every year since 1879. He commuted his pre-emption to homestead April 7, 1881.

On July 6, 1882, he was a citizen of the United States, over twenty-one years of age, qualified to make timber-culture entry under the land laws; and had actual and exclusive possession of the land in contest, and was cultivating one-half of it in crops and claiming the right to make timber-culture of the whole tract. His improvements at the time on the premises were worth between \$300 and \$400; and he had some trees growing then also. It was also proved that after he was allowed to make his entry, he set out trees every year for four consecutive years.

I am of opinion that White's possession and occupancy of the land in contest, with intent to appropriate it under the timber-culture laws, was not sufficient to except said land from the grant to the company contained in section 3 of the act of July 2, 1864 (13 Statutes, 367). Timber-culture claims and rights can be initiated only by entry at the local land office; and are not derived from antecedent occupancy, improvement and cultivation.

Therefore your office decision is hereby reversed, and White's timber-culture entry No. 1305 will be canceled.

PRACTICE—AFFIDAVIT OF CONTEST—PREFERENCE RIGHT.

SHUGREN ET AL. v. DILLMAN.

An affidavit of contest may be properly rejected if not corroborated; and where the contestant in such case waives the right of appeal and subsequently furnishes the requisite corroborative affidavit, his right to proceed dates from such time, and should not be recognized in the presence of an intervening contest regularly initiated, and if so recognized, the preferred right must be accorded to the intervening contestant.

Secretary Smith to the Commissioner of the General Land Office, December 4, 1894. (J. I. H.) (G. C. R.)

On March 4, 1889, Jacob Dillman made homestead entry of the SE.
½ of Sec. 8, T. 2 S., R. 65 W., Denver, Colorado.

On March 28, 1892, Swan J. Shugren filed his affidavit of contest against the entry, alleging abandonment, failure to make improvements or residence on the land, and the continuance of such default on that date. His affidavit of contest was rejected on the day of its presentation, for the reason that it was not corroborated, and he was notified by registered letter on April 1, 1892, and given thirty days within which to appeal.

On April 16, 1892, Frank M. Shafer filed his affidavit of contest, duly corroborated, against Dillman's entry, also alleging abandonment, change of residence, etc. This affidavit was filed on the same day, "subject to application to contest of Swan J. Shugren, filed March 28, 1892."

On April 23, 1892, one Munger appeared before the local officers and corroborated Shugren's affidavit, and on the same day Shugren made affidavit of the non-residence of the entryman, and asked that service be had by publication. Notice was accordingly published (April 27, 1892), summoning the defendant to appear before the register and receiver on June 9, 1892.

On May 6, 1892, Shafer filed a motion to advance the cause, recall the notice issued on Shugren's contest, and give to him the first right to contest the entry. This motion was overruled on June 8, 1892, and Shafer appealed. On the following day (June 9) the case was called, as per Shugren's published notice, the evidence was submitted showing that the entryman had abandoned the land, and the register and receiver recommended the cancellation of the entry.

On October 7, 1892, your office reversed the action of the register and receiver in refusing to give Shafer the preference over Shugren, and awarded to Shafer the preference right of entry. From that judgment Shugren has appealed to this Department.

The evidence taken at the hearing on Shugren's contest amply sustains the averments of both contestants, that the entryman abandoned the land.

Practice Rule No. 3 states that: "Where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made." The purpose of this rule is to assure the government of the good faith of the contestant (*Gotthelf v. Swinson*, 5 L. D., 657), and not that jurisdiction may be vested in the local officers—that being obtained only by service of notice. (*Houston v. Coyle*, 2 L. D., 58; *Seitz v. Wallace*, 6 L. D., 299.)

It follows that an affidavit of contest, while provided for in the rules of practice, is not essential. Contests have been allowed where no affidavit has been filed, or where the charges were reduced to writing, but not verified by the oath of the contestant (*Gotthelf v. Swinson*, *supra*). If, however, a contest affidavit be presented to the local officers, duly corroborated, and containing charges which, if true, would result in the cancellation of the entry, and those officers, in the absence of any prior charges duly made under the rules of practice, reject the applica-

tion to contest, it would be the denial of a right, and an appeal from such action would be entertained. (*Drummond v. Reeve*, 11 L. D., 179.)

Failure to appeal, however, from such erroneous action in proper time forfeits that right. (*Hawkins v. Lamm*, 9 L. D., 18.)

The purpose of the affidavit of contest and the corroboration thereof by one or more witnesses being to assure the good faith of the contestant, the local officers would undoubtedly be authorized to reject the same, if lacking in any of the elements, forms or averments specially provided for in the rules of practice.

As above seen, one of the requirements provided for in rule 3 is: that the affidavit of contest "must be accompanied by the affidavits of one or more witnesses in support of the allegations made." Shugren's affidavit, while formal in other respects, did not comply with that rule; and its rejection outright for that reason was not error. While given the right to appeal, he did not do so, but twenty-seven days thereafter appeared with a witness, who corroborated his affidavit, and the same was filed "April 23, 1892." He thus waived his right of appeal, by the performance of the conditions rightly imposed by the local officers, and then, and not until then, could he rightfully ask that his contest be considered.

In the meantime, however, and on April 16, 1892, Shafer filed his contest affidavit, in due form and properly corroborated. At that time there was no prior contest, for it had been rejected, and, as above seen, properly so.

It was therefore error to allow Shugren, in the presence of Shafer's rights, to file what was to all intents and purposes a new affidavit, and issue thereon the notice. Shafer had the prior right to contest the entry, and has duly taken the necessary steps for the preservation of that right by an appeal.

Shugren's right to enter the land is subject to the exercise of the preference right, within thirty days, by Shafer. Such will be the order, and the decision appealed from is affirmed.

MINERAL LAND—DISCOVERY—AGRICULTURAL CLAIM.

CASTLE v. WOMBLE.

A mineral discovery, sufficient to warrant the location of a mining claim, may be regarded as proven, where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

Secretary Smith to the Commissioner of the General Land Office, December 5, 1894. (V. B.)

July 2, 1889, Martin Womble filed in the local land office at Stockton, California, his pre-emption declaratory statement No. 14,722, 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. 30, T. 2 N., R. 12 E., M. D. M., alleging settlement July 2, 1889.

By your office letter of January 2, 1892, this declaratory statement was canceled, to the extent of the conflict with the Empire Quartz Mine, and the land in controversy is now properly described as lots 9, 10 and 11, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 2 N., R. 12 E.

The official plat of survey of the township was filed June 13, 1871. The lands are unoffered, and lots 9 and 10 were returned as mineral in character.

April 15, 1892, Womble filed notice of intention to submit final proof June 13, 1892, and Walter Castle filed protest, alleging in substance that, March 15, 1890, he, with others, located the Empire Quartz mining claim, embracing a portion of lots 10 and 11, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section thirty; that said mining claim contains a lode of quartz rock in place, carrying gold in paying quantities; that said land is more valuable for mineral, than for agricultural, grazing, or other purposes.

On this protest a hearing was had before the register and receiver, testimony taken, and a decision rendered by them, finding the land to contain gold sufficient to justify further development, and that Womble's declaratory statement having expired by limitation of law, and the Empire Quartz mining claim having attached to the land by location, Womble should be required to procure, at his own expense, a segregation of the Empire Quartz mining claim, before he be permitted to enter the remainder of the land embraced by his declaratory statement.

Womble appealed, and your office held that the part of the land embraced within the limits of the Empire Quartz mine contains sufficient mineral to justify the belief that it will develop into a paying mine, and affirmed the judgment of the local officers. Womble appealed to the Department.

The law is emphatic in declaring that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (Revised Statutes, 2320.) And this Department said in the Cayuga Lode (S. L. D., 703), 5—"This is a prerequisite to the location, and, of course, entry of any mining claim. Without compliance with this essential requirement of the law no location will be recognized, no entry allowed. Has such discovery been made in this case?

In the case of Sullivan Iron Silver Mining Co. (143 U. S., 431), it was commonly believed that underlying all the country in the immediate vicinity of land in controversy was a horizontal vein or deposit, called a blanket vein, and that the patent issued was obtained with a view to thereafter develop such underlying vein. The supreme court, however, said, page 435, that this was mere speculation and belief, not based on any discoveries or tracings, and did not meet the requirements of the statute, citing Iron Silver and Mining Co. v. Reynolds (124 U. S., 374).

In the last cited case the court, on page 384, says that the necessary knowledge of the existence of minerals may be obtained from the outcrop of the lode or vein, or from developments of a placer claim, previous to the application for patent, or perhaps in other ways; but hopes and beliefs cannot be accepted as the equivalent of such proper knowledge. In other words, it may be said that the requirement relating to discovery refers to present facts, and not to the probabilities of the future.

In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which, in the judgment of the register and receiver and your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed.

After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase." For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do.

Entertaining these views, your judgment is affirmed.

PUBLIC SURVEY.—SPECIAL INSTRUCTIONS.

O. P. IVERSON.

Special instructions may be issued *nunc pro tunc* to cover a survey of Indian allotments executed at the request of an allotting agent, though not authorized by the approved contract, it appearing that the survey was actually necessary and to the interest of the public service.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (W. M. B.)

I am in receipt of your office letter "E" of August 29, 1894, and enclosures, requesting authority from this Department to instruct the surveyor-general to issue special instructions *nunc pro tunc* for the survey of allotments in fractional townships hereinafter designated, which said surveys were heretofore executed; liability thereof reimbursable and chargeable to appropriation for allotments under provisions of section 9 of the act of February 8, 1887 (24 Stat., 391).

Referring to certain enclosed communications of the surveyor-general William P. Watson, deputy surveyor O. B. Iverson and John R. Rankin, United States allotting agent of dates and contents stated, you say—

For the reasons set forth in said correspondence I have the honor to request authority from the Department to instruct the U. S. surveyor-general for Washington to issue to Oliver P. Iverson, U. S. deputy surveyor, *nunc pro tunc* special instructions providing for the surveys for allotments in fractional T. 11 N., R. 18 E., and in the W. $\frac{1}{4}$ of T. 7 N., R. 19 E., within the Yakima Indian reservation. . . .

The surveyor-general does not state the cost of executing said additional surveys; consequently the amount of the liability to be named in special instructions can not now be given accurately, but it is presumed that the sum of \$750, or so much thereof as may be necessary to liquidate the cost of survey, will be sufficient.

The record shows that by authority of this Department, of date April 8, 1893, contract No. 409, dated May 15, 1893, was awarded to deputy Iverson, and approved, for the survey of allotments of lands designated therein within the said Yakima Indian reservation; liability \$1,100, and that in the returns of surveys under contract mentioned, the said deputy surveyor embraced those of the lands above described, which were not authorized by your office, but were executed by virtue of request of Allotting Agent Rankin, as per his letter of October 14, 1893.

It appearing from the record, however, that the surveys herein, under consideration, were actually necessary, and since the execution of the same promoted the good and interest of the public service, the request of your office as contained in the above quoted extract from your said letter, is hereby granted.

SOUTH v. JOHNSON.

Motion for review of departmental decision of July 7, 1893, 17 L. D., 36, denied by Secretary Smith, December 6, 1894.

REPAYMENT—DOUBLE MINIMUM PRICE.

BYRON ALLISON.

Repayment of an alleged double minimum excess can not be allowed where the land was properly held at that price at the date of its sale.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (F. W. C.)

I am in receipt of your letter of July 30, 1894, submitting for the consideration of this Department, an application made on behalf of Byron Allison, assignee of James J. Trainor, who made pre-emption cash entry No. 15,895 on January 9, 1889, for the SW. $\frac{1}{4}$ of Sec. 20, T. 15 S., R. 7 E., M. D. M., San Francisco, California, for repayment of \$1.25 per acre, the original payment on said entry having been made at the rate of \$2.50 per acre, the land being considered as double minimum land.

This land is within the primary limits of the grant for the Southern Pacific R. R. Co., and opposite the portion of the road between Alcalde and Tres Pinos which was never constructed, and the grant appertaining to which was forfeited by the act of September 29, 1890 (26 Stat., 476).

This land is also within the limits of the grant for the Atlantic and Pacific R. R. Co., opposite the portion shown by the location extending northward from San Buena Ventura to San Francisco.

By departmental decision of March 23, 1886 (4 L. D., 458), it was held, that there was no grant north of San Buena Ventura and the lands previously withdrawn opposite the portion of the location north of San Buena Ventura were ordered restored and to be disposed of at the minimum price.

It is the contention of counsel in support of the application for repayment that as the claim for the grant north of San Buena Ventura had been formerly recognized by the Department, and as the Southern Pacific R. R. Co. made no specific claim to that portion of the grant opposite unconstructed road, these lands should have been disposed of as single minimum lands under the terms of the departmental order of March 23, 1886, *supra*.

With this I am unable to agree. It having been found that the Atlantic and Pacific R. R. Co. was not entitled to a grant north of San Buena Ventura, any further consideration on account of said grant, so far as affects the status of the land north of San Buena Ventura, is unnecessary.

The land is clearly shown to be within the former limits of the grant to the Southern Pacific R. R. Co. and was on account thereof increased to the double minimum price. Being opposite unconstructed road on March 2, 1889, it was, by the act passed on that day (25 Stat., 854), reduced in price to \$1.25 per acre, but as the purchase under consideration was made on January 9, 1889, prior to the passage of the act of March 2, 1889, I know of no authority authorizing the repayment of \$1.25 per acre as applied for.

The accompanying application should therefore be denied.

APPLICATION TO ENTER—REINSTATEMENT—RES JUDICATA.

REYNOLDS *v.* NORTHERN PACIFIC R. R. CO.

An application to enter rejected by final decision of the Department is *res judicata*, and cannot be reinstated with a view to its allowance under a changed construction of the law.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (J. I. H.) (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 13 N., R. 3 W., Olympia land district, Washington, and is before the Department again on a motion to review departmental

decision of March 21, 1894, denying the petition of William A. Reynolds for re-instatement of his application to enter the above described tract, made by said petitioner December 15, 1885.

The record shows that the local officers held that the application should be allowed. Upon appeal by the railroad company, your office refused to allow the application, and upon further appeal, this Department, on July 24, 1889, sustained the action of your office. (9 L. D., 156).

This land was within the primary limits of the grant to the Northern Pacific Railroad Company, and opposite the portion of the road extending from Portland, Oregon, to Tacoma, Washington, a grant to aid in the construction of which road was made by joint resolution of May 31, 1870, (16 Stat., 378).

At the date of the grant, the land in controversy was covered by the homestead entry of James R. Johnson.

At the date of the definite location of the company's road opposite this land, made September 13, 1873, the lands were free from adverse claim, so far as was shown by the record.

The reason given in the decision of the Department of July 24, 1890, (9 L. D., 156) is, that the land passed to the railroad company at the date of definite location. This had been the well established doctrine of this Department, and so remained until the case of *Bardon v. Northern Pacific Railroad Company* was decided, (145 U. S., 535) wherein the supreme court held that:

Land which, at the time of the grant of July 2, 1864, (13 Stat., 365, c. 217) of public lands to the Northern Pacific Railroad Company, was segregated from the public lands within the limits of the grant by reason of a prior pre-emption claim to it, did not, by the cancellation of the pre-emption right before the location of the grant, pass to the company, but remained part of the public lands of the United States, subject to be acquired by a subsequent pre-emption settlement, followed up to acquisition of title.

This decision was made May 16, 1892.

Subsequent to this decision, Reynolds made an application for the re-instatement of his application to enter the tract of land above described, which was considered by this Department, and decided March 21, 1894, (L. and R., Miscellaneous, 283, p. 13), in which the Department refused to re-instate the application, upon the ground that there was nothing to re-instate, as the application to enter had never been accepted and permitted to go of record. It is now moved that this decision be revoked and set aside, and that the application be granted.

After a careful examination of all of the authorities cited by counsel for the movant, I fail to see any error in the former decision of this Department. The cases cited by counsel are of two classes: one being where an entry had been erroneously canceled, and the other where application was made by a *bona fide* settler. Neither of these classes

of cases covers the facts here presented. Reynolds simply made an application, which was not allowed to go of record, as asserted by counsel, and made no allegation of settlement. He is therefore not in the position of one whose entry has been erroneously canceled, nor is he in the position of one who is a *bona fide* settler, but stands as a naked applicant for the land.

It is true that the case of *Bardon v. Northern Pacific Railroad Company*, *supra*, overruled the prior holdings of this Department, and if it had been made prior to the decision in 9 L. D., *supra*, Reynolds' application would have been allowed; but the decision then given became *res judicata*, and the subsequent decision rendered by the supreme court cannot, and does not, affect the status of this particular case.

For the reasons given, the motion is dismissed, and the former decision of this Department is re-affirmed and adhered to.

PRACTICE—NOTICE OF DECISION.

WEED v. SAMPSEL.

Written notice from the General Land Office to the resident attorney of record in a case that "action has this day been taken" therein, is sufficient notice of an adverse decision.

The rule that requires a copy of the decision to accompany the notice thereof is not applicable where the notice is sent by the General Land Office to attorneys of record resident in Washington.

Secretary Smith to the Commissioner of the General Land Office, December 5, 1894. (J. I. H.) (E. M. R.)

This case involves lot 9, block 56, Guthrie, Oklahoma Territory, and is before the Department on application for a writ of certiorari from your office decision of April 26, 1894, refusing to forward the appeal of Edwin A. Weed from your office decision of March 30, 1894.

The record shows that on March 30, 1894, your office decision in the case of *Edwin A. Weed v. John A. Sampsel*, for the above described tract was rendered in favor of the defendant, and on the same day a letter was addressed by your office to Padgett and Forrest, attorneys for Weed, as follows:

WASHINGTON, D. C.,

March 30, 1894.

Messrs. PADGETT AND FORREST,

Attorneys-at-law, Washington, D. C.

GENTLEMEN: As attorneys for Edwin A. Weed in the matter involving lot 9, block 56, Guthrie, Oklahoma, you are advised that action has this day been taken in the case of *Edwin A. Weed v. John A. Sampsel*. Reference is had to your letter of May 26, 1894.

Very respectfully,

EDWARD A. BOWERS,
Acting Commissioner.

April 19, 1894, the townsite board addressed a letter to Mr. Weed, in which it was said:

You are advised that under date of March 30, 1894, the Honorable Commissioner of the General Land Office has, by his letter "G" of March 30, 1894, decided said lot contest in favor of Sampsel. Twenty days from notice are allowed in which to comply with the requirements of the Commissioner or to appeal from his decision to the Honorable Secretary of the Interior.

April 17, 1894, Padgett and Forrest served their appeal upon the attorneys for Sampsel, and filed the same with the Commissioner.

April 26, following, the Commissioner refused to forward the said appeal because not taken in time.

May 11, Weed filed his petition for writ of *certiorari*.

The only question at issue, made by the application here, is whether the notice given by your office to the resident attorneys in this city, of March 30, 1894, is such a notice as is contemplated under the rules and meets their requirements.

The time allowed for appeal in all Oklahoma townsite cases is ten days. (12 L. D., 187.)

Counsel for Weed contend at length, that your office should have notified them that a "decision" had been rendered, and not that an "action" had been taken. I fail to see any force in this position in view of the fact that the two words are often used interchangeably in the rules of practice and in the departmental decisions.

This being the case, and the appeal having been eight days too late (provided the notice served on March 30, 1894, was a proper one) I am brought to a discussion of the question as to the sufficiency of the notice shown.

In *Dougherty v. Buck* (16 L. D., 187), it was held:

A motion to dismiss an appeal because not taken in time can not be sustained where it appears that notice of the decision did not contain a copy of the same, and that the appeal was, consequently, taken within the required time from the receipt of such copy.

And again in *Augustus H. Berry* (18 L. D., 192), it was said:—

An appeal should not be refused on the ground that it is taken out of time if a copy of the adverse decision is not served on the appellant.

In the latter case it appears that the attorneys were non-residents, and while this does not appear to have been set out in the former decision, in view of what is hereinafter set forth, such must have been the case.

The rules of practice do not require that a copy of the decision of your office should be served with the notice. This practice was established by departmental decision in view of the fact that where the attorneys were non-resident, it often happened that neither they nor their clients, were in a position to have access to the records of the local office, by reason of their places of residence being remote therefrom, and in order that such litigants might have an opportunity to properly form their appeal and specification of errors, this holding was made.

But this Department has never held that a copy of your office decision should be served upon resident attorneys, because the reasons that were potent in the former class of cases would not apply where the attorneys were residents of the city of Washington. All that the rules require in the service of a decision of your office upon resident attorneys, is that notice shall be given in writing.

The records of your office are open to the inspection of the resident attorneys, and upon receipt of such notice as was given in this case, it became the duty of the attorneys, by an inspection of the records, to secure such information as was necessary for the prosecution of their cause.

In *Watt et al. v. The Columbia Townsite* (18 L. D., 139), in passing upon the question of time allowed for appeals in townsite cases, it was held, *inter alia*,—

As said instructions provided for an exception to the regular practice, failure to comply therewith will not defeat the right of the appellant to be heard where it appears that his action was based upon the construction of said requirement adopted by the local office.

In that case the notice stated that thirty days were given for appeal, and the decision, *supra*, exercised the supervisory power with which I am clothed, in order that no hardship should result from following the order given officially.

But it cannot be maintained here that the letter of the townsite board to Mr. Weed in anywise misled him as to his rights in the premises in relation to his appeal, because the record shows that the appeal was filed two days prior to the reception of that notice by Mr. Weed, and, consequently, it could not have misled him, or caused his failure to appeal within the proper time.

As this case does not come within the rule laid down in *Watt et al. v. The Columbia Townsite*, I do not think a proper showing has been made for the exercise of discretionary authority.

For the reasons stated, your office decision is affirmed and the application for certiorari is hereby denied.

HOMESTEAD ENTRY—MEANDED STREAM.

CHARLES C. HILL (ON REVIEW).

A homestead entry, canceled in part on account of embracing land on both sides of a meandered stream, may be reinstated, in the absence of any adverse claim, it appearing that said stream is not in fact meandered within the meaning of the law and regulations.

Secretary Smith to the Commissioner of the General Land Office, December 5, 1894. (J. I. H.) (E. W.)

Your office letter of October 9, 1894, transmitted a motion for review of departmental decision of July 22, 1892 (15 L. D., 98). Said letter of

transmittal also contained the statement that "lot 5, Sec. 7, the portion of said entry canceled, is still vacant public land as shown by the records of this office."

The ground of motion for review may be substantially stated as follows: It appears that during the month of March in the year 1887, said Hill made homestead entry for a tract of land in the Burns land district, in the State of Oregon, through which runs a stream known as the Silvies river. It appears further that your office in March, 1891, suspended the entry "for the reason that the tract is on both sides of a meandered stream and therefore not contiguous."

Hill appealed to the Department from your said office decision which appeal contains an admission that the said Silvies river was a meandered stream. This fact being conceded in his appeal to the Department, the case was for that reason adjudged against him.

Subsequent to the decision under review, on February 19, 1894 (18 L. D., 135), the Department, in the case of *ex parte* James Smith, decided that the said Silvies river is not a meandered stream within the meaning of that term as used in the manual of surveying.

The contention of Chas. C. Hill is that inasmuch as it has been subsequently decided that said river is not a meandered stream, and further, inasmuch as that portion of his original homestead which he was required to surrender is still vacant and unappropriated, he should not be estopped from availing himself of the full benefit of the provisions contained in the homestead laws. He therefore requests the Department to recall so much of the decision under review as requires him to surrender a portion of the land included within the limits of his original homestead entry, and that his homestead be reinstated in full.

The departmental decision is modified in conformity with the request contained in the motion for review, and your office will therefore direct that the homestead entry of Chas. C. Hill be re-instated as originally made, if there be no other intervening legal obstacle.

STEWART v. DOLL.

Motion for review of departmental decision of March 31, 1894, 18 L. D., 309, denied by Secretary Smith, December 6, 1894.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

JOHN W. GREEN.

The location of a soldier's additional homestead, under a certificate of right obtained through a transfer of the soldier's right, at a time when such action was held invalid by the Department, will not preclude the perfection of an additional entry subsequently made by the soldier and transferred to purchasers in good faith.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (J. I. P.)

By your letter of April 6, 1894, you transmitted to this Department the motion of C. A. Creel for the review or modification of the decision of the Department of February 19, 1894, 18 L. D., 129, cancelling the soldier's additional homestead entry No. 12,946 of John W. Green for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 9 S., R. 53 W., Denver, Colorado, land district, made August 23, 1888.

It appears that your office on June 5, 1878, issued to Green a certificate showing that he was entitled to an additional entry of forty acres. This certificate was located August 10, 1885, in the name of Green, on the NE. $\frac{1}{4}$ of Sec. 22, T. 19 E., R. 13 E., Sacramento, California, land district.

Green, by his affidavit, which is corroborated by his wife, Mrs. M. J. Green, states that his last entry, made in the Denver district, was made in good faith, and without any knowledge on his part that your office had ever issued any certificate in his name, or that any entry had ever been made thereon. But it is further stated in his affidavit that prior to the 5th of June, 1878, he did, at Hope, Midland county, Michigan, execute some paper pertaining to his additional homestead right in the nature of an application and two powers of attorney, which were executed in blank, and that he never was informed that the certificate had been issued in his name; having never heard from the papers so executed, he presumed they were void and had been destroyed. He further states that he received \$40 for the execution of these papers, and that they were executed in blank as to the grantees, and that they were made without any reservation whatever in favor of him as to any lands that might thereafter be located with said papers, or any benefit whatever that might flow therefrom, and that he was not informed, and did not know, that a certificate would or could issue in his name.

It is evident that the papers executed by Green were in the nature of an absolute sale of his additional homestead right, and that the location of said certificate in the Sacramento district was made by the party, or his transferee, to whom said sale was made.

That location at the time it was made, conferred no rights whatever on Green's transferees, as under the law and the rulings of the Department at that time, a soldier's additional right was held to be a personal one, and its transfer held to be invalid for any purpose. (John M.

Walker, 7 L. D., 565; Circular of February 13, 1893, 7 L. D., 567; G. A. Morris, 17 L. D., 512, and authorities there cited.)

It is urged that the entry in the Denver district was made in absolute good faith, and that after entry he conveyed the land to Creel, who files this motion.

The decision of February 19, 1894, held the Denver entry for cancellation, on the ground that Green did not come to the Department with clean hands; that the Sacramento entry, and final certificate issued thereon, must be followed by patent, by virtue of the act of March 3, 1893, 27 Stat., 593, which provides that soldier's additional homestead entries that have been made and initiated upon a certificate issued by your office of the right to make such entry, although invalid for any cause, where there is no adverse claimant, may be perfected by the purchaser paying the government price for the land.

At the time Green made his soldier's additional entry in the Denver district there was no legal barrier thereto, as the entry in the Sacramento district was invalid for reasons above stated, and patent had not issued thereon.

It is shown in the motion that the land embraced in the Denver entry has been platted as a town site, and that several parties, innocent purchasers in good faith, have acquired interests therein; that several buildings and two stores have been erected on said tract. It is further shown that the tract located in the Sacramento district does not appear to be claimed by anybody, and that no application has ever been made to purchase said tract under the act of March 3, 1893.

It is clear to me that there was no impediment to Green's additional entry made at Denver, and that the rights acquired by the subsequent purchasers in good faith to the land embraced in said entry are valid and subsisting rights.

Section 148 of the sundry civil act of August 18, 1894, declares all sales of soldier's additional certificates heretofore made to be valid, and all entries made by *bona fide* purchasers thereof are directed to be approved, and patents directed to be issued in the name of the assignees.

If the above section confirms and makes valid the entry made by Green's assignees at Sacramento, a question which I am not now called upon to decide, still it does not and can not affect the rights of innocent purchasers in good faith acquired under the Denver entry, which was made at a time when the Sacramento entry had no legal validity, and was no legal barrier thereto.

It follows, therefore, that the additional homestead entry of Green for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 9 S., R. 53 W., Denver, Colorado, land district, made August 3, 1888, should be held intact, and that patent should issue thereon.

The motion is allowed; the departmental decision of February 19, 1894, is modified as above set forth.

SETTLEMENT—APPLICATION—PROTEST—FINAL PROOF—EQUITABLE ACTION.

WALKER v. SNIDER (ON REVIEW).

Settlement on land covered by the entry of another confers no right as against the entryman.

An application to make entry of land embraced within the uncancelled entry of another gives the applicant no right, even though the statutory life of the record entry had expired at the date of said application.

Where a homesteader, under instructions of the General Land Office, submits final proof after the expiration of the statutory life of his entry, and a protestant, without interest, appears, and objects thereto on the ground of the entryman's failure to submit his proof within the period provided by law, said protestant does not have such an "adverse claim" as will defeat equitable action on the final proof if it be found otherwise satisfactory.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (P. J. C.)

I have considered the motion for review filed by counsel for Benjamin Snider of departmental decision of June 18, 1893 (Walker v. Snider, 16 L. D., 524), wherein your office decision rejecting his final proof and holding his homestead entry for lots 1 and 2, Sec. 28, and lots 1 and 2, Sec. 29, T. 164 N., R. 56, Grand Forks, North Dakota, for cancellation, was affirmed. In the consideration of the motion I have found it necessary to re-examine the record.

It seems that Snider made homestead entry of said tract November 13, 1882, and offered commutation proof November 17, 1883. Robert Walker filed contest against the entry, and a hearing was had, which finally resulted in departmental decision of February 12, 1886, awarding the land to Snider (4 L. D., 387).

Snider did not make payment and final entry, as he might have done under said decision. On November 14, 1889, Walker presented his application to make homestead entry, and also an uncorroborated affidavit of contest, alleging failure of Snider to reside upon and cultivate the land, abandonment, and that he had not offered final proof within seven years from date of entry. The record does not show what action the local officers took in regard to this application to enter and contest.

On November 22, 1889, the local officers rejected Snider's application to make final proof, "for the reason that there is pending against said entry a contest filed November 14, 1889, by Robert Walker." Snider, with his application to make proof, filed an affidavit setting forth the proceedings in the former contest, and says that at the time of receiving notice of departmental decision in that case he had not the means wherewith to pay for the land, and under advice of his attorneys and the local officers decided to live on the land and submit proof before his homestead entry expired; that he renewed his residence thereon and has continued to reside on and improve the land; that he had intended

to make final proof within time, but that by reason of his duplicate receipt being with the papers in the former case, he did not definitely know the date of the expiration of his homestead entry. He appealed from the rejection of his application to make final proof, and your office, by letter of December 30, 1889, decided, after having recited the claims of both parties in full, that

in view of the foregoing the appeal is sustained, and the applications dismissed. You will advise the parties in interest hereof, and claimant that in event of this decision becoming final, further correspondence will be had in relation to his final proof.

On January 9, 1890, the order for final proof by Snider was granted by the local officers, and March 5, following set for the day of taking the same before the local office. The record shows that on the latter date the claimant appeared

also appears at the same time and place Robert Walker, in person and by his attorneys, Bangs and Fisk, and make protest against the acceptance of said proof, on the ground and for the reason that the same has not been made within seven years from date of entry, and that the adverse right of aforesaid Robert Walker has intervened.

The proof was offered, Snider cross-examined, and the testimony of Walker taken.

As a result the local officers recommended that the entry be allowed and referred to the board of equitable adjudication. Walker appealed, and your office reversed their judgment, and the Department affirmed your action (16 L. D., 524), on the grounds that Walker's "contest" had intervened before Snider took any action toward making final proof, and that it is only cases where there is no adverse claim that can be referred to the board of equitable adjudication.

Review of this decision is now asked on the grounds: (1) that it was error to hold that Walker had obtained any adverse right by reason of his contest, which should operate to prevent the confirmation of Snider's entry by the board of equitable adjudication; and (2) error in holding that Snider had not resided upon this land as required by law.

The protestant in his testimony and otherwise in the record seems to rely entirely upon his supposed rights under his original settlement. This matter is *res judicata*, having been determined adversely to him in the case reported in 4 L. D., 387, and will not be inquired into again. His attempt at making his residence on the land since that decision is merely colorable at best, as he admits living elsewhere with his family during the winters 1865-6 and 1887-8, and says he has "resided there off and on ever since." But admitting, for the sake of argument, that his residence has been such as the law demands, he could acquire no rights as against Snider, because the land was segregated by his entry, and Walker's presence was as a trespasser only.

Neither did he acquire any right by the presentation of his application to make homestead entry, because, although Snider's time had expired in which to make final proof, yet his entry was still of record,

and no further entry could be permitted until that was canceled (*Goodale v. Olney*, 13 L. D., 498; *Maggie Laird*, Id., 502).

His affidavit was not and could not be treated as a contest. It was not verified as prescribed by the rules, and on a presentation of the whole matter by both parties under Snider's appeal from the rejection of his application to make final proof, it was decided by your office that the appeal of Snider should be sustained, and the applications of Walker for entry and contest should be dismissed. Walker abided by this decision, and it is therefore conclusive of the questions there presented.

Up to this point therefore Walker acquired no adverse right to the land, either by settlement, application to enter, or contest. How, then, is he here? The answer to that is conclusive by the record as made by the local officers. He appears simply as a protestant against the acceptance of Snider's proof, and the sole ground of his protest, in the light of what has been said above, is the failure of Snider to make proof within seven years.

I think it may be said that the entry of Snider was then a matter of investigation by the government. Your office had sustained his application to make final proof. The only question involved there was one between the government and the entryman. The government, speaking through your office, has said his proof might be submitted. The issue under the protest was one with which the government was perfectly familiar; there was no doubt that the proof was not made within the limited period; the entryman admitted it under oath, gave his excuse therefor, and your office held it sufficient, and permitted him to proceed. Under these circumstances it seems to me that the protestant has not such an adverse claim that would defeat the reference of the entry to the board of equitable adjudication.

The local officers were not without fault in this matter. It was their duty to have notified the entryman of the expiration of his entry and require him to show cause why it should not be canceled, under the circular of December 20, 1873 (1 C. L. O., 13). In the absence of their performance of this duty, the action of your office in sustaining Snider's appeal had virtually the same effect.

I am not aware of any case that goes to the length of holding that the act of any person without interest in the land, a mere informer or protestant, such as Walker is shown to be, acquires such an "adverse claim" as contemplated by circular of April 10, 1890 (10 L. D., 503), as would defeat reference to the board of equitable adjudication.

The decision for review of which this motion is filed appears to hold that Snider's failure to reside upon the land is sufficient to defeat his right thereto. But on further consideration of this case I am inclined to think that holding erroneous. In the first place, under the charges of the protest this was not an issue, and might well be dismissed without further comment. But I am constrained to believe that this finding of fact was not justified. The testimony shows that shortly

after Snider submitted his first final proof in 1883; and it had been accepted, he moved off the land, as he had the right to do, and also took off the original house, and lived elsewhere, until he decided he would not make payment under his commutation proof. He then moved back on the land, in the meantime having built a good residence and made other improvements, including a barn and necessary out-houses. During all the time, however, he had continued to cultivate the land, and raised crops thereon, having fifty acres in cultivation. His residence was continuous after November, 1886. Whatever apparent default there may have been in the continuity of residence was cured long prior to any attempt of Walker to assert a claim to the land, and he cannot be heard to object thereto. Moreover, all these matters were considered by your office in its said decision of December 30, 1889, and was binding on Walker.

It is clear to me that the error in the decision of which this is a review was in treating Walker as a contestant. In that capacity the Department recognizes such an adverse right as would defeat reference to the board of equitable adjudication. Under the facts as stated in said opinion, the conclusion is correct, but a re-examination of the record convinces me that Walker does not appear in the status of a contestant, but merely as a protestant, and as such cannot defeat the right of Snider to have his entry accepted and so referred.

It is therefore ordered that Snider be permitted to complete his entry, and that the same be then referred to the board of equitable adjudication for confirmation.

Said departmental decision of June 16, 1893, is recalled and revoked.

DONATION CLAIM—RESERVATION—EXECUTIVE ORDER.

JAMES MAXCY.

An executive order, reserving land for light-house purposes, will not take effect upon land embraced within a donation claim under which due compliance with the law has been shown prior to the issuance of said order.

*Secretary Smith to the Commissioner of the General Land Office, Decem-
(J. I. H.) ber 6, 1894. (J. I. P.)*

By your office letter "D" of September 8, 1894, you transmitted to this Department for consideration and examination the application of the transferee of James Maxcy for patent to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lots 2 and 3, Sec. 12, T. 22 S., R. 13 W., Roseburg, Oregon, land district.

The facts in the case are, that James Maxcy, on June 22, 1857, filed at Roseburg, Oregon, notification No. 971, for the lands above described, under the 5th section of the act of September 27, 1850 (9 Stat., 496), and the acts of February 14, 1853 (10 Stat., 158), and July 17, 1854 (10 Stat., 305), amendatory of said act of 1850.

On January 1, 1858, Maxcy made proof of having occupied and cultivated said land from April 1, 1853, to January 1, 1858.

October 2, 1868, the local officers at Roseburg, Oregon, forwarded to your office the appeal of Maxcy from their action in refusing to issue a certificate in the above case, on the ground that a portion of said land, namely, lot 3, had been reserved for light house purposes by your office letter "C" of January 10, 1860, in accordance with the President's order of December 27, 1859.

By decision of your office, dated February 18, 1874, it was held that the reservation of said lot 3 by the President's order of December 27, 1859, could not affect Maxcy's right to a certificate and patent for his claim, as it was perfected so far as residence and cultivation was concerned, nearly two years prior to the date of the reservation, and that Maxcy was entitled to a certificate upon furnishing the necessary proof and paying the fees prescribed by law. Certificate No. 2002 was accordingly issued to Maxcy August 15, 1877, for all of the lands above described; but in view of the fact that a portion of said claim seems still to be used for light house purposes, the matter has been referred here by your office for examination.

It is virtually admitted that Maxcy had fully complied with the requirements of the law necessary to entitle him to a certificate and patent. At any rate, there is no showing to the contrary. The filing of his notification of June 22, 1857, was a segregation of the land claimed by him. (John J. Elliott, 1 L. D., 303). Having complied with all of the requirements of the statute necessary to entitle him to a certificate and patent, his right thereto became vested.

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., 402.)

And further—

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the land to another party is void, unless the first location be vacated and set aside. (*Wirth v. Branson*, 98 U. S., 118.)

In this case, Maxcy's right to a patent having become vested almost two years prior to the order of the President definitely locating the light house reservation, it could not be affected by that order. Hence it follows that the issuance of final certificate No. 2002 to Maxcy, on August 15, 1877, for the lands described, was proper, and patent should issue thereon.

CERTIORARI—APPEAL—NOTICE OF DECISION.

PROUTY v. CONDIT.

An application for certiorari will be granted where the right of appeal is denied on the ground that it was exercised out of time, and the record does not show that notice of the decision appealed from was served on the applicant.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (J. S. H.) (E. M. R.)

This case involves lot 2, block 60, Guthrie, Oklahoma, and is before the Department on an application for certiorari by Lottie Condit from your office decision of July 18, 1894, refusing to forward the appeal filed by her, from your office decision of March 28, 1894, because not taken in time.

The record shows that on August 25, 1890, Frank G. Prouty applied to townsite board No. 1, for the above described tract. On the next day Lottie Condit made a like application.

Hearing having been had on December 22, 1890, to pass upon the question thus raised between the adverse claimants, the townsite board decided the case in favor of the defendant, Lottie Condit.

Upon appeal, your office decision of March 28, 1894, reversed the findings of the townsite board and awarded the land to Prouty.

Your office decision shows that on May 26, 1894, an appeal was filed by Attorney Fred M. Elkins; and it is further stated that Prouty on April 3, 1894, filed an affidavit setting forth that "he does not believe that Fred Elkins has the right to accept service on behalf of Lottie Condit," and requesting that you "require Fred Elkins to show his authority for accepting service in said cause or appearing in any manner in said action."

It appears, further, that Elkins filed before the townsite board a letter received from Mrs. Lottie Condit Ritter—the defendant having married subsequent to the initiation of the proceedings in this case—requesting him to look after her interest.

This authority was not deemed sufficient by the townsite board and an attempted service of notice was made upon Mrs. Ritter herself.

Your office decision complained of sets forth: "The registry receipt is addressed to Mrs. Lottie Ritter, formerly Miss Lottie Condit, Pueblo, Colorado, and dated April 24, 1894, and the return receipt is signed Mrs. L. Ritter per A. A. Ritter."

It is well settled that the service of notice of a decision must be made upon the attorney or the party in interest. This notice must affirmatively appear. *Harris v. Llewellyn* (18 L. D., 439).

In the case at bar it appears, on the contrary, that Mrs. Ritter did not receive the notice. Counsel for appellants appeals to the supervisory power with which I am clothed, but in view of what the record

shows it becomes unnecessary for me to consider the question of whether such a case is made as would justify its use.

The record shows no service of notice upon Mrs. Ritter. The town-site board having held that Attorney Elkins produced no competent authority to act as attorney, it follows that proper service of the decision should have been made upon Mrs. Ritter, which has not been done.

You will therefore certify to this Department the record in the case and suspend all further action until the matter is passed upon as presented by the record.

DUFFY QUARTZ MINE.

Motion for review of departmental decision of March 23, 1894, 18 L. D., 259, denied by Secretary Smith, December 7, 1894.

PRACTICE—MOTION FOR REVIEW.

MULLER v. COLEMAN.

A question as to the correctness of the record comes too late, when raised for the first time on motion for review.

Secretary Smith to the Commissioner of the General Land Office, December 6, 1894. (E. M. R.)

This is a motion for review by Sherrard Coleman in the above entitled case, of departmental decision of April 16, 1894, which reversed the decision of your office and canceled the filing of the defendant. The land involved is the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 13 N., R. 9 E., Santa Fe land district, New Mexico.

The record shows that Sherrard Coleman filed a coal declaratory statement on March 29, 1890, for the SW. $\frac{1}{4}$ of said section, township and range, alleging possession on February 15, 1890.

On the same day Frederick Muller filed a like declaratory statement for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the said section, alleging possession from March 26, 1890.

On the third day of May following, Coleman applied to purchase said land as coal land under the act of congress of March 3, 1873 (17 Stat., 607), which application was suspended by the local officers and Frederick Muller notified, who then appeared and filed a protest.

A hearing was had at which a decision was rendered in which it was held that Coleman was disqualified from making entry by reason of the fact that he was a deputy United States surveyor. Upon appeal your office decision of October 13, 1892, decided that Coleman was not under contract with the United States during the year 1890, as a deputy United States surveyor, and, upon the facts as disclosed by the

evidence, it was held that Coleman had a preference right of purchase to the land.

Upon a motion for review your office, by decision of December 24, 1892, held:

A further examination of the records of this office disclose that February 15, 1890, and thereafter, Coleman was under contract with the Department for the survey of certain public lands.

But it was further held in said decision that a deputy United States surveyor was not an employé in the office of the Commissioner of the General Land office as defined in the McMicken case, and therefore the motion for review was refused.

Muller appealed to this Department, and in the departmental decision complained of dated April 16, 1894, the decision of your office was reversed, it being held that the position occupied by Coleman came within the inhibition of section 452 of the Revised Statutes, which is as follows:

The officers, clerks and employees of the General Land office are prohibited from directly, or indirectly, purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section will forthwith be removed from his office.

And in the case, *supra*, 10 L. D., 96, it is held that this inhibition applies to any of the branches of the public service under the control and supervision of the Commissioner of the General Land office.

Your office decision was, therefore, accordingly reversed.

In the motion for review now before the Department it is set out that while the evidence shows that in reply to the question asked Coleman as to whether he was a deputy United States surveyor his reply was "yes," as a matter of fact the reply that he really made was "I do not know."

The brief sets out:—

whereupon the register and receiver undertook to decide the question and having reached the erroneous conclusion that he was a deputy, directed the clerk to put down the reply "yes."

It is now asserted that his commission as a deputy United States surveyor had expired a year prior thereto with the term of office of Surveyor-General George W. Julian, and that he was not re-appointed a deputy by Surveyor-General Edward F. Hobart until nearly a year thereafter.

This question was not raised before the Department when the former decision was rendered, though the decision of the local officers and of the Commissioner of the General Land office, on motion for review, had stated that he was a deputy United States surveyor. Nor does it appear that the movant objected to the answer with which he is accredited at the hearing; now, for the first time, he undertakes to raise the question in a motion for review.

This is not, I think, permissible. It appears from his own answer that he was a deputy United States surveyor; the records of your

office—so it is stated in your decision—show that at the time of making the filing he was a deputy United States surveyor. He had his opportunity to contradict this at the hearing; he failed to do so then, and, subsequently, when the case appeared before your office and this office, and the question is now raised too late to be favorably considered. In a motion for review the movant will not be allowed to question the correctness of the record.

For the reasons stated the motion is refused.

FLORIDA PHOSPHATE LANDS—ACT OF OCTOBER 1, 1890.

GARY *v.* TODD (ON REVIEW).

The act of October 1, 1890, with respect to settlement claims on Florida phosphate lands is retrospective in character, applying exclusively to cases arising prior to April 1, 1890; and under the provisions of said act an entry made prior to said date will not be canceled, on account of the subsequent discovery of phosphate, if at the date of the entryman's settlement he had no knowledge of the existence of phosphate deposits on his claim.

Secretary Smith to the Commissioner of the General Land Office, December 7, 1894. (J. L. McC.)

The Department is in receipt of three motions, filed by Clarence C. Todd and his attorneys, for review of departmental decision of February 12, 1894 (18 L. D., 58), in the case of Thomas R. Gary against said Todd, directing the cancellation of his homestead entry, made September 18, 1889, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and Lot 3, of Sec. 11, T. 18 S., R. 19 E., Gainesville land district, Florida.

The ground of said decision was that Todd made the entry with the knowledge that the land embraced therein contained a valuable deposit of phosphates.

The motions will not be treated separately. The only one of the numerous allegations of error that need be considered is, in substance, that the decision is not sustained by a preponderance of the evidence—accepting the testimony as given to be true. Furthermore, the applicant for review, in connection with his motion, swears "that the evidence given by Poacher and Abston is wholly untrue, and he believes that all of their said evidence was given for the sole purpose of reward and compensation, and in a malicious way," and files the affidavits of others tending to show that such was the case. I think these affidavits need not be considered.

The local officers, after giving a full resume of the testimony of the witnesses, find:

It is clear from the evidence that the existence of phosphate in Citrus county—
(Not upon the land in controversy, but in the county in which it was situated)—

was not generally known in September, 1889, at the time when defendant made his homestead entry; yet it is equally clear that the fact of its existence was known to

some of the citizens of Citrus county, even prior to the month of September, 1889. . . . It is clear that the defendant complied with the law as to residence, cultivation, and improvement; and were it not for the statements made by him to the witnesses who testify in behalf of the contestant there would be no difficulty in reaching a favorable conclusion in his behalf. . . . This contest having been initiated prior to the passage of the act of October 1, 1890, we hold that the determination of the issue is dependent on the statute in existence at the time the contest was commenced, and can not be in any way affected by legislation passed after its commencement and prior to the close of proceedings pending at the date of the passage of said act. Holding this view of the case and that he knew at the time said entry was made that the land was more valuable for mineral than for agricultural purposes, we recommend the cancellation of homestead entry No. 19,502.

As one factor, and manifestly a highly important one, in leading the local officers to their conclusion, was their opinion that the act of October 1, 1890 (26 Stat., 662), had no application to entries made prior to that date, such conclusion might be to a considerable extent vitiated if it should appear that this opinion was incorrect, and that said act does not refer to and affect entries made prior to its passage. It reads as follows:

That any person who has in good faith entered upon any lands of the United States in the State of Florida, subject at the date of said entry to homestead or pre-emption entry, and has actually occupied and improved the same for the purpose of making his or her home thereon, under the homestead or pre-emption laws, prior to the first day of April, anno domini, 1890, shall have the right, upon complying with the further requirements of the law, in other respects, to complete such homestead or pre-emption entry and receive a patent for the lands so entered, occupied and improved, notwithstanding any discovery of phosphate deposits upon or under the surface of any of said lands after such entry was made: *Provided*, That the entryman had no knowledge of the existence of such phosphate deposits upon the land which is subject of such entry at the date when the settlement thereon was made.

It will be seen that the act is entirely retrospective; that it applies, and that exclusively, to entries made "prior to the 1st day of April, 1890"—of which this entry of Todd's is one.

In all cases of attempts to defeat an existing entry, the burden of proof is on the party attacking its validity.

In the case at bar, it must be shown that the phosphate deposit was "upon the land which was the subject of the entry"—not upon land in adjacent counties, or even upon adjacent lands in the same county.

It must be shown that the entryman had "knowledge"—not simply suspicion or hope—of the existence of such deposits on his claim.

The local officers avowedly ignore the law passed especially for the protection of certain entries made on phosphate lands in Florida, and largely base their decision adverse to the defendant on the fact that phosphate was about that time being found in other parts of Citrus county and in adjoining counties; and that Todd expressed a suspicion and hope that some might be found on his land.

The question at issue is, whether it is shown that, at the date of his settlement, Todd had knowledge of the existence of phosphate deposits on his claim.

This renders necessary an examination of the evidence.

I have therefore carefully re-examined the voluminous testimony taken in the case. I do not deem it necessary to recapitulate the same. It is sufficient to say that, as the result of such examination, I find the evidence entirely insufficient to show that the entryman knew of the existence of phosphate on his claim at the date of settlement—which was some time in November, about two months after entry (September 18, 1889).

The departmental decision heretofore rendered, directing the cancellation of the entry, is therefore hereby recalled and revoked; the decision of your office, dated April 2, 1892, is affirmed; and the contest is dismissed.

ABANDONED MILITARY RESERVATION—ACT OF AUGUST 23, 1894.

FORT JUPITER.

An abandoned military reservation in the State of Florida, placed under the control of the Secretary of the Interior prior to the act of July 5, 1884, should be disposed of under the act of August 18, 1856, unaffected by the act of August 23, 1894.

Secretary Smith to the Commissioner of the General Land Office, November 22, 1894. (E. W.)

I have considered your office letter of October 5, 1894, requesting an "early decision of the question whether the Fort Jupiter abandoned military reservation, Florida, is to be disposed of under the act of August 18, 1856, or under the act of August 23, 1894."

Your office letter above mentioned states that—

The following military reservations in the State of Florida were placed under the control of the Interior Department on the dates named after each, in accordance with the provisions of the act of August 18, 1856 (11 Stat., 87), viz:

Fort Brooke, January 4, 1883;

Fort Jupiter, March 16, 1880;

Hospital Lot (St. Augustine), October 15, 1883;

Blacksmith Shop Lot (St. Augustine), October 15, 1883.

The first section of the act of August 23, 1894, reads as follows:

That all lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public-land laws of the United States, and a preference right of entry for a period of six months from the date of this act shall be given *bona fide* settlers who are qualified to enter under the homestead law and have made improvements and are now

residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act; *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal instalments, at times and rates of interest to be fixed by the Secretary of the Interior.

It will be observed that the above-mentioned act is limited in its application to "any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the act approved July 5, 1884, the disposition of which has not been provided for by a subsequent act of Congress," etc.

In the case of *Mather et al. v. Hackley's Heirs*, on review (19 L. D., 48), the Department determined the legal status of the Fort Brooke military reservation, which is manifestly the same as that of the Fort Jupiter military reservation. In the above mentioned case, the act of 1884 (23 Stat., 103), is construed as follows:

It will be noticed that by the terms of the act itself, as viewed in the light of the ordinary rules of construction, it is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

The President therein is empowered to place under the control of the Secretary of the Interior, such lands as "have become, or shall become useless for military purposes."

But the land formerly embodied in the Fort Brooke military reservation had been on January 4, 1883, relinquished and transferred by the Secretary of War to the Interior Department and thus restored to the public domain before the passage of said act; therefore, there can be no reason why the President should consider their value for military purposes, in the sense contemplated by said act.

The scheme contemplated by the statute was the restoration of useless reservations. At that time the land in controversy did not belong to any reservation. I am of the opinion, therefore, that the act of 1884 has no application in the disposition of the lands belonging to said reservation.

I am, therefore, of the opinion that the Fort Jupiter reservation should be disposed of in accordance with the provisions of the act of August 18, 1856.

PRACTICE—APPEAL—PRE-EMPTION—FINAL PROOF.

MURPHY v. LOGAN.

When notice of a decision is given through the mails by the local office ten days additional are allowed within which to file appeal, without regard to the date when the appellant actually receives said notice.

The act of March 2, 1889, withdrawing all public lands (except those in Missouri) from private entry did not repeal the distinction between offered and unoffered lands made in the pre-emption law.

A pre-emptor in the submission of final proof is warranted in relying on the certificate of the register as to whether the land is "offered" or "unoffered."

If a pre-emptor offers final proof in the presence of an adverse claim he must stand or fall on the proof so offered.

Secretary Smith to the Commissioner of the General Land Office, December 8, 1894. (F. W. C.)

I have considered the case of Daniel W. Murphy v. Wm. Logan, involving the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lot No. 2, Sec. 30, T. 52 N., R. 20 W., Duluth land district, Minnesota, on appeal by Murphy from your office decision of July 31, 1892, accepting the final proof tendered by Logan and holding for cancellation Murphy's homestead entry covering said land.

On April 1, 1890, Logan filed declaratory statement No. 5185 for this land, alleging settlement March 29, preceding.

On May 21, 1891, Murphy made homestead entry No. 5358 for same land.

In accordance with published notice Logan submitted proof on July 29, 1891, against the acceptance of which Murphy protested, and upon said protest, hearing was set for August 10, 1891, but, by consent of parties, was continued to September 15, 1891.

On August 12, 1891, counsel for Logan moved to dismiss the protest by Murphy because it alleged only conclusions of law; was not sworn to nor corroborated.

On September 15, 1891, the motion was granted, but Murphy was permitted to cross-examine Logan and his witnesses to his proof and also offered testimony in his own behalf.

Upon the record as made, the local officers differed; the register holding that Logan's proof was made in time but did not show adequate residence and improvements, and should, therefore, be rejected, but that further time should be afforded him to make proof and that Murphy's entry should be canceled, because made in the interest of one John W. Cameron.

The receiver held that, as the land had been offered, the proof was out of time more than twelve months from alleged settlement; that it did not show compliance with law and, in the presence of an adverse claim, must be rejected and the filing canceled, and that the showing made did not warrant a finding that Murphy's entry was made in the interest of Cameron.

Your office decision finds that the proof was offered out of time, but holds that the same should be accepted as it shows a *bona fide* attempt to comply with the law, and, in conclusion, states "it is not deemed necessary to go, at this time, into the *bona fides* of Murphy's entry."

From said decision Murphy appeals, said appeal having been filed in the local office October 6, 1892.

Counsel for Logan moves to dismiss said appeal because filed out of time.

It appears that notice of your decision was given the parties through the local office by mail, the letters being registered July 28, 1892, and the notice was received by Murphy on August 1, 1892, as evidenced by the registry return receipt.

It is claimed therefore that the time for appeal began to run on August 1, 1892, and that the appeal to be in time must have been filed by October 1, 1892.

Rule 87 of Practice provides that where notice of a decision of your office is given through the mails by the register and receiver

Five days additional will be allowed by those officers for the transmission of the letter, and five days for the return of the appeal through the same channel.

In the case of *Haley v. Harris* (13 L. D., 136), it was held:—

When notice of a decision is given through the mails by the local office, ten days additional are allowed within which to file appeal, irrespective of the time actually required for the transmission of said notice.

Murphy's appeal is therefore in time.

The appeal does not raise any question as to the dismissal of Murphy's protest, but this does not seem to have in anywise interfered with the hearing of the case, and need not be further considered by this Department.

Your office decision states that this land was offered on December 4, 1882, by proclamation No. 877.

It is plain, then, that under the law, proof should have been made within twelve months from date of settlement, namely, by March 29, 1891.

The register finds the proof to have been made in time, because he holds that the act of March 2, 1889 (25 Stat., 854), in withdrawing all lands except in the State of Missouri from private entry, removed all difference between the two classes of lands, viz., offered and unoffered lands, and that since the passage of said act, all lands should be considered as unoffered and thirty-three months from settlement allowed within which to make proof under the pre-emption laws.

I can find no such purpose in the said act as could be construed as repealing the limitations contained in the pre-emption laws.

It appears further, that the fact that this land was offered land was overlooked by the local officers at the time Logan made filing therefor, and he was given a receipt numbered under the unoffered series, with the time of expiration given as December 29, 1892.

In the case of *Grant v. McDonnell* (18 L. D., 373), it was held that a pre-emptor, in the submission of his final proof is warranted in relying on the certificate of the register as to whether the land is "offered" or "unoffered," consequently, it must be held that Logan's proof was offered in time.

It is well established, however, by the rulings of this Department, that where a pre-emptor offers proof in the presence of an adverse claim, he must stand or fall upon the proof as offered.

It is claimed on behalf of Logan that he visited this land and cleared a small spot of ground in March, 1890; that he began the erection of a log house in April, which was finished the following month, in which he lived until July 5, 1890. During this time he cleared and cultivated less than an acre of ground and planted a portion to potatoes.

Prior to filing for this land he had been working on the D. & W. R. R., distant about two miles from the land in question. In July he left to work on the D. & I. R. R. for the reason, as given by him, to earn better wages. While so engaged he was distant about seventy-two miles from the land. In October following he visited the land for a day or so, and claims to have gathered about five bushels of potatoes from his garden, which he carried to the railroad to give to a friend. He was not upon the land again until the latter part of May, about May 23, 1891, when he remained continuously upon the land until his offer of proof in July following.

From a careful review of the testimony I agree with the receiver, who, in summing up the case, states—

I cannot conclude that Logan has shown a degree of effort to comply with the law that would warrant me in saying that good faith is apparent. He is a single man, has work about two miles from his claim, and it would seem that he might have continued in that employment and, by being in the vicinity of his land, be enabled to maintain a residence thereon, without loss to his pocket. It is true he says he went away for better wages and could not make a living from his work on the D. & W. Road—near the claim—but I believe the latter statement is an exaggeration. He does not show what his remuneration was, and if he earned greater wages on the D. & I. R. R., he does not appear to have spent any part of his surplus on the claim.

There is nothing definite shown as to who did the clearing, or how much money Logan paid anyone for help on the improvements, and it would seem a just deduction from the testimony that the house was built, except the roof and finishing, by his friends the section crew, and the clearing was done in a great measure, by cutting logs for the house. On this testimony I am inclined to the belief that Logan could have made a much better showing if he had been actuated by an honest purpose to comply with the law, and that he has not manifested good faith.

As to Murphy's connection with the land, it is shown that Cameron is his brother-in-law; that one Linnell, an explorer, secured "minutes" on this land which were sold to some one whose name is not given, who sold them to Cameron; that Murphy did not have any regular employment and that Cameron, being interested in him, offered to advance all the expenses incident to the entry of this land, Murphy to repay him when able.

Both Cameron and Murphy take the stand and swear positively to this condition of affairs, and both swear that Cameron has no interest in the land neither present nor prospective.

Your opinion states that "Murphy knew, when he made his homestead entry, that Logan had returned to the land, and was living in his cabin."

Murphy swears that he was not upon the land until after he made entry, and I find nothing in the record to support your finding. It must have been based upon the theory that Murphy should have made examination before he filed.

From a careful review of the testimony I must hold that no such showing has been made as would warrant a forfeiture of Murphy's home-

stead rights, and without this Logan could not be granted further time even if good faith in the matter of compliance with law had been shown on his part, which, however, the record does not show.

I must, therefore, reverse your decision and direct the cancellation of Logan's filing. Murphy's entry will stand subject to compliance with law.

PRACTICE—APPLICATION TO ENTER—APPEAL.

CARR v. RHINEHART.

An appeal from the rejection of an application to enter land will not be entertained in the absence of notice to an adverse claimant of record.

Secretary Smith to the Commissioner of the General Land Office, December 10, 1894. (J. I. H.) (G. B. G.)

The land involved herein is 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. 17, T. 3 S., R. 38 W., Oberlin, Kansas.

The record shows that one Abram Maples made timber culture entry for the tract September 6, 1890, said entry having been cancelled on the contest of one Mary F. Duncan, by your office letter of August 31, 1892.

On October 17, 1892, the defendant, Samuel W. Rhinehart, made homestead entry for the tract.

It appears further, that the said contestant, Duncan, was notified on October 14, 1892, by registered mail, of the cancellation of the said Maples' entry, and of her preference right to enter said tract.

On November 14, 1892, the plaintiff, Emmons W. Carr, filed his application to make homestead entry for the tract, which was rejected by the local officers, because of the prior entry of Rhinehart.

On appeal to your office, the applicant states that he established settlement and residence on the land October 13, 1892, and that on that same day Rhinehart made his application to enter, which was allowed on the 17th of the same month.

Your office held that his ground of appeal was without merit, for the reason that the statements made in the application to enter, "are not corroborated, or even sworn to", and sustained the action of the local officers in rejecting his application.

On further appeal of the applicant to the Department, it is assigned as error that the aforesaid finding of fact by your office, does the applicant an injustice, since it is alleged that "said statement was both corroborated and sworn to," and asks that "if the corroborated sworn part of said appeal is not with said appeal, that said Carr be allowed to file a duplicate of same, or copy, or new corroborated and sworn statement, as required by the rules."

An examination of the record shows that the statement referred to is unverified, and without corroboration, and judging from the general

appearance of the files, it is very improbable that there has ever been a verification or corroboration on file.

There is abundant blank space on the paper on which the statement is written, for verification. That would have been the proper place for it, and there is no reason why it should have appeared on a separate piece of paper.

Be this as it may, there is another reason why the claim of the applicant can not be considered on present presentation.

An appeal from the rejection of an application to enter land will not be entertained in the absence of notice to an adverse claimant of record. Horace H. Barnes (11 L. D., 621).

It does not appear of record that the entryman Rhinehart had any notice of the appeal to your office, and it should have been dismissed for that reason, in addition to the reasons urged by your office.

The decision appealed from is affirmed.

HOMESTEAD ENTRY—AMENDMENT.

NIKOLAI MARTENSTON.

An application for permission to change a homestead entry, based on the alleged worthless character of the tract covered by the existing entry, will not be granted, where it appears that the applicant did not make a personal examination of said tract prior to making entry thereof.

Secretary Smith to the Commissioner of the General Land Office, December 10, 1894. (G. B. G.)

On April 18, 1892, Nikolai Martenson made homestead entry for the SW. $\frac{1}{4}$ of Sec. 32, T. 120 R. 52, Watertown land district, South Dakota.

On July 30, 1892, the said entryman filed his application in the local office, asking that he be allowed to amend said entry, by relinquishing the aforesaid tract, and embracing in lieu thereof, the fractional SW. $\frac{1}{4}$ of Sec. 7, T. 119 R. 52.

In the application it is alleged, substantially, that the land embraced in said entry is covered with water and stone, and is wholly unfit for cultivation. That the applicant is a Norwegian by birth, having been in this country only two years previous to that time; that he is unable to speak or read the English language, and is not familiar with the laws and customs of the United States. That at the time he filed on said tract of land, he had been informed that the land was vacant; that all of the land in the Sisseton reservation, of which the land entered is a part, was good agricultural land; that the land in said reservation was being rapidly appropriated, and that his only chance to get land was to file at once, and that he used all the diligence that the circumstances of the case would permit.

That he has, since making the entry, examined the claim carefully, and finds it worthless, as before stated.

It is further alleged that he has not sold or relinquished any part of said claim.

These statements are corroborated by two witnesses.

This presents a case which appeals strongly for equitable relief, but an examination of the law governing applications of this character, and the precedents of the Department in analogous cases, shows that no relief may be had.

Sections 2369, 2370, 2371 and 2372, of the Revised Statutes, and section 7, of the act of March 3, 1891, (26 Stat., 1095), contain all of the provisions of the law relative to a change or correction of entries. Section 2369 provides for a change of entry where there appears to be error in the public records, or some mistake has been made through the fault of the government officers, and by section 2370, the provisions of the preceding section are extended on certain conditions, to cases where patent may have been issued for the land. Section 2371 extends the provisions of the preceding sections to errors in the location of land warrants.

Section 2372 is authority for correcting mistakes made by the entryman himself, but this is limited to "a mistake of the true numbers of the tract intended to be entered". And section 7, of the act of March 3, 1891, (*supra*) provides only for the correction of clerical errors.

It will be readily observed that the mistake on which the application in the case at bar is predicated, is not of that character contemplated by the law. It is true, that there is a mistake as to the character of the land, but such mistake is directly chargeable to the applicant's laches, in that he failed to make a personal examination of the land before making his entry, and this Department has uniformly and often held that an amendment is unauthorized unless it appears that the record fails to express the original intention of the entryman, and specifically it has been held that an entry made without examination of the land, may not be amended. *Ex parte Josephus A. Pyle* (3 L. D., 361); *Aloys Eck, et al.* (7 L. D., 219); *Alexander Morris* (9 L. D., 376); *Charles A. Vincent* (14 L. D., 632); *Lizzey Peyton* (15 L. D., 548).

The decision appealed from, denying the application aforesaid, is hereby approved and affirmed.

TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW.

SMITH v. GLEASON.

A timber culture claimant, who enters a tract covered by a swamp selection, is required to comply with the timber culture law, pending the right of the State to be heard in defense of the selection.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (C. W. P.)

This record presents the appeal of William H. Gleason from the decisions of your office of April 10, 1893, and July 21, 1893, respec-

tively, in the case of J. H. S. Smith against William H. Gleason, involving the SW. $\frac{1}{4}$ of Sec. 12, T. 27 S., R. 37 E., Gainesville land district, Florida.

This tract is a portion of the land selected by the State of Florida, on January 16, 1885, under the act of September 28, 1850.

Gleason made timber culture entry of said tract September 19, 1887, wherein he alleges, that the land in its natural state, is not swamp and overflowed, and rendered thereby unfit for cultivation. The governor of Florida was theretupon notified, under the provisions of the circular of December 13, 1886, (5 L. D., 279). He replied, in writing, that he did not desire to defend the State's claim.

The local officers thereupon reported that fact to your office, and on April 23, 1888, your office finally rejected the State's claim, and directed the local officers to notify the parties in interest. It does not appear that notice was given to Gleason.

On January 9, 1892, Smith filed a contest against said entry, charging failure to comply with the law in the matter of cultivation and planting.

A hearing was had, and the local officers sustained the contest. Gleason appealed. Your office affirmed the judgment of the register and receiver, and Gleason appeals to the Department.

Gleason does not deny that he has not complied with the timber culture law, but offers as a reason for his non-compliance with the law, that until after notice of the termination of the State's claim, he did no regard himself as required to comply with the requirements of the timber culture law. Your office very properly held that such position could not be sustained.

If, pending a final decision in a contest, on whatever ground or charge, the entryman, whose claim is attacked, is required to continue to comply with the law, (*Byrne v. Dorward*, 5 L. D., 104), how much stronger reason is there that an entryman on lands claimed as swamp lands, should be required to comply with the law governing his entry, pending the right of the State to apply for a hearing to prove the swampy character of the land. The entryman makes his entry at his peril, and if it should be on lands belonging to the State, it would be no one's fault but his own. There is no analogy to the case of *Mallet v. Johnston* (14 L. D., 658). Gleason was not a contestant claiming a preference right. He had already made his entry under the circular of December 13, 1886.

The judgment of your office is affirmed.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

SHAFER *v.* BUTLER.

The right of purchase under section 3, act of September 29, 1890, accorded to persons in "possession", is limited to those holding under deed, written contract with or license from the railroad company.

The right of purchase conferred by said section upon persons who have settled on said lands with intent to secure title through the company, can not be exercised by one who, prior to the passage of said act, had not established his residence on the land.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (J. I. H.) (F. W. C.)

I have considered the appeal by J. M. Butler from your office decision of June 5, 1893, holding his homestead entry covering the SE $\frac{1}{4}$, Sec. 17, T. 3 N., R. 33 E., La Grande, Oregon, subject to the right of purchase in E. B. Shafer, under the provisions of section three of the act of September 29, 1890 (26 Stat., 496).

The land in question is a portion of that appertaining to the unconstructed part of the Northern Pacific railroad, the grant to aid in the construction of which was forfeited and restored to the public domain by the act of September 29, 1890 (*supra*).

On July 14, 1891, Lucy Shafer, wife of the present contestant, filed notice of her intention to purchase this land under the 3rd section of the act of forfeiture.

On January 22, 1892, Butler made homestead entry of the land, and on February 13th following, E. B. Shafer filed a contest against said entry alleging that he settled upon said land on June 2, 1890, with intention of purchasing the same of the company; that he had valuable improvements thereon and was entitled to purchase under the third section of the act of forfeiture, and asked that a hearing be ordered at which he might establish his right of purchase to the end that Butler's entry be canceled and he be permitted to make purchase.

Upon said contest hearing was ordered, the testimony being taken under rule 35 of practice.

Both parties appeared at the time set before the commissioner to take the testimony, and after contestant had been sworn and began his testimony, Butler moved the dismissal of the contest because the facts stated in the affidavit are insufficient upon which to base a contest.

This motion was disregarded by the local officers and found to have been filed too late by your office decision.

The argument of the case shows that the motion relied upon the ground that the affidavit of contest did not state that the contestant had applied to purchase the land.

It is shown that the contestant had, however, applied to purchase before instituting this contest.

This fact I do not deem material, however, for the reason that Butler's entry was a segregation of the land and no other entry could be allowed until the same was canceled.

Accepting the motion as filed in time, I must dismiss the same as the affidavit alleged sufficient upon which to order the hearing.

The testimony shows that this land was first claimed by Bluford Stanton for about eight years, during which time he occupied the same and made valuable improvements thereon. How he held the land, whether under contract or license from the company, or intending to acquire title from the United States does not appear.

He sold to J. M. Elgin, who in turn sold to L. D. Shafer, the brother of contestant.

L. D. Shafer came into possession of the land in 1888 and held the same until the latter part of May, 1890, when he sold to contestant for \$3,000.

Contestant was then living upon a homestead upon which he made proof in 1891.

In the purchase of this land he used some money belonging to his wife, and the transfer, which was a quit claim deed, was made in her favor.

The greater portion of the discussion of the case is confined to the question as to whether she or her husband was legally entitled to possession under the deed, but with the view I take of the case, this question is immaterial.

Admitting that contestant was in possession under said deed, yet as it is not shown that he, or those before him in possession, held the land under deed, written contract with, or license from the company, such possession does not entitle him to purchase the land under section three of the act of forfeiture.

He claims the right of purchase as one who had settled said tract with a *bona fide* intention to secure title through purchase of the company, but the record fails to sustain such claim.

It is unnecessary to inquire whether his purchase of the improvements upon this land, made at the time alleged, can be held to have been made in good faith with the intention of looking to the company for title, for the reason that it is shown that he had not established his residence upon the land prior to the passage of the act of forfeiture, but was at that time living upon other lands held under the homestead laws, for which he completed title in 1891.

He is, therefore, not qualified to purchase as one who had settled said tract with a *bona fide* intent to secure title of the company, under the provisions of section three, of the act of forfeiture, and I must, therefore, reverse your office decision and direct that the contest be dismissed. See James C. Daly (17 L. D., 498); Same, on review (18 L. D., 571).

PRACTICE—SECOND CONTEST.

KING ET AL. v. GUNNELS.

A second contestant can not question collaterally the sufficiency of the evidence upon which a judgment of cancellation was rendered in a prior contest against the same entry.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (C. W. P.)

This controversy involves the SW. $\frac{1}{4}$ of Sec. 4, T. 15 N., R. 6 E., Guthrie land office, Oklahoma Territory.

The record shows the following facts: John Gunnels made homestead entry of said land October 13, 1891. On November 16, 1891, Wm. A. Bowman initiated contest against said entry. The case was set for hearing. Contestant failed to appear, and no action was then taken.

On June 16, 1892, James M. King filed affidavit of contest against the same entry, alleging abandonment by both Bowman and Gunnels. After due notice, a hearing was had. Bowman and Gunnels made default. Testimony on behalf of King was submitted. The local officers dismissed Bowman's contest, and recommended the cancellation of Gunnel's entry.

July 2, 1892, pending the contest of King, James Montgomery initiated a contest against said entry, alleging abandonment. The contest of Montgomery was inadvertently set for hearing for October 17, 1892, when the attorneys for King filed a motion to suspend action on said contest of Montgomery until King's contest was finally adjudicated.

On December 15, 1892, the attorney for Montgomery filed a motion that his contest be considered the first contest. This motion was overruled, and the affidavit of contest of Montgomery held to be the second contest. Montgomery appealed to your office.

Montgomery's contention was that the contest of King, filed June 16, 1892, was premature, in that he can show that the entryman had not abandoned his entry six months, at the time King filed his affidavit of contest, etc.

Your office overruled this motion of Montgomery, who now appeals to the Department.

In the case of Campbell against Middleton (7 L. D., 400), it is held that a second contestant cannot question collaterally the sufficiency of the evidence upon which a judgment of cancellation was rendered in a prior contest against the same entry.

The decision of your office is accordingly affirmed.

RESERVATION—PREFERRED RIGHT OF CONTESTANT.

JEFFERSON E. DAVIS.

Whatever preferred right a contestant may have, on the cancellation of the entry under attack, is defeated by an intervening proclamation by the President declaring the establishment of a forest reservation that includes the land embraced within the contested entry.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (A. E.)

This is an appeal from your office decision of June 24, 1893, rejecting the application of Jefferson E. Davis, made May 13, 1893, to purchase the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 30, T. 9 S., R. 25 E., Stockton, California, under the provisions of the timber and stone act.

The application of Davis was rejected by the local office, because "the land is shown by our records to be a part of the 'Sierra Forest Reserve,' as defined by the proclamation of the President, transmitted to this office by the Honorable Commissioner's letter 'P' of March 21, 1893. From this rejection Davis appealed, claiming that he had a preference right of entry of said land because he was a successful contestant of one Bacon, whose entry was held for cancellation by departmental decision of March 13, 1893, and his rights were preserved by the President's proclamation making said forest reserve.

On June 24, 1893, your office affirmed the local office, because the lands applied for were withdrawn on March 14, 1892, for a forest reservation, and established as such reservation by the President's proclamation on February 14, 1893; and further because Davis could not claim any right to make said purchase by reason of having successfully protested the acceptance of the final proof of said Bacon, whose entry was canceled. From this Davis appealed to this Department.

The land applied for was included within the reservation referred to, and said reservation took the same beyond the operation of the land laws, and being by authority of law and not containing a provision excepting the rights of successful contestants from the force and effect of the reservation, it destroyed any privilege which the applicant might otherwise have had, had said reservation not been made.

Your office decision is therefore affirmed.

WAGON ROAD GRANT—FINAL PROOF—SPECIAL NOTICE.

CALIFORNIA AND OREGON LAND CO. v. MERRILL.

A settlement claim existing at date of withdrawal excepts the land covered thereby from the operation of a wagon-road grant.

A wagon road company is not entitled to special notice of a settler's intention to submit final proof, if it has no specific claim of record for the land claimed by the settler.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (J. I. P.)

The tracts included in this controversy are 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. 27, T. 30 S., R. 42 E., Lake View, Oregon, land district, and are within the primary granted limits of the grant of July 6, 1864, to the Oregon Central Military Wagon Road Company (13 Stat., 355). Your office decision states that said company's maps of definite location were filed February 28, 1870, withdrawal on which was made May 2, 1876. The township plat was filed March 29, 1883, and on July 17, 1883, James P. Merrill filed his pre-emption declaratory statement for the tracts described, with others, alleging settlement thereon July 3, 1869.

After due notice thereof, by posting and publication, Merrill made final proof before the local office November 12, 1883, and final certificate No. 288 was issued to him December 13, 1883.

Your office held that Merrill's settlement on the land in 1865, and his continuous residence thereon from that date, excepted the tracts involved from the operation of said grant, because in existence at the time said grant went into effect.

The California and Oregon Land Company, successors to the Oregon Central Military Wagon Road Company, appealed from that decision to this Department, alleging as errors therein in substance that the land company was entitled to special notice in Merrill's notice of final proof, and that there is a variance between the date of settlement alleged in his declaratory statement and that shown in his final proof, the former being July 3, 1869, while the latter shows it to be in July, 1865. Also that Merrill abandoned his rights under his alleged settlement by not filing his declaratory statement until eight years thereafter, and further that the dates of withdrawal on said grant were made August 12, 1865, and May 18, 1870, instead of May 2, 1876, and that the grant was operative from its date.

The records of your office show that the dates of withdrawal on said grant are as stated by the appellant, namely: August 2, 1865, and May 18, 1870, and that the statement in your office decision, with reference thereto, is erroneous. This fact, however, does not affect the merits of Merrill's claim, as his final proof shows settlement on the tract in question to have been made in July, 1865, which is anterior to the date of the first withdrawal, and under the settled rulings of this

Department in such cases, would operate to except said tract from the operation of said grant.

The contention that Merrill abandoned his rights under his alleged settlement by not filing his declaratory statement until eight years thereafter is without merit. It is true that rights based on settlement must be asserted within the statutory period to be effective as against an intervening entry of another; but appellant is not in the position of an intervening entryman; its rights, if it has any, are under its grant and the withdrawal of August 2, 1865.

If Merrill's settlement excepted said tract from the operation of said grant and withdrawal, even his subsequent abandonment of the tract would not benefit appellant, as the effect of that would be to restore the tract to the public domain, free from any claim of appellant.

The real point in controversy here is that appellant was entitled to special notice when Merrill made final proof, and that he cannot be heard to show a different date of settlement from that alleged in his declaratory statement. The rule of this Department with reference to special notice in cases of final proof is in substance that when final proof is made, all persons who have an adverse claim of record to the specific tract involved are entitled to special notice. (See Instructions, 3 L. D., 112; Reno *v.* Cole, 15 L. D., 174.)

In the case of Central Pacific Railroad Company *v.* Geary (7 L. D., at bottom of p. 150), the rule as above stated is emphasized. The railroad company claimed that by reason of its application to select said lands it should have been specially cited to appear and contest Geary's right to the land. The language of the decision on that point was as follows—

I cannot concur with your office in the conclusion that the company has waived its claim to the land. It had filed a formal protest against the allowance of any entry therefor and it had selected this land as indemnity. This selection by the company constituted it an adverse claimant of record, and as such adverse claimant of record it should have been specially notified of the intention of Geary to submit final proof.

It will be observed that being an *adverse claimant of record* is the test of the right to be specially notified.

Again, in the case of the Oregon Central Military Wagon Road Company *v.* Canter, on review (13 L. D., 174), this same principle was considered. In that case the Department held adversely to the contention of the appellant here. It held that the wagon road company had no claim of record for said tract other than the grant as shown by the definite location of its road, and that Canter's published notice of intention to make final proof was an invitation to every one, with or without interest, to come in and contest claimant's right to the land, citing Manderfield and O'Connor *v.* McKinsey (2 L. D. 580). The Department then went on to say:

The company certainly cannot rightfully claim any greater privilege than settlers, and the latter, unless they have filed applications for the specific tracts mentioned

in the published notices, are not entitled to special notice of the intention of the claimant to make final proof.

In other words, the Department held that the claim of the wagon road company to the tract there involved, by reason of its grant and definite location (which was a blanket claim to all the land within the limits of said grant), did not constitute a specific claim of record to said tract, and hence the wagon road company was not entitled to special notice.

The case of *Reno v. Cole* (15 L. D., 174), would, perhaps, on casual reading, appear to conflict with the well established rule above stated. But a careful examination of that case will show that there is no conflict. Cole was a remote grantee of the railroad company for a tract that had been excepted from the operation of the grant to said company. Reno had made homestead entry for the same tract, and hence was an adverse claimant of record under the rule as above stated. Cole gave notice of his intention to purchase under section five of the act of March 3, 1887 (24 Stat., 556). It would seem that Reno's name was mentioned in the published notice, but that he received no *actual* notice of Cole's intention to purchase. Thereupon the Department held—

While such notification to an adverse claimant need not be a *personal* notice as required on resident defendants in contest cases, yet it should be *actual* notice, either personal or by registered letter (or unregistered letter the receipt of which is shown or acknowledged). I do not think that personally mentioning the other claimants in the published notice, as in this case, is a sufficient compliance with the rule requiring them to be specially notified.

The effect of that decision is that where constructive notice to adverse claimants of record, under the rule stated, had theretofore been deemed sufficient, actual notice, by one of the modes indicated, is now required.

In the recent case of *Andrew Davis* (18 L. D., 525), it was held that specially mentioning the name of an adverse claimant in the published notice is not sufficient, following *Reno v. Cole, supra*.

The doctrine announced in *Reno v. Cole* and the cases following it does not conflict with the cases herein above mentioned, nor change the rule therein declared, that adverse claimants of record shall be specially notified. It simply changes the mode of executing that rule.

The facts in the *Canter* case, *supra*, are identical with those here. If appellant company was not an adverse claimant of record in that case, it is not such in the case at bar.

For the reasons stated, your said office decision is affirmed, and the papers transmitted by your office letter "F" of June 14, 1893, are herewith returned.

Other errors were alleged and considered, but those stated were the vital ones.

TIMBER CULTURE CONTEST—ARID LAND.

ANDREWS v. YOUNG.

A timber culture entry of arid land is made at the risk of the entryman, and his failure to show due compliance with law will not be excused on the ground that irrigation of the land was not practicable.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (C. W. P.)

On January 15, 1887, John Young made timber culture entry, No. 867, of the SE. $\frac{1}{4}$ of Sec. 23, T. 3 N., R. 2 W., Boise City land district, Idaho.

On November 29, 1890, De Forest H. Andrews filed an affidavit of contest against said entry, alleging:

That the land embraced in said entry is arid land, and will not produce an agricultural crop without irrigation, or a proper distribution of water thereon, all of which the claimant, John Young, knew at the date of his entry, and now knows. That during the first year of said entry, the claimant failed to break or plow five acres, as required by law. That during the second year of said entry, and to date, the claimant, John Young, failed to break or plow five acres, required by law, and also that during the second year of said entry, and to date, the claimant failed to cultivate five acres to crop, or otherwise. That during the third year of said entry, and to date, the claimant has failed to properly cultivate any trees, seeds or cuttings, planted by conducting water thereon, or otherwise, and that the above facts fail to show the good intention of said claimant.

A hearing was had before the local officers, who recommended that the entry be cancelled. Young appealed. Your office affirmed the judgment of the register and receiver.

A motion for a new trial was granted, and a new trial had before the local officers. The register recommended the cancellation of the entry; the receiver dissented.

On appeal, your office dismissed the contest.

These are the facts: It is admitted by Young that the land in dispute was arid land at the time of his entry, that timber could not be grown upon it, nor an agricultural crop raised, without irrigation. This was known to Young when he made his timber culture entry.

The first year Young did nothing on the land. At the close of the second year, though well aware that all money and labor expended upon the land would be of no avail without irrigation, Young plowed nearly nine acres. The third year he had some fencing done, and some wheat sowed, and he planted some locust seed and cuttings.

On his examination at the first hearing, when asked, "Did the seed and cuttings grow?", he replied, "I think not." "Why did they not grow?" "Because they had no water." "Why did you not irrigate?" "Because I could not get water. It would cost \$200,000 to build a ditch there."

It also appears from the evidence, that in the year 1889, there had been constructed an irrigating canal within 35 miles of Young's tract,

and in December of that year, he joined with some of the neighbors in an agreement to take water from it, when completed. There was a verbal promise given that water should be delivered during the summer of 1890.

At the second hearing, there was put in evidence a paper, purporting to be a water right certificate, in these words:

For, and in consideration of the sum of one dollar, and other valuable consideration, the receipt of which is hereby acknowledged, The Central Canal and Land Company hereby certifies that there is due and payable to John Young, or his assignus, one water right, representing one cubic foot of water per second of time. . . . The Central Canal and Land Company, upon the surrender of this certificate promise and agree to execute good and sufficient deed.

This paper is dated on the 4th of January, 1890, and recorded in the records of Ada county, Idaho, on the 16th of October, 1891. No mention was made of it by Young in his examination at the first hearing. It was also in evidence at the second hearing, that the canal was completed to the land in dispute, in the month of May, 1891.

Upon consideration of the whole testimony, I think it is quite clear that Young made his timber culture entry as a speculation, based upon the expectation of an enhanced value of the land, when an irrigating canal should be constructed, from which water could be procured.

The idea that what he did upon the land during the three years prior to the initiation of the contest, is evidence of good faith, when he knew, and admits that he knew, the work would be thrown away upon this arid land, which would produce nothing without irrigation, is preposterous.

In *Sampson v. Lawrence* (8 L. D., 511) it is said, "The natural unfitness of the land for the growth of timber, cannot be accepted as an excuse, it appearing that she (the entryman) was cognizant of the character of the land at the time of her entry"; and, in *Chapman v. Zweck* (1 L. D., 123), "A party taking up land in the arid country, without the means of complying with the stringent provisions of the law, does so at his own risk"; and, in *Cummings v. Rudy* (16 L. D., 115), "The land selected is naturally unfitted for the growth of timber, and its arid character must have been known to the entryman when he made the selection. As he made no effort to reclaim the land by irrigation, or in any way fit it for the cultivation and growth of timber, he has not complied with the law."

In the recent case of *Taylor v. Jordan* (18 L. D., 471) it is held, that failure to comply with the letter of the timber culture law may be excused, if there is a reasonable compliance with the law, and good faith is manifest.

In the case at bar, I find neither a reasonable compliance with the law, nor good faith.

The judgment of your office is reversed, and Young's entry will be cancelled.

DESERT LAND ENTRY—ACT OF MARCH 3, 1891.

SAMUEL W. STAVER.

By the amendatory act of March 3, 1891, the right to make desert land entry is restricted to resident citizens of the State or Territory in which the land sought to be entered is situated.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (W. M. B.)

I have considered the case of the United States *v.* Samuel W. Staver, involving desert land entry for 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. 29, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, all in T. 4 N., R. 39 E., Blackfoot, Idaho, land district.

The record shows that Staver, on September 12, 1890, filed affidavit of contest against the timber culture entry made by James Chapman for the lands in said section 29, and that made by William Blackburn for lands in said section 20, and that he secured the cancellation of both entries, and on April 18, 1891, made desert land entry for said land, making final proof June 2, 1891.

It appears that at date of entry and final proof Staver was a resident of Portland, Oregon, and that on November 24, 1891, the local office was instructed by your office to require claimant to show cause why his entry should not be canceled for non-conformity with provisions of the act of March 3, 1891 (26 Stat., 1095), restricting the right to make desert land entries to resident citizens of the State or Territory in which the land sought to be entered is located.

The record further shows that the register, on February 6, 1892, transmitted Staver's affidavit, corroborated by the deputy clerk of the fifth judicial district of Idaho, going to show that at the time of filing affidavit of contest against the timber culture entries he made application for desert land entry before the clerk referred to, on September 12, 1890.

The papers show also that Staver has spent over \$2,000 in the way of improvements and irrigation of this land. The entry seems to have been made in good faith, and it also appears that the passage of the act of March 3, 1891, *supra*, was not known to the register or to Staver at the time of making entry and final proof, and under the circumstances as stated by you that it is a hardship on claimant to lose the land, yet there can be no doubt of the illegality of the entry, for which reason your office decision holding the same for cancellation is hereby affirmed.

CONSTRUCTION OF STATUTES—CONFIRMATION.

SNOW V. NORTHEY ET AL.

Questions relative to the constitutionality of statutes cannot be considered by the Department in the administration of the law.

The official acts of the local office in issuing a final certificate are subject to supervision by the General Land Office and the Department.

An entry may be confirmed, under section 7, act of March 3, 1891, as to a specific tract embraced within the purchase of a transferee, though the entry as an entirety is not within the confirmatory operation of said act.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (G. C. R.)

The case of *Snow v. Northeby et al.*, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 22, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 16 S., R. 6 W., Huntsville, Alabama, was before the Department December 17, 1891, on the appeal of Northeby and Dummett as transferees, from the action of your office denying them a hearing. The Department dismissed their appeal, and returned the case to your office for adjudication, at the same time calling the attention of your office to the allegation that one-half the land involved in the entry was transferred to Northeby prior to March 1, 1888, and directing notice to section 7 of the act of March 3, 1891 (20 Stat., 1095).

The case is again before the Department on the appeal of P. E. Snow from your office decision of October 29, 1892, holding that Northeby, as transferee of the entryman, is entitled to patent for one-half the land, under the provisions of the act of 1891 (*supra*).

The facts are as follows:

One Richard P. Doney made entry of the land on February 23, 1887, and on December 12, following, he submitted commutation proof, and final certificate issued December 21, 1887.

On November 23, 1888, P. E. Snow filed his affidavit of contest against the entry; his affidavit was amended March 29, 1889, and hearing had June 7, thereafter. The entryman made default, but E. T. Dummett appeared in person and V. L. Northeby by counsel, each claiming to be innocent purchasers of the land under warranty deeds. The evidence was taken, and the local officers found that the entryman had "utterly failed to comply with the law," and recommended the entry for cancellation.

Northeby and Dummett applied to the local officers for a new hearing. Their application was transmitted to your office, where, on August 27, 1890, the same was denied. On appeal, the Department dismissed the appeal, but, as above seen, directed the attention of your office to the confirmatory provisions of the act of 1891 (*supra*).

It appearing that the entryman (Doney) had sold the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 23 (one-half the land), by warranty deed, to V. L. Northeby, on January 3, 1888, for the sum of \$250, and that final certificate issued

on December 21, 1887, your office held that the entry was confirmed as to that part of the land, in the absence of any charge of fraud, or proof that the land had been reconveyed to the entryman.

The evidence showing that the entryman had failed to comply with the law as to residence, improvements, etc., and that the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 22 (one half the land) was not sold to Dummett until July 24, 1888, your office directed the cancellation of the entry as to that part of the land.

Dummett has not appealed, but Snow has appealed, claiming that his right as a contestant had become "inchoate" and had attached to said land prior to March 3, 1891, and that the act of that date could not affect the land, provided he prosecuted the contest to a successful termination; that the act is an *ex post facto* law, and is "utterly illegal and expressly contrary to the Constitution of the United States, so far as the land involved in this case is concerned."

Mr. Northey, the transferee, through his attorney, controverts this position, and, while not assuming to represent Dummett, the other transferee, he insists that the entry as a whole should be passed to patent, because final receipt had been issued, which "is equivalent to a patent," and that your office has no jurisdiction over the land after final receipt is issued.

The 7th section of the act of 1891 (*supra*) confirms all entries made under the pre-emption, homestead, desert-land or timber-culture laws, "in which final proof and payment have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which had been sold or encumbered prior to the first day of March, 1888, and after final entry to *bona fide* purchasers or encumbrancers for a valuable consideration." And the fact that a contest had been brought after final entry and before the passage of the act (1891) can make no difference, although alleging a cause, capable of proof, and which, in the absence of the act, would have resulted in cancellation (*Kenoyer v. Gardner et al.*, 13 L. D., 181). If, however, the entry be canceled by a decision which became final before the passage of the act, the entry is not confirmed, nor does the act provide for the reinstatement of canceled entries (*Wiley v. Patterson*, 13 L. D., 452).

The Department seeks to execute the laws as passed and approved; the questions relating to their constitutionality have no place in the executive branches of the government, and can not therefore be considered here. Nor is it necessary to discuss at length the question raised by the transferee as to the legal effect of a final certificate, duly issued by the local officers for land opened to settlement and entry. It is sufficient to say without multiplying authorities that it is the settled rule of the Department that the official acts of the register and receiver in issuing final certificates are subject to supervision by your office and this Department, and may be approved or disapproved. (*Gates v. Scott*, 13 L. D., 303). For if, as contended, a final certificate, in all instances,

is the equivalent of a patent, the act of 1891, specially providing for confirmation of entries in certain cases, would have been wholly unnecessary.

A purchaser of land held under final certificate takes an equity only, and is charged with notice of all defects in the title.

The act of 1891 (*supra*) did not of itself change the legal effect of a final certificate, but was only intended to relieve bona fide encumbrancers and purchasers where, upon the faith of the register's certificate, their money was invested in the land prior to March 1, 1888. *Axford v. Shanks* (on review), 13 L. D., 292.

A more serious question, however, is involved in this case.

It will be noticed that final certificate was issued to the entryman December 21, 1887; there was no adverse claim prior to that date, but only one half the land was sold prior to March 1, 1888—the other half having been sold July 24, thereafter. It is nowhere claimed that these purchases were not made in good faith, or that they were not for a valuable consideration without notice of the non-compliance with the law on the part of the entryman.

In the case of *Bradbury v. Dickenson* (14 L. D., 1), it was held that the sale of an *undivided* interest in the lands covered by an entry prior to March 1, 1888, does not bring the entry within the confirmatory provisions of section 7 of said act.

The sale of an undivided interest in land creates a tenancy in common between vendor and vendee; in such case they hold by unity of possession, "because (in such case) none knoweth his own severalty, and therefore they all occupy promiscuously" (Blackstone).

The sale of an undivided interest in an entry thus leaves the entryman with an interest in the whole tract; if a half interest be thus conveyed, the grantor and grantee are seized *per my et per tout*, each having an "undivided moiety of the whole and not the whole of an undivided moiety." Such an interest remaining in the entryman, it can not be said that he has sold the entry, for the part sold is incapable of identification, and one of the essential elements authorizing confirmation is wanting, namely, *an entry sold*, and hence the doctrine in the *Bradbury-Dickenson* case (*supra*). But when a final entry has been allowed and a certificate has issued, in the absence of an adverse claim, and a distinct subdivision of the land covered by the entry, and duly described, is sold after such entry to a *bona fide* purchaser for value before March 1, 1888, and no fraud is found on the part of the purchaser, the same reasoning can not apply in avoidance of confirmation.

Northey purchased the land in good faith; had he purchased the whole tract, in place of only one-half, the entry as a whole would be confirmed, notwithstanding the failure of the entryman to comply with the law.

The same reasons which induced the passage of the confirmatory act—namely: the relief of the thousands who had invested their

money on the faith of the register's certificates that the law had been complied with, and that patents should issue for the lands—apply with as much force to one who purchases a distinct part of the lands as to one who purchases the whole tract.

I think for these reasons that the entry should be confirmed as to that portion of the lands (above described) which the entryman conveyed to Northey. As to the remaining part of the land, it having been conveyed to Dummett after March 1, 1888, the same should be canceled. It is so ordered, and the decision appealed from is affirmed.

TIMBER CULTURE CONTEST—SECOND CONTESTANT.

CRANE v. HOWE.

Where a contest has been prosecuted to a final determination a second contestant will not be allowed to attack the entry on the same grounds, and covering the same time; but evidence submitted under a second contest, with respect to the status of the entry at a period later than that covered by the first contest, may be properly considered.

Failure of a timber culture entryman to secure the requisite growth of trees does not warrant cancellation where negligence or bad faith does not appear.

Secretary Smith to the Commissioner of the General Land Office, December 11, 1894. (P. J. C.)

The land involved in this controversy is the NE. $\frac{1}{4}$ of Sec. 4, T. 25 N., R. 43 E., W. M., Spokane Falls, Washington, land district.

It is shown by the record that Leonard Howe made timber culture entry of said tract April 1, 1884. On April 13, 1892, George T. Crane filed an affidavit of contest against said entry, alleging that the entryman

did not break 5 acres the first year as required by law, and did not cultivate said 5 acres the second year to crops or otherwise and did not the third year plant 2,700 trees, tree seeds or cuttings to the acre upon said five acres. That he did not break 5 acres of said land the second year. That he never irrigated said land, although irrigation was needed. That he never cultivated the second five acres to crop or otherwise the third year. That he never planted said second five acres to trees, tree seeds or cuttings the fourth year as required by law. That he has failed to properly cultivate any trees on said claim since the entry thereof. That he has failed to protect the timber planted on said claim and by reason of said failure the timber has been greatly damaged by stock. That he is not in good faith endeavoring to comply with the timber culture law and that he has not now growing upon said claim the requisite number of trees as required by law.

Notice of contest was given by publication, and on the day set for hearing appearance for the defendant was entered by attorney through the son of the defendant, whom the testimony shows died on April 16, 1892.

Hearing was had before the local office, and as a result they decided that the allegations were sustained, and recommended the cancellation of the entry.

The defendant appealed, and your office, by letter of April 7, 1893, reversed their judgment, and held the entry intact, whereupon the contestant prosecutes this appeal, assigning error both of law and fact.

The records of your office disclose the fact that one Andrew Raub brought a contest against this entry in 1887, on substantially the same grounds as alleged in the present contest; that a hearing was had in which the local officers recommended the dismissal of the contest, and, on appeal, your office, by letter of November 30, 1891, affirmed their decision. No appeal having been taken therefrom, your office, by letter of July 23, 1892, declared the case closed. It will thus be seen that the former contest had not been finally disposed of at the date when the present contest was initiated.

There is another feature of the case that it is well to mention, and that is that the order of publication in this case was granted April 15, 1892, and, as heretofore stated, the defendant died on the following day. The service by publication was directed to the entryman alone. Your office held, among other things, that this service was not binding upon the heirs.

Inasmuch, however, as the heirs of the deceased entryman voluntarily appeared at the hearing without objection; that the testimony was taken on both sides, a large number of witnesses having been examined, and the case seeming to have been fairly presented by each of the parties; and, inasmuch as from an examination of the record it is evident that the case may be disposed of on its merits as presented, I do not deem it necessary to discuss or decide the two latter suggestions; but with the hope that this may be a final determination of the controversy, base my judgment entirely upon the facts as disclosed by the testimony. To do otherwise, in my judgment, would necessitate the remanding of the case back to the local office for the purpose of correcting errors which affect only the defendants.

It is not the policy of the Department to permit a second contest against a given entry, based upon the same charges. In other words, where a contest has been initiated and carried through to final determination, the Department will not permit another contestant to attack the entry upon the same grounds, covering the same period of time, and thus harrass the entryman with a multiplicity of suits. (*Gray v. Whitehouse*, 15 L. D., 352.) Therefore, it having been determined by your office in its final decision in the Raub case that there had been a compliance with the law up to and including the time of the institution of that contest, to wit: July 12, 1888, the date upon which service of notice was had on the entryman the evidence covering that period in the case at bar will not be considered. But in so far as it is applicable to the time subsequent thereto, it will receive due consideration.

The testimony of the contestant and his numerous witnesses is entirely of a negative character. The only point upon which they testify at all is as to the manner of the cultivation of the land, and they

conclude simply from observation, and by reason of the fact that weeds grew upon the land, that it had not been cultivated during the period. There is not a witness on behalf of the contestant who swears that no trees, tree-seeds or cuttings had been planted during the period. Some of them admit that plowing was done for the purpose of cultivating the land, but the balance say it could not have been done, because of the presence of the weeds that were growing. They all admit that trees have been, and were at the date of the hearing, growing on the land.

It seems to me that the testimony offered by the contestant is not sufficient to sustain the charges in his affidavit. It will be observed that the gist of his affidavit of contest is the lack of cultivation. He does not specifically allege a failure to plant except for the third year on the first five acres and the fourth year on the second five acres. The balance of his charge is substantially failure to cultivate and properly protect the trees.

These same points were considered and decided in favor of the defendant in the Raub contest, and, as hereinbefore said, are not subject of investigation in this controversy. But aside from this, it is affirmatively shown by the persons who did the work upon the land that in 1888, before service of notice of the Raub contest, the ground had been replanted; that in 1889 it was plowed and seeds planted where they were missing from the former plantings, and that in 1891 and 1892 trees were also planted upon the ground. It is true that the number of trees growing upon the land at the date of the hearing were probably not a sufficient compliance with the law as to the number required, but I am unable to find anywhere in this testimony any evidence of bad faith upon the part of the defendant or his agent in making an earnest effort to comply with the law.

For these reasons your judgment is affirmed.

PRACTICE—SECOND CONTEST—HEARING.

PATTERSON ET AL. v. LINDSTROM.

The first contestant in time is entitled to the first process and hearing, and if, for any cause, he fails to sustain his charges, the second contestant in time is then entitled to be heard.

Where several contests are filed they should not be consolidated, or heard at the same time; but where such action is taken, and the several contestants submit testimony that calls for cancellation of the entry, the case may be disposed of on the record so made.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (G. C. R.)

On May 27, 1889, Oliver Lindstrom made homestead entry for the SE. $\frac{1}{4}$ of Sec. 8, T. 11 N., R. 3 W., Oklahoma, Oklahoma Territory.

On July 12, 1889, Clarence Patterson filed his affidavit of contest

against the entry, alleging that the entryman died on or about July 1, 1889, "leaving no heirs."

Subsequently Abraham Clement, William Lewis, Valentine Balzer, and Edwin H. Hall filed contests against the entry, alleging substantially the death of the entryman, and that the unknown heirs abandoned the tract.

The hearing was had August 12, 1891, the contestant Clement making default. Service by publication on the unknown heirs was filed by each of the remaining contestants, and the heirs failing to appear, were declared in default. The several contests were consolidated.

The register and receiver decided that Patterson had failed to establish the truth of his charge, namely, that the deceased entryman had left no heir, and dismissed his contest. That the charges of Lewis, Balzer and Hall, namely, that the heirs of the deceased entryman had abandoned said tract and failed to cultivate or improve the same, was sustained by each of said contestants, and the entry was accordingly recommended for cancellation.

The local officers further held that Balzer was the first to file a contest, the charges of which were established by the evidence; his contest was therefore sustained, and all others were dismissed.

From that action Patterson, Hall and Lewis appealed.

Your office, by decision dated June 8, 1893, affirmed the action of the local office dismissing Patterson's contest. Your office further held that "the consolidation of separate contests is not allowable," and for that reason reversed the action of the local officers in sustaining the contest of Balzer, while a prior one was under consideration, and remanded the case, that "the contest initiated by a second contestant may be taken up and decided from the record transmitted by you."

From that judgment Patterson has appealed.

The record has been very carefully examined. I concur in the finding of your office and the local office that Patterson failed to sustain his charges, and his contest was therefore properly dismissed.

The evidence shows that the entryman died on or about June 30, 1889. Service was had by publication upon the unknown heirs, and the hearing thereafter had established the fact that the heirs, if any, abandoned the land.

The evidence on the part of each of the contestants, Hall, Lewis and Balzer, is sufficient upon which to base a judgment of cancellation, and the only question now to be determined is as to which of the three last named is to be awarded the first or preference right of entry.

In all cases, the first contestant in time is entitled to the first process and hearing; if for any cause he fails to sustain his charges, the second contestant is then entitled to his day in court; but these contests should not be consolidated or heard at the same time; such practice results oftentimes, as in the case at bar, in disputations and wordy conflicts among the several contestants themselves.

The second and all subsequent contests may be received and filed, but no action should be taken thereon until the first is disposed of; if the first contest fails, the subsequent contests may be taken up in their order.

Since the evidence amply justifies a cancellation of the entry, and inasmuch as the register and receiver have decided that Balzer is the second contestant, and decided in favor of him, and Hall and Lewis have appealed from that action, I see no reason why the case should be returned to the local office, "where the contest initiated by the second contestant may be taken up and decided from the record transmitted by you."

The record is therefore returned, with directions that you pass upon the case as presented by the appeals of Hall and Lewis.

The decision appealed from is accordingly modified.

RAILROAD LANDS—SETTLEMENT RIGHT.

STRYKER ET AL. v. BRINKLEY.

The validity of a settlement, as affected by its having been made within the enclosure of another, cannot be questioned by one who at such time had no interest in the land, nor in the improvements thereon.

The right of purchase under section 5, act of March 3, 1887, can not be exercised by one who has rescinded and surrendered his contract of purchase made with the railroad company.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (F. W. C.)

With your office letter of August 25, 1893, were forwarded the papers in the case of J. V. S. Stryker v. John H. Brinkley, involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 4 N., R. 68 W., Denver land district, Colorado, on appeal by Stryker from your office decision in favor of Brinkley.

This land is within the limits of the grant for the Union Pacific Railway Company, and was held to be excepted from that grant upon the application by Cornelius V. Stryker to make pre-emption filing for the same.

Cornelius V. Stryker is the father of J. V. S. Stryker, and it appears that he entered into a contract with the Union Pacific Railway Company in February, 1885, for the purchase of the entire SE. $\frac{1}{4}$ of said section 21. In the following October, learning that there was some question as to the company's right to the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, being the land in controversy, he instituted a contest against the company as to said tract by applying to file pre-emption declaratory statement for the same, which resulted in his favor, as before stated. This decision was rendered in 1888, and before filing his pre-emption declaratory statement on January 17, 1889, he agreed with the company to surrender his old contract covering the entire SE. $\frac{1}{4}$, and was given a

contract for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the money previously paid upon the whole SE. $\frac{1}{4}$ was applied on account of the new contract for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$.

On September 12, 1890, John H. Brinkley filed pre-emption declaratory statement for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, being the land in question, alleging settlement September 6, 1890, and on November 17th following, J. V. S. Stryker made homestead entry for the same land.

In accordance with published notice, Brinkley offered final proof under his filing on September 19, 1891, when he was met by J. V. S. Stryker, who protested against the acceptance of the same, alleging that Brinkley had never made a valid settlement upon the land. At this hearing Cornelius V. Stryker made no appearance in his own behalf, but was present as a witness for his son.

Upon the record as made the local officers recommended the acceptance of Brinkley's proof and the cancellation of the filing by Cornelius Stryker and the homestead entry by John V. S. Stryker. From this decision John V. S. Stryker appealed, which appeal was considered in your office decision of March 20, 1893, which sustained the decision of the local officers and held for cancellation the homestead entry by J. V. S. Stryker.

J. V. S. Stryker has further appealed to this Department.

Since transmitting the record upon the appeal by J. V. S. Stryker you have forwarded the papers relative to the case of John H. Brinkley v. Cornelius V. Stryker, which arose upon the application by Stryker to purchase the land under the 5th section of the act of March 3, 1887 (24 Stat., 556).

At the time of the offer of proof under said application, Brinkley appeared and moved that the same be dismissed, which motion was granted by the local officers, and Stryker appealed therefrom.

As to the first case arising upon the offer of proof by Brinkley, after a careful consideration of the matter, I must affirm your office decision, for the reason that the enclosure of the land by the elder Stryker could not prevent Brinkley from making a valid settlement thereon as against J. V. S. Stryker, who had at that time not attained his majority, and who had no interest in the land nor the improvements thereon until after Brinkley had established an actual residence upon the land.

As between J. V. S. Stryker and John H. Brinkley, I have, therefore, to direct that Stryker's homestead entry be canceled, and that Brinkley be permitted to complete entry upon the proof already made.

In the matter of the case arising upon the application of Cornelius V. Stryker to purchase the land under the 5th section of the act of March 3, 1887, I must hold that no such right of purchase exists, for the reason that by the rescission and surrender of the contract originally made by the company for the entire SE. $\frac{1}{4}$ (with the view of transferring the payments previously made under said contract to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, for the purchase of which a new contract was entered

into), any right of purchase which may have previously existed under the act of 1887 as to the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ was abandoned, and the case arising upon Stryker's application is therefore dismissed.

Your office decision is accordingly affirmed.

ENTRY—SUBMERGED LANDS.**JESSE BURKE.**

There is no law authorizing the entry of submerged lands lying within a navigable stream.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (P. J. C.)

The record shows that Jesse Burke made soldier's additional homestead application for certain lands which are described as "Belle Isle Middle Ground," in T. 2 S., R. 12 E., Grayling, Michigan, land district, April 25, 1892, which was rejected by the local officers, because "the records of this office show no land as within described subject to homestead entry."

On appeal your office, by letter of April 27, 1893, affirmed their decision, whereupon the applicant prosecutes this appeal.

It is conceded by the applicant in his voluminous correspondence in reference to this matter, that what he terms the "parcel of land" applied for is under the waters of Detroit River, from three to five feet deep. It is shown by the chart made under the direction of the War Department, on file in your office, and approved in 1876, that there is no land in the vicinity described except such as submerged at the depth above mentioned. By the original survey of this township, approved in 1818, two small islands, possibly covering part of that sought to be entered, are indicated, but they were not surveyed. These small islands, it is shown by affidavits filed by the applicant, have long since disappeared from the surface of the water.

There is no law to my knowledge that would justify the entry of a "parcel of land" thus submerged in a navigable stream.

Your decision is therefore affirmed.

REPAYMENT—DESERT LAND ENTRY.**S. V. REHART.**

Repayment of the first installment paid on a desert land entry, on the ground that the entryman is unable to secure a water supply, will not be allowed, where the applicant makes entry prior to having secured a water right.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (J. I. P.)

On November 8, 1888, S. V. Rehart filed in the local office at Lakeview, Oregon, a declaration of his intention to reclaim Sec. 14, T. 33

S., R. 18 E., under the provisions of the desert land act of March 3, 1877 (19 Stat., 377), and on the 9th day of June, 1893, he filed in the same office his relinquishment of said tract, together with an application for the repayment of the purchase money paid by him on November 8, 1888, amounting to the sum of \$160.

Said application was transmitted by the local office to your office, which, on July 5, 1893, rejected the application, for the reason that the entryman had relinquished his entry because he was unable to obtain water to irrigate the land, and that the law governing the return of purchase money does not provide for repayment in cases where the parties failed to comply with the law under which they have made their entries.

Paragraph 10 of the instructions of your office of July 27, 1887 (5 L. D., 708), provides that a person who makes a desert land entry before he has secured a water right does so at his own risk, and as one entry exhausts his right of entry, such right cannot be restored or again exercised because of failure to obtain water to irrigate the land selected by him.

The appeal by Rehart from your office decision is substantially upon the ground that he endeavored in good faith to obtain water with which to irrigate said tract, but failed to do so, through no fault of his, and that therefore his application should be approved, and repayment of his purchase money should be directed by this Department.

In the case of Frank A. White (17 L. D., 339), reference is had to all of the legislation of Congress on the subject of repayment of purchase money and fees, and it is there declared that no public officer has power to pay money out of Treasury of the United States without a statute expressly authorizing him so to do, and however just a claim for repayment may be unless there is in existence a statute authorizing repayment by the Secretary of the Interior, no relief can be granted.

The facts in this case are that Rehart purchased an interest in an irrigating ditch prior to the date of filing his declaration of intention to reclaim the tract in question, and after he had expended quite a sum of money in completing said ditch, he was enjoined by certain land owners whose lands lay below Rehart and on both sides of the stream from which he expected to get the water to irrigate said tract. He claims that said injunction prevented him from irrigating his land, although, in fact, he had in good faith done all he could to secure water for that purpose. It will be observed that the purchase by Rehart of the irrigating ditch was not obtaining a water right, and that while he is peculiarly unfortunate in having expended the amount of money he did on said improvements, and still failing to secure water for irrigation purposes, yet he did not comply with paragraph 10 of the order of June 27, 1887, *supra*, in that he did not acquire a water right prior to entry, and hence proceeded at his own risk. His failure is due to no fault on the part of the government. Nor does it appear that the government

could not have approved and confirmed said entry, as the land is clearly desert in character. That being the case, there is no statute in existence authorizing this Department to direct repayment of said purchase money. In this connection reference is had to the cases of Perkins Russel (2 L. D., 691); Arthur L. Thomas (13 L. D., 359); and Edward F. Stahle (13 L. D., 396).

This opinion has been extended beyond a formal affirmance, in order that the facts might be presented which were omitted in your office decision, and that the reasons might be given for the action of the Department in withholding from the appellant the rights claimed by him in the premises.

Your office decision of July 5, 1893, is affirmed.

HOMESTEAD ENTRY—NATURALIZATION—SETTLEMENT RIGHT.**SOMERS v. HEUER.**

A declaration of intention to become a citizen filed by an alien who does not complete his naturalization during the minority of his children, confers upon said children, at the attainment of majority, the status of persons who have filed their declarations of intention.

An allegation of settlement subsequent to that set up in support of a prior adverse entry does not afford any basis for a hearing as against the settlement right of the prior entryman.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (F. W. C.)

I have considered the appeal by Ernest Heuer from your office decision of April 29, 1893, holding for cancellation his homestead entry No. 18,468, covering the NE. $\frac{1}{4}$, Sec. 18, T. 120 N., R. 51 W., Watertown land district, South Dakota.

The land in question is a portion of that formerly comprising the Sisseton and Wahpeton reservation, which was restored to the public domain under the President's proclamation of April 11, 1892, and open to settlement and entry on and after noon of April 15, 1892.

On April 18, 1892, Heuer made entry of the above described tract and in his homestead affidavit alleged settlement thereon one and a half minutes past twelve o'clock, noon, April 15, 1892.

On the following day one W. J. Somers applied to enter the same land alleging settlement thereon two and a half minutes past twelve, noon, of April 15, 1892.

Upon said application the local officers ordered a hearing and cited both parties to appear. Upon the day set for the hearing the plaintiff moved that the case be dismissed for the reason that no formal contest had been filed against his entry, and that the settlement alleged by Somers was subsequent to that alleged by him (Heuer) in his entry of record.

Said motion was overruled and the case proceeded to a hearing.

In the decision as made at said hearing, the local officers found that Heuer was born in Germany and that the filing papers in which he made declaration to become a citizen of the United States was not made until April 18, 1892, hence they found that when Heuer claimed to have made settlement upon the land in question he was not qualified to acquire any rights thereto by settlement, entry or otherwise, and for this reason they recommended that his entry be canceled.

Heuer appealed to your office and on the same day filed a motion to re-open the case for the purpose of introducing evidence to show that at the date of his alleged settlement he was a duly qualified homesteader, and in support thereof submitted his own affidavit and a certified copy of his father's declaration of intention to become a citizen of the United States, which declaration was made on September 29, 1889, and during the appellant's minority.

Your office decision reviewed the case and found that the local officers should have granted the motion to dismiss, filed by Heuer, but as the record failed to show that he was duly qualified at the time of his alleged settlement, said decision sustained the action of the local officers and for that reason held Heuer's entry for cancellation.

In the said decision it is held that—

The disability of alienage of a son, under the settlement and homestead laws of the United States may be extinguished: first, by the naturalization of his father during his minority (9 L. D., 297); second, by his declaration of his intention to become a citizen of the United States when he attains the age of twenty-one years. The record of the case shows that the defendant reached the age of twenty-one years on the 18th day of March, 1892. The motion to re-open the case in view of the foregoing facts and the law, does not, in my opinion, set up facts which, if true and susceptible of proof, would constitute good grounds for granting the motion. It is, accordingly denied.

In the case of *Meriam v. Poggi* (17 L. D., 579), it was held:

The minor child of an alien, who has declared his intention to become a citizen but has not completed his naturalization before the child has attained his majority, occupies under the pre-emption law, the status of a person who has filed his declaration of intention to become a citizen. (Syllabus.)

It must be remembered that this case arises upon the order of a hearing by the local officers, based upon the application by Somers to make entry of this land. No charge was made of disqualification on the part of Heuer; the local officers of their own motion having raised the question of disqualification from the fact that Heuer had not declared his intention to become a citizen until April 18, 1892. In support of his motion to re-open the case a certified copy of his father's declaration of intention to become a citizen made at the time when he was a minor, has been furnished, and under the decision in the case of *Meriam v. Poggi*, *supra*, just referred to, I am of the opinion that the showing made is sufficient to hold that he was duly qualified to make homestead settlement at the time alleged by him in his homestead affidavit.

The application by Somers alleges settlement subsequent to that

alleged by Heuer, and the motion made by Heuer to dismiss the proceedings had upon the order of hearing by the local officers, should have been granted and the case arising thereon is, therefore, dismissed.

Heuer's entry will, therefore, be permitted to stand and your office decision is accordingly reversed.

CONTEST—RELINQUISHMENT—GOOD FAITH.**BANNISTER v. JOHNSON ET AL.**

The purchase of an outstanding relinquishment, and filing thereof, by the contestant, during the pendency of the hearing, does not necessarily affect the good faith of his contest.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (C. W. P.)

I have considered the appeal of Daniel M. Bannister from the decision of your office, rejecting his application to make homestead entry of the SE. $\frac{1}{4}$ of Sec. 28, T. 117 N., R. 61 W., Huron land district, South Dakota.

December 28, 1891, Cora E. Johnson made homestead entry of said land.

February 20, 1892, Daniel M. Bannister filed affidavit of contest against said entry, alleging that claimant has sold and relinquished said entry for a valuable consideration, to one Park Aldrich; that said entry was not made in good faith for the benefit of claimant, but was made for the purpose of speculation and sale.

A hearing was ordered for April 25, 1892. March 26, 1892, Janet E. Morse filed affidavit, alleging that she made settlement March 6, 1892, upon said tract, by building a house thereon, which has since been occupied by her as a residence, and had also offered, March 18, 1892, application to make homestead entry of said tract; that prior to the time she made said settlement, she knew that the relinquishment of Cora E. Johnson's entry had been executed and delivered, and that the same was in the possession of the contestant, and that she was aware of the contest of Bannister.

She further charged that Bannister's contest was not made for the purpose of securing the cancellation of Cora E. Johnson's entry, but for the purpose of withholding in the hands of Bannister the control of the land, and for the purpose of defeating any attempt by her, or any other person, to enforce the cancellation of said entry, and secure lawful title to the land. And she prayed to be allowed to intervene and prove the fraudulent nature of the contest, &c.

At the time and place of hearing Bannister and Janet E. Morse appeared, but the entryman made default.

Bannister and Janet E. Morse were both represented by counsel, and offered proof to sustain their case, respectively.

The evidence shows that on February 19, 1892, Cora E. Johnson executed a relinquishment of the entry in question, upon an agreement (made through her brother) with one Aldrich, who was acting as the agent for Janet E. Morse, to pay her \$200 for her claim. The relinquishment was placed in the hands of a third party, to await the arrival of Aldrich's principal, Miss Morse, then absent, with the understanding that she was not to pay for it, unless she should get the land. Before her arrival, Bannister had initiated his contest: whereupon, Aldrich notified the Johnsons that Miss Morse would not buy the relinquishment.

Subsequently, but after the contest had begun, D. P. Bannister, the father of contestant, bought the relinquishment for his son. It had been offered to him before the contest, but before he agreed to purchase it, he was told by Johnson it had been sold to Aldrich.

Miss Morse then had a small house moved upon the land, and claims to have established residence. This relinquishment was offered by the contestant at the hearing, accompanied with an application for homestead entry of the land.

The register and receiver recommended the cancellation of the entry, and that preference right of entry should be awarded to contestant.

Janet E. Morse appealed to your office, alleging in substance, that her motion to dismiss Bannister's contest should have been granted, and that the decision of the local officers is contrary to the law and the evidence.

Your office affirmed the decision of the register and receiver, recommending the cancellation of Cora E. Johnson's entry, but held that no preference right of entry should be given to the contestant, Bannister, who has appealed to the Department.

The ground of the decision of your office appears to be that the contestant did not prosecute his contest in good faith, and that it was but "a sham contest."

I cannot agree with your office in this opinion. Janet E. Morse, through her agent Aldrich, was seeking to buy the relinquishment from Cora E. Johnson, and I see no reason why Bannister should not himself become the purchaser, for his own protection.

The case of *Butman v. Barrister* (13 L. D., 493) is not in point. In that case, the contestant, Butman, at the time the contest was initiated, had under his control the claimant's relinquishment, which rendered the contest unnecessary. Butman's motive for bringing the contest was shown to be for delay, and to enable him to make final proof of, and dispose of a homestead entry of other land, before the cancellation of Percy's entry, which would entitle him to make pre-emption filing on the contested land. His contest, therefore, was not initiated in good faith; and it was held that he had acquired no preference right on the cancellation of the entry.

I agree with the local officers, that in the case at bar, there is nothing

in the evidence to show that the contest was initiated in bad faith, or for any unlawful purpose, or to show that there has been any attempt on the part of contestant, to commit any wrong or fraud whatever.

For these reasons, the judgment of your office, denying preference right of entry to Bannister, is reversed.

HOMESTEAD CONTEST—HEIRS.**CUDDY v. TOBIN.**

A charge of failure to comply with the law against the heirs of a homesteader cannot be sustained, where such failure is due to the wrongful acts of the contestant.

Secretary Smith to the Commissioner of the General Land Office, December 13, 1894. (I. D.)

The plaintiff in the case of Robert C. Cuddy *v.* the Heirs of Edward J. Tobin appeals from your office decision of April 18, 1893, involving homestead entry for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 1, 2 and 3, of Sec. 4, T. 8 N., R. 19 W., Los Angeles land district, California, wherein it holds said entry intact and dismisses the contest.

Edw. J. Tobin made homestead entry of this land November 23, 1888 and died January 16, 1890. There is no claim that the entryman failed in compliance with the law during his lifetime.

August 15, 1890, Cuddy went upon the land and initiated a contest, alleging abandonment on the part of the heirs.

October 2, 1890, a hearing was had and the local officers recommended that the entry be held intact and dismissed the contest, and your office on March 3, 1892, affirmed that decision.

November 3, 1891, Cuddy filed a second affidavit of contest charging that the heirs of Tobin had never lived upon the land and had abandoned the same, and on March 24, 1892, he filed an amended affidavit charging the continued absence from the land and failure to cultivate by the heirs.

Hearing was had June 6, 1892, and concluded August 16, 1892.

The evidence shows that Robert Tobin, a brother of the entryman, and Mrs. McNulty, a sister, are the sole heirs of the decedent; that the brother lived in New York city and the sister in Philadelphia; that they learned of their brother's death a few weeks after it occurred by a letter from a sister of the plaintiff, but had no knowledge or information of this entry until after Cuddy had gone upon the land and begun a contest; that Robert Tobin is a poor man working in a store in New York city (and the sister also in poor circumstances); but that on learning the facts he went to California and tried to get possession from Cuddy who refused to move off, and he continuously prevented Tobin or his agents from cultivating or improving the land.

The evidence shows that from the time Robert Tobin and his sister knew of this entry, they used all due diligence to get possession and

cultivate and improve the land, but were prevented solely by Cuddy who remained continuously in possession and used the land.

Cuddy cannot sustain the charge that the heirs failed to enter the land and cultivate it, and therefore abandoned it, when their failure was caused by his own acts.

Your office decision is affirmed; the contest will be dismissed, and the entry held intact.

TIMBER LAND ENTRY—CONTIGUOUS TRACTS.

DANIEL J. HEYFRAN.

A timber land entry under the act of June 3, 1878, may not embrace non-contiguous tracts.

Secretary Smith to the Commissioner of the General Land Office, December 14, 1894. (F. W. C.)

With your office letter of September 16, 1893, was forwarded the appeal by Daniel J. Heyfran from the action taken by your office letter of June 13, 1893, in suspending his timber land cash entry No. 393, made on January 18, 1893, for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28 and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 32, T. 14 N., R. 16 W., Missoula land district, Montana, because the said tracts are not contiguous.

The appeal urges that there is nothing in the act of June 3, 1878 (20 Stat., 89), under which this entry was made, requiring that the lands entered be contiguous, and that said action is in conflict with the holding in 2 L. D., 332.

Said reference is to a letter from your office addressed to the local officers at Shasta, California, in which it is stated "that it is the practice of this office to allow entries under the timber-land act of June 3, 1878, to embrace non-contiguous tracts."

I am unable to find any reported case in which this question has ever been considered by this Department, but the discussion made in the matter of the entry of coal lands under section 2347 R. S., would seem to apply with equal force to the case in hand. C. P. Masterson (7 L. D., 172); Same on review (*id.*, 577).

Said section does not in specific terms require that the lands entered shall be contiguous, but the entryman is restricted to one right of entry, and it was held that such entry must be made of contiguous lands.

In the case of private cash entries there is no limitation upon the number of entries and, consequently, the right of entry is not restricted to contiguous lands.

Under the act of June 3, 1878 (*supra*), persons are restricted to one right of entry and I therefore affirm your office decision holding that such entry must embrace contiguous lands.

Subsequent to forwarding Heyfran's appeal, to wit, on December 13, 1893, you transmitted a relinquishment by Heyfran of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$,

Sec. 28, T. 14 N., R. 16 W., which was made conditional upon his right to amend his entry so as to embrace the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 32, T. 14 N., R. 16 W., in lieu thereof.

Under the circumstances, I can see no objection to allowing the amendment, if the lands desired to be included by the amendment are subject to the entry, but if the amendment cannot be allowed it will be necessary for the entryman to elect which of the tracts now covered by his entry he desires to retain, and in the event of his failure to make such election, your office will cancel the entry as to one of the tracts.

TIMBER LAND ENTRY—UNOFFERED LANDS.

ANWAY v. PHINNEY.

The withdrawal of offered lands in aid of a railroad grant abrogates the original offering, and brings them within the category of unoffered lands, and hence, subject to timber land entry if restored to the public domain.

The burden of proof rests upon a timber land applicant to show that the land has its principal value in the timber thereon, and is, moreover, unfit for cultivation.

Secretary Smith to the Commissioner of the General Land Office, December 14, 1894. (W. F. M.)

It appears from the record that on April 1, 1884, James F. Phinney made a cash timber land entry, under the act of June 3, 1878, of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 20, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 29, township 23 N., R. 3 E., within the land district of Seattle, Washington, Olympia series.

On May 5, 1887, Loren B. Anway filed an affidavit of contest alleging that the land covered by the entry is agricultural in character, and not chiefly valuable for its timber, and, therefore, not subject to entry under the timber and stone act.

A hearing was had on this issue on February 8, 1888, and on December 9, 1889, the register and receiver rendered their joint decision recommending the cancellation of Phinney's entry.

The case is now before me on appeal from your office decision holding that the land in controversy falls in the category of offered lands; and pretermining, therefore, a finding on the facts.

The records of your office show that the land in controversy was offered at public sale, at the minimum price of one dollar and twenty-five cents an acre, on July 13, 1863, under the authority of an executive proclamation of date March 20, 1863.

Under the grant of 1864, the Northern Pacific Railroad Company filed their map of general route of its main line on August 13, 1870, and it appears that these lands fell within the primary limits under said location. It is also within the limits of the withdrawal upon the map of general route of the branch line filed August 20, 1873. The main line in 1875 fixed its terminal south of this land, and the limits upon

the map of amended general route of the branch line excluded it, so that the portion in the odd numbered section was restored to entry, after due notice by publication, on September 1, 1879, in accordance with your office letter ("F"); of July 3, 1879.

It has been held by this Department that the withdrawal of offered lands in aid of a railroad grant abrogates the original offering, and on the revocation of such withdrawal the lands are restored to the public domain free of their previous offered condition, and hence not subject to private cash entry. Julius A. Barnes, 6 L. D., 522, syllabus.

This is now the settled rule, and, under its operation, the restored lands reverted to the government free of the character impressed upon them by the original offering.

The fact that the hearing in this cause was had so long ago as February, 1888, and that it has been pending here for more than two years, is deemed sufficient reason for deciding it now on the merits instead of remanding it to your office for that purpose, as is the usual practice.

The register and receiver, before whom the hearing was held found that the land embraced in Phinney's entry "is not unfit for cultivation and chiefly valuable for its timber; that the same is not and was not of the class of lands contemplated to be entered under the act of June 3, 1878, known as the timber land act," and recommended the cancellation of the entry.

In the case of *Houghton v. Junett*, 4 L. D., 238, it was held that

With the language of the timber act as a guide as to what must be proven by the purchaser thereunder, there can be no doubt but that the burden of proof is with him to show that the land applied for has its principal value in the timber thereon and is, moreover, unfit for cultivation. Both of these conditions must be shown to exist before the land is subject to purchase under the act.

Leaving out of view the testimony of the contestant, I do not think the contestee has met either of the requirements imposed by the doctrine as thus stated. Phinney's own estimate of eight hundred thousand feet of merchantable timber on the one hundred and twenty acres in controversy discloses such a sparseness of growth as to throw suspicion upon his entry, in order to sustain which, under such a state of facts, its utter worthlessness for agricultural purposes, would have to be shown.

On the other hand, the witnesses of the contestant, most of whom were farmers living in the vicinage, testified that the land is adapted to the successful cultivation of such agricultural crops as are usually grown in that country. This evidence possesses peculiar weight, and in my opinion should control the case.

In determining what constitutes "land unfit for cultivation," resort must always be had to evidence drawn from the neighborhood of the land, and in such case the testimony of men engaged in tilling the soil must of necessity be held as entitled to the first consideration. *Houghton v. Junett, supra.*

The decision of your office is, therefore, affirmed.

HOMESTEAD CONTEST—ABANDONMENT—RELINQUISHMENT.**BLACKSHEAR v. GRIFFIN.**

Under a homestead contest, on the ground of abandonment, the default will be held to have been cured, where, prior to the issuance of notice the wife of the entryman returns to the land, and it does not appear that he has established a residence elsewhere.

There is no authority under the law for the wife of the entryman to file a relinquishment, binding her husband, where it does not appear that the same is done with his consent.

Secretary Smith to the Commissioner of the General Land Office, December 14, 1894. (E. W.)
(J. I. H.)

The plaintiff in the above mentioned case appeals from your office decision of June 27, 1894, in which you sustain the action of the local officers in recommending the dismissal of plaintiff's contest.

The land involved in this case is the SE. $\frac{1}{4}$ of Sec. 18, T. 4 N., R. 10 W., Gainesville land district, Florida.

It appears that defendant made homestead entry of the tract in controversy on the 23d of November, 1891, and established his residence thereon. It further appears that sometime in the spring of 1892 he left the tract, his wife about the same time, or very soon thereafter, also moving away therefrom.

On the 17th of October, 1892, plaintiff filed his affidavit of contest upon the ground of abandonment. Upon this notice issued from the local office on March 24, 1893.

Between the date of filing the affidavit of contest and the issuing of notice thereon, the wife of defendant returned to the land in controversy.

It does not appear whether defendant did establish a residence elsewhere, nor does his whereabouts seem to be known.

The above stated facts appearing in the testimony taken before the local officers at the trial of the contest, they held that the return of the wife to the land in controversy before notice issued upon plaintiff's contest, cured the laches of the defendant; whereupon they recommended that plaintiff's contest be dismissed.

In this ruling your office concurs.

The law fixes a man's domicil where his family permanently resides, and it nowhere appearing that the defendant after leaving the land in controversy, had established a residence at any other place, I concur in the conclusion at which you have arrived.

Accompanying the record of this case is a letter which purports to be a relinquishment on the part of the defendant's wife, requesting that decision be rendered in favor of contestant.

I know of no authority of law authorizing the wife to file a relinquishment binding her husband, where it does not appear that the same is done with his consent.

Your office decision is accordingly affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.**NORTHERN PACIFIC R. R. CO. v. TRIPP.**

A settlement claim will not defeat an indemnity selection of the land, where at such time the settler was asserting a similar claim, under another law and for a different tract, which he subsequently perfected.

Secretary Smith to the Commissioner of the General Land Office, December 14, 1894. (F. W. C.)

I have considered the appeal by the Northern Pacific R. R. Co. from your office decision of October 18, 1888, holding for cancellation its indemnity selection of lots 1, 2, 3 and 4, Sec. 1, T. 26 N., R. 33 E., Spokane Falls, Washington, on account of the settlement claim of A. W. Tripp.

The land involved is within the indemnity limits of the grant for said railroad company and was selected on account thereof May 14, 1885.

Upon an application by Tripp to make homestead entry, accompanied by an affidavit in which settlement was alleged February 15, 1885, hearing was duly had, the testimony taken thereat showing that Tripp settled upon the land prior to selection, claiming the same as a homestead, and that he has since continued to claim and improve the land until the date of hearing. But it was also shown that at the time of settling upon this tract he was claiming another tract under the pre-emption law, upon which he made proof in July, 1885.

From this state of facts you hold that Tripp had such a claim to the land at the date of selection as would defeat the company's right and its selection is therefore held for cancellation, with a view to allowing Tripp's application; from said decision the company appeals.

The only question presented for consideration in view of the recent decision of the Department in the case of *Jennie L. Davis v. Northern Pacific R. R. Co.* (19 L. D., 87), is as to whether the fact that Tripp made proof upon his pre-emption claim subsequent to date of selection by the company would defeat his rights in the premises under his settlement made upon the land in question under the homestead law prior to the offering of such pre-emption proof.

It is well established by the repeated rulings of this Department that a person can not maintain two claims arising under the settlement laws at one and the same time, and while a person attempting to hold two such claims might abandon one or the other, and thus legalize his claim to the tract retained, the nature of his claim asserted at any given time must be arrived at by a consideration of the facts proven in each given case.

In the case under consideration Tripp had, prior to the date of the company's selection and his alleged settlement upon the tract in question, made pre-emption filing for another tract upon which he made proof in July, 1885, two months after the company had made selection of the land in question. By so doing he abandoned any right of election

he might before have had in the matter of assertion of claim to the land in question, and clearly established the previous acts performed in the matter of improvement of the land in question, as a mere trespass, and as such in nowise interfered with the company's right to make selection to the land under consideration.

In the case of the Northern Pacific R. R. Co. v. Therriault (18 L. D., 224), it was held that

where the facts and circumstances surrounding the use and occupancy of the land are such as to overcome the presumption that the occupant intended to claim a tract under the public land laws, the occupancy must be regarded as a mere trespass, and not sufficient to except the land covered thereby from the operation of the grant to said company. (Syllabus.)

The holding in said case based upon a previous decision of the Department in the case of said company against Jas. L. Morse (L. and R. Press-copy book 201, page 703) is conclusive of the case under consideration, and I must, therefore, reverse your office decision and direct that Tripp's application be rejected and the company's selection be permitted to stand, if in other respects regular and valid.

REPAYMENT—FEE FOR NOTICE OF CANCELLATION.

HARRINGTON v. GATES.

Repayment of the one dollar deposited by a contestant for notice of cancellation will not be granted on the ground that the fee was unearned where the record shows that the contestant made entry of the land, and hence must have received notice of cancellation from the local office.

Secretary Smith to the Commissioner of the General Land Office, December 14, 1894. (J. I. H.) (J. I. P.)

I have considered the appeal of Orville C. Harrington from your office decision of September 7, 1893, affirming the decision of the local officers, rejecting his application for the repayment of one dollar which he claims was unearned by the local officers, under section 2 of the act of May 14, 1880 (21 Stat., 140).

The facts in the case show that the homestead entry of Gates, against which Harrington had filed contest, was canceled on August 3, 1893, by relinquishment, and that Harrington, on the same day, made homestead entry No. 3233 for eighty acres of the land embraced in Gates entry. When he instituted contest Harrington paid the fees required by law, including one dollar, for what is called the cancellation fee.

Section 2 of the act of May 14, 1880, is as follows—

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.

It will be observed that the last clause of said section provides that said fee shall be paid the register for giving notice of cancellation. It is denied by Harrington that the notice in this case was actually given; that he appeared at the local office immediately after relinquishment and made entry of the land.

The very fact, however, that he did make entry of said land is conclusive evidence that he must have had notice of the cancellation of said entry, and the only medium through which he could have received said notice legally was through the local office. Hence the payment of the fee of one dollar was proper, and its repayment cannot be successfully demanded.

The section quoted does not in terms require the register to give a written notice of cancellation, and if Harrington received actual notice of said cancellation, it must have emanated from the local office, and would, therefore, entitle the register to the fee stated.

I have deemed the question presented of sufficient importance to extend this opinion beyond a simple affirmance.

The decision of your office is affirmed.

SWAMP GRANT—INDIAN RIGHT OF OCCUPANCY.

STATE OF WISCONSIN.

By the swamp land grant the State of Wisconsin acquired the title, the naked fee, to the swamp land embraced within the Lac de Flambeau reservation, subject to the right of Indian occupancy; and, while said right exists, no action should be taken under said grant looking toward a disturbance of the Indian right.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (F. L. C.)

I am in receipt of your office letter of April 17, 1894, relative to certain selections made by the State of Wisconsin under the swamp land grant of September 28, 1850 (9 Stat., 519), of lands within the Lac de Flambeau Indian Reservation. Reference is made in said letter to a schedule of 101 selections made by members of the above mentioned band of Chippewa Indians, "which was approved by the President, except where they were in conflict with selections made and claimed by the State of Wisconsin under the swamp land grant of September 28, 1850."

The selections thus in conflict have been under consideration in your office, where it appears a decision was rendered April 17, 1894, rejecting the State's claim to all of the lands in conflict with said Indian selections, except as to thirteen tracts averaging forty acres each, making an aggregate of about five hundred and twenty acres, which are found to be swampy in character. As to these, the Lac de Flambeau reservation being a subsisting one, your office expresses a doubt as to the propriety of preparing and submitting to the Department for its approval to the State a list of the tracts so found to be swamp, and instructions are asked on this point.

The Lac de Flambeau reservation was set apart as a specific reservation under and by virtue of the provisions of the treaty of September 30, 1854 (10 Stat., 1109).

The grant of swamp lands to the State having been made September 28, 1850, four years prior to the treaty, and being a grant *in presenti*, the question arises: Did the State get title to the swamp lands falling within the Indian reservation?

It seems that the Indians prior to the treaty of 1854 had the right of occupancy to the land in the reservation, together with the country surrounding it. By the treaty of October 4, 1842 (7 Stat., 591), ceding to the United States certain country described by bounds in Article 1, the Indians stipulated for the right of occupancy of the lands ceded, until required by the President to remove.

It thus appears that the title to the lands in question was in the United States at the date of the swamp land grant in 1850. It therefore passed by said grant, but subject to the right of Indian occupation, for that was the character of the holding by the government, and it could pass no more than it had. The grantee, the State, could take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States. *Beecher v. Wetherby*, 95 U. S., 517 (525).

In *United States v. Thomas*, 151 U. S., 577 (583), the supreme court, having under consideration a case involving a school section in Wisconsin on lands similarly situated, so far as the rights of the Indians were concerned, to those here being considered, said that the right of Indian occupancy "gave them the enjoyment of the land until they were required to surrender it by the President of the United States, which requirement was never made." The court further said:

So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.

The decisions cited were dealing with the school grant, while we have here under consideration the swamp land grant; but the two grants are of equal dignity and are similar in character so far as the passing of title is concerned, and the reasoning of those cases applies to this. Furthermore, the case last cited involved a consideration of the rights of a band of the Chippewa Indians; the matter before me relates to the rights of another band of the same tribe, holding its rights under the same treaties. It is therefore directly in point, and is authority for saying that by the grant of 1850 the State of Wisconsin acquired the title to the swamp lands in the Lac de Flambeau reservation, subject to the right of Indian occupation—the mere naked fee, without the right to occupy until the Indian right shall have been extinguished. But, instead of any action looking to extinguishment of Indian right of occupancy, it has been made more certain and stable by the treaty of 1854 providing for the establishment of a permanent and specific reservation.

The Lac de Flambeau reservation being such, nothing should be done which would tend to disturb or cloud that right while it exists, or which might appear to evidence a greater right in the State than it really has or can get at the present time.

In view of what has been said herein, I am of the opinion that so long as the Indian reservation remains intact, patent should not issue to the State for the swamp lands within said reservation.

You are therefore directed not to submit any list of said lands for approval while the condition indicated continues.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

SMITH v. MILLER.

The disqualification imposed upon persons who enter the Territory of Oklahoma, prior to the time fixed therefor, can not be ignored on the ground that the settler was misinformed as to the law.

Secretary Smith to the Commissioners of the General Land Office, December 19, 1894. (J. L.)

I have considered the case of Irene Smith against Warren Miller, upon the appeal of the latter from your office decisions of February 23, and May 23, 1893, affirming the decision of the local officers, sustaining Smith's contest, and holding for cancellation Miller's homestead entry, No. 5483, of the SW. $\frac{1}{4}$ of section 25, T. 19 N., R. 2 E., Indian meridian, Guthrie land district, Oklahoma.

On May 2, 1889, Warren Miller filed his soldier's declaratory statement, No. 174, and on October 22, 1889, made homestead entry, No. 5483, of said land.

On April 29, 1891, Irene Smith filed her affidavit of contest against said entry, alleging:

That the said Warren Miller did enter upon and occupy a portion of the lands opened to settlement by act of Congress approved March 2, 1889, and the President's proclamation of March 23, 1889, in violation of said act and proclamation, by entering upon and occupying a portion of said lands, and selecting the same as a homestead, after the 2d day of March, and before 12 o'clock, noon, of April 22, 1889.

After a hearing, which began June 15, 1891, and ended on January 12, 1892, the local officers, on August 31, 1892, jointly recommended that Miller's entry be canceled, and that the contestant, Smith, be awarded a preference right of entry of said tract.

Upon appeal by Miller, your office, on February 23, 1893, affirmed said decision of the local officers, and held Miller's homestead entry, No. 5483, for cancellation. And on May 23, 1893, upon consideration of a motion for review, filed by Miller, your office adhered to its former decision.

Miller has appealed to this Department.

I have carefully examined the whole record, the briefs of counsel, the testimony, and the proceedings before the local officers. I find no material error in the rulings of the local officers, affecting the merits of the case, and injurious to the appellant.

In February, 1889, Miller was within the Oklahoma country without lawful authority or permission, looking for a quarter-section of land to be taken by him as a homestead, when the country should be opened to settlement. In the early part of March he went to Independence, Kansas, where there was a land office, and consulted a firm of land lawyers there, in whom he had confidence, in respect to his rights and privileges under the provisos of section thirteen of the act of Congress approved March 2, 1889, (25 Stat., 1005). He was advised, that in order to violate the third proviso, it would be necessary for a person both "to enter upon and to occupy" the land claimed, previous to the time of opening to be fixed by proclamation.

He returned to Oklahoma, camped in the Stillwater bottom, in the neighborhood of the land in contest, and spent several days during the month of March, finding corners, running lines, and ascertaining the numbers and boundaries of many quarter-sections, including among them, the tract in controversy.

About the last of March, or first part of April, at his camp in Oklahoma, he was shown a copy of the President's proclamation of March 23, 1889. Shortly afterwards, during the month of April, he removed his camp some four or four and a half miles north, and established it on the narrow strip of land which lies between the north line of the range of townships numbered 19, and the south line of the Cherokee Outlet, and kept it there until after 9 or 10 o'clock, P. M., of Sunday, April, 21 1889, when, during the night, he again removed his camp. In the meantime, he made frequent trips into Oklahoma, and selected the land in contest as his claim, before April 22, 1889; and took active steps to prevent its being taken by anybody else. The precise time of his settling upon and occupying said land, is not shown; but his camp was seen upon it between the hours of 12 M., and 1 P. M., of April 22, 1889.

The foregoing facts are not disputed by any person. The only excuse for his unlawful presence in the prohibited territory, offered by his witnesses or his counsel, (for Miller himself refrained from testifying as a witness in his own behalf) was that he was ignorant of the law, and verily believed that it was lawful for him, an old soldier, to enter the territory and select his homestead, provided he did not take possession of it, and occupy it before 12 o'clock, noon, of April 22, 1889.

Such excuse would doubtless acquit the entryman of willful perjury. But in this proceeding, ignorance of the law is no excuse.

Your office decisions are hereby affirmed.

COAL LAND ENTRY—ADVERSE CLAIM.

O'GORMAN v. MAYFIELD.

Failure to perfect a coal land entry within the statutory period defeats the right of purchase in the presence of an intervening adverse claim.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (P. J. C.)

The land involved in this appeal is lots 5, 6, 11, and 12, Sec. 5, T. 46 N., R. 7 W., N. M. P. M., Montrose, Colorado, land district.

The record shows that Reuben N. Mayfield filed his coal declaratory statement for the above tract March 29, 1891, alleging possession on and from March 26, 1891; that on December 1, 1891, John O'Gorman also filed coal declaratory statement for the same tract, alleging possession on and from October 5, 1891.

On May 13, 1892, Mayfield served notice on O'Gorman that he would make final entry of said land on May 26, 1892. On said last named date O'Gorman filed a protest against said entry, setting forth numerous grounds why said entry should not be permitted; but, as I view it, the material one is that Mayfield had failed to make proof and entry within one year and sixty days from his alleged settlement and improvement thereon, and by reason thereof he had forfeited any and all right to the land.

Mayfield's application was therefore rejected and the purchase money tendered returned to him, because of said protest. Notice of hearing was given and finally had before the local officers, commencing July 19, 1892, on which day O'Gorman filed proof and offered to make payment for the land in controversy, which was rejected on account of the protest pending against the entry of Mayfield. The purchase money was also tendered by O'Gorman.

As a result of said hearing, the local officers found in favor of Mayfield, and recommended that his proof be approved and final entry permitted, and that O'Gorman's declaratory statement be canceled.

O'Gorman appealed, and by your office letter of April 11, 1893, the judgment of the local officers was reversed, on the ground that he had not made his proof within the period limited by statute.

A motion for review of this decision was filed, and on August 7, 1893, your office overruled said motion, whereupon Mayfield prosecutes this appeal, assigning numerous grounds of error, the principal one being, however, that it was error to hold that he did not make proof and tender payment within one year from the expiration of the sixty days allowed by statute in which to complete the filing.

It is unnecessary to consider other grounds of error, in my judgment, for the reason that this one proposition is sufficient upon which to base a judgment.

The land in controversy was surveyed land at the dates hereinbefore given.

Section 2349, Revised Statutes, provides that all claims must be presented at the proper land office within sixty days after date of actual settlement and improvement of the land, by filing a declaratory statement therefor. Section 2350, *Id.*, provides that the claimant shall be required to prove his right and pay for the "lands filed on within one year from the time prescribed for filing" the declaratory statement, "and upon failure to file the proper notice and to pay for the lands within the required period, the same shall be subject to entry by any other qualified applicant."

By Mayfield's declaratory statement it is shown that he took possession of said lands March 26, 1891. The sixty days within which he was required to file his declaratory statement expired May 25, following. From that date, therefore, his year began to run within which he should submit his proof and make entry. In computing the time it seems to me to be fair and in consonance with the rule covering such matters, to eliminate the first day, to wit, May 25. The year from that date would therefore expire at 12 o'clock midnight May 25, 1892. The application for purchase and tender of the money not having been made until the 26th, it is therefore clear to my mind that the applicant did not bring himself within the law. (*Endlich on Interpretation of Statutes*, Sec. 390, *et seq.*; *Brennan v. Hume*, 10 L. D., 160.)

It is contended by Mayfield, and supported by his own affidavit, and that of the former register of the land office, and also by another party who claims to have been present, that he, Mayfield, offered to make final proof, and tendered the purchase money, on May 12, and the reason assigned in the affidavits for the register not accepting it on that day was because he had not served notice on O'Gorman, who, it will be remembered, had a claim of record at that time for the same land, and it is said in his affidavit that the register informed Mayfield that his proof made on the 26th would be in ample time.

There is nothing in the record showing that this offer to make proof and tender was made, as stated, on May 12, and I do not think that *ex parte* statements made since the trial, and since your said office decision holding the entry for cancellation, should be accepted to contradict the record.

The notice which Mayfield served upon O'Gorman is dated May 10. Mayfield was cognizant of this notice, because his name is signed thereto, and the notice is that proof would be offered on May 26. It was served on the 13th. It would therefore seem that if, in fact, he did offer proof and payment, as alleged, on the 12th, it was made with a full knowledge of the fact that notice had not been served, and certainly Mayfield will not now be heard to say, under these circumstances, that he relied upon the information given him by the local office.

Moreover, this requirement is a statutory one. Every man is presumed to know the law, and in the face of an adverse claim he cannot be permitted to say that he relied on information or advice from others.

The judgment of your office is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

UNION PACIFIC RY. CO. v. NORTON (ON REVIEW).

The exceptions to the right of purchase conferred by section 5, act of March 3, 1887, as found in the first proviso thereto, are in favor of occupants, and in the second proviso in favor of persons who had made settlement since 1882.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (E. W.)

The defendant in the above stated case presents a motion for the reconsideration and review of departmental decision of September 21, 1893 (17 L. D., 314).

The material question presented in the various grounds of the motion for review may be considered in connection with the ninth ground thereof, which reads as follows:

Error in holding that 'the question to be determined is: has Stanger or his grantors the right to purchase the land under the provisions of the fifth section of the Act of March 3, 1887,' when in fact the only question in the case was: has Norton acquired the right to homestead the land if it was excepted from the grant?

In order that the questions presented may be intelligently considered, it is necessary to recite some of the material facts in said case. These facts as stated in the departmental decision are as follows:

The SW. $\frac{1}{4}$ of Sec. 3, T. 4 S., R. 69 W., Denver, Colorado, is within the limits of the grant to the Denver Pacific Telegraphic and Railway Company, now the Union Pacific Railway Company, the right of which attached to lands in the vicinity of this tract, on definite location of the road August 20, 1869.

The record shows that Richard K. Cline filed a pre-emption declaratory statement for the tract in question March 23, 1865, alleging settlement the day before.

Robert Henderson made a like filing on the land March 28, following, alleging settlement the same day, and on January 6, 1875, you canceled his filing for conflict with the railroad grant.

On July 21, 1874, the railway company sold and transferred the tract to Horace A. Gray and Peter G. Bradstreet. Afterwards Gray conveyed his interest to Margaret P. Evans, and in 1883 said Bradstreet and Evans sold and conveyed the same to John S. Stanger, who soon thereafter enclosed the land with a fence and cultivated a part thereof.

On June 12, 1885, Michael F. Norton applied to make a homestead entry for the land. His application was rejected on account of the railroad claim, and he appealed. On March 15, 1886, the railway company moved that Norton's application be dismissed.

April 26, 1889, Bradstreet and Evans, through their attorney in fact, applied to purchase the tract from the government under the act of March 3, 1887 (24 Stat., 556). Their proposed purchase was to make good the title of the transferee.

December 18, 1889, Stanger, the transferee of Bradstreet and Evans, applied to purchase the land under the act of August 13, 1888 (25 Stat., 439).

Bradstreet and Evans offered proof on their application after publishing notice of the time and place thereof.

June 18, 1891, you considered the claims asserted for the tract, and held that the pre-emption filings excepted the land from the operation of the railway grant, rejected the applications to purchase, and allowed Norton's homestead entry. The case is here on the appeal of said company and the transferee.

July 6, 1891, after your decision was made, Stanger applied to purchase the tract under the fifth section of the act of March 3, 1887, which was forwarded to the Department unacted upon by you. It would appear from this that he had abandoned his application under said act of August 13, 1888, but whether he has or not, it must be denied, because that act applies only to lands that have "heretofore been withdrawn by the executive department," and the land in question has never been withdrawn, because never subject to withdrawal, being excepted from the grant by pre-emption filings.

The question to be determined is: Has Stanger or his grantors the right to purchase the land under the provisions of the fifth section of the act of March 3, 1887 (*supra*).

It appears that the railway company sold the lands in 1874 and Norton, a qualified entryman, made homestead application in 1885. Norton's application was rejected because of its conflict with the claim of the railway company under its grant, and Norton appealed.

The real question in the case is this: Did Stanger acquire a right under the act of 1887, which would defeat the right acquired by Norton under his homestead application of 1885?

It is clear from the facts in this case that Mr. Norton was not in the occupancy of the land in question at the date of the purchase by Mr. Stanger. Therefore this claim of Stanger to purchase does not fall within the provisions of the first proviso to the fifth section of said act, nor does the record show that Mr. Norton had settled upon these lands at any time since the first day of December, 1882; and therefore Stanger's application to purchase is not controlled by the second proviso to said section. The exceptions in the first proviso of the act of Congress are in favor of occupants, and in the second proviso in favor of persons who had made settlement. Whether Congress could deprive Mr. Norton or other entrymen of the benefits of the homestead law by this legislation, is not a question for the Department to decide; that is a matter which the courts must determine.

The motion is denied.

SECOND ENTRY—SETTLEMENT RIGHTS—RELINQUISHMENT.**DOWMAN v. MOSS.**

The intent of section 2, act of March 2, 1889, was to afford relief to those entrymen who for some reason had lost their land, and, under the law, were precluded from making a second entry. It was not intended to allow those, who made entry before the passage of the act, to relinquish and make a new entry.

Settlement on a tract covered by the existing entry of another confers no right while said entry remains of record; but, on the relinquishment of said entry, the right of the settler on the land attaches at once, and can not be defeated by the intervening entry of a third party.

Where the settler in such case has established a residence in good faith on the land, prior to the cancellation of the existing entry, his temporary absence from the claim, at the instant of relinquishment, will not defeat his settlement right.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (A. E.)
(J. I. H.)

The full record of the cause shows the following:

On February 6, 1885, Henry B. Greening made homestead entry of the SE. $\frac{1}{4}$ Sec. 22, Tp. 65 N., R. 4 W., Duluth (Minnesota) land district. On May 11, 1888, Greening relinquished his claim, and Lyman E. Thayer, of Wausau, Wisconsin, made homestead entry. On November 10, 1888, one day less than six months after, Thayer relinquished, and Julia McCarthy made homestead entry. On May 9, 1889, one day less than six months after, McCarthy relinquished, and Napoleon B. Thayer made homestead entry. On November 9, 1889, exactly six months after, Thayer relinquished and John A. Murphy made homestead entry. On May 7, 1890, two days less than six months after, Murphy relinquished, and one Robert H. Doran made homestead entry. Doran, before making this last entry, had an entry of record, made August 4, 1886. He filed a relinquishment of this, with an affidavit stating that he had received no benefit from his entry made August 4, 1886. He therefore claimed the right to make a new entry, and with the filing of the relinquishment of Murphy he made application to enter that land, which is the land in controversy. This application was allowed. On October 24, 1890, Carrie Moss, defendant in the case under consideration, filed Doran's relinquishment and an application to make homestead entry of the land, which was allowed.

On November 18, 1890, Richard Dowman, plaintiff, applied to make homestead entry of the land. With his application Dowman filed an affidavit stating that he made actual settlement on the land September 19, 1890, built a house, was residing thereon, and was in full and exclusive possession of the premises on October 24, 1890, when Doran's entry was relinquished and Carrie Moss made her entry.

Steps were taken to determine the rights of these parties forthwith, but being afterwards set aside because of an undecided contest then pending, which involved the land in controversy, they need not be detailed.

On February 3, 1892, however, your office ordered a hearing to determine the rights of Dowman and Moss to the said land.

Under this a hearing was ordered and held July 20, 1892, after which two opinions were rendered, one by each of the local officers.

The register held,

that Dowman has failed to make out a case; that as a matter of fact he was not residing upon the land when Moss filed, and that he had not made such a compliance with law as would, in any event, undo the rights gained by Moss as an actual bona fide settler upon the premises. This leads to the conclusion that the entry of Moss must stand, and that the application of Dowman must be dismissed, and it is so held subject to the right of appeal.

The receiver held that,

a careful consideration of it (the evidence) justifies me in finding that Dowman settled upon said land as alleged, on September 19, 1890, and has ever since maintained a bona fide residence thereon, and was in actual occupation and possession thereof on October 24, 1890. I therefore recommend that the Moss entry be canceled and that Dowman be allowed to perfect his entry.

Both parties appealed, and your office, by letter ("H") of January 9, 1893, found that:

Dowman left Grand Marais, where he had been living for several years, and went upon the land, which was then covered by Doran's entry, September 19, 1890. He at once commenced the construction of a log house or cabin which was completed October 10, following. He placed therein a cooking stove and some rude furniture, such as bunks or beds, stools, a table, and some shelves. These were all hewn out of the timber found on the place. He remained at this cabin continuously until October 30, 1890. His only absence was from about October 19 to 24, when he made a trip to secure provisions. . . . A careful consideration of the great mass of testimony adduced at the trial before your office impels me to believe that Dowman only made a pretentious or colorable residence on the land for the purpose of "holding it down." I therefore concur in the opinion of the Honorable Register, and dismiss the contest of Dowman, subject to appeal.

From this decision Dowman has appealed to this Department.

There appears an error in the record of this case, to point out which is not material to a determination of the only question at issue, yet it is deemed important that the attention of the local office be directed to it.

This was permitting Doran to relinquish his homestead entry and make entry of the land in controversy.

The second section of the act of March 2, 1889 (25 Stat., 854), under the provisions of which Doran claimed the right to make another entry, provides:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding.

The intent of this provision was to afford relief to those entrymen who for some reason had lost their land, and under the law were precluded from making a second entry. It was not intended to allow those, who made entry before the approval of the act, to relinquish it

and make a new entry. To construe the act as allowing this would be to open a way for the sale of homestead claims and the taking of new ones, which is against the policy of the public land system.

Doran made an entry on August 4, 1886, and that entry severed the land covered by it from the public domain, and kept it under the control of Doran until he relinquished it, on May 7, 1890, a period of nearly four years. The latter date was more than a year after the approval of the act under which he claimed the right to make another entry. Therefore, the entry of Doran was erroneously allowed.

The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For although Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of settlement. But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it. In this case it not being denied that Dowman settled upon the land, the only question is whether he did so in good faith—that is, with the intention of taking the land under the homestead law.

The testimony introduced by defendant is nearly all irrelevant. Instead of impeaching the good faith of the settler Dowman, defendant introduces evidence to show the character of defendant's improvements, the amount of money she could afford to expend on them, and how much superior they were to those of the settler. Defendant also introduces a great amount of testimony to try to show that although settler Dowman settled September 19, 1890, built a cabin, and went to live in it, that in returning from a trip to the county town to buy provisions, he did not get to the land on his return until a short time after the minute when it is claimed Doran's relinquishment was filed and Moss's entry made at Duluth, one hundred and sixty miles away.

It is probably established doctrine in this Department that has been upheld by a long line of decisions that are too numerous to cite, that necessary absences from a man's claim do not break the continuity of settlement or residence within the intention of the land laws, but that the settler though actually absent, is constructively present upon his land to all intents and purposes. Therefore, even had Dowman not been actually within the limits of his claim at the instant the relinquishment of Doran was filed in the land office at Duluth, he was constructively upon the land, as that was his only home and his right attached before that of Moss's entry, just as surely as if he had been actually within the walls of his cabin. To hold otherwise would be both unreasonable and trifling, and therefore would not be sanctioned by law. But the evidence does not show, first, the exact time when the relinquishment of Doran was filed. Miss Moss in her testimony admits that she did not know the exact time when it was filed, and there seems to be considerable doubt on this point. Second, the evidence does not

show that Dowman was not within the limits of his claim at the time it is presumed that the relinquishment was filed.

But from what has been said it is needless to further discuss testimony bearing upon this point, as this kind of testimony, like that relating to Moss's improvements, and the large amount of money she possessed and expended, is wholly irrelevant to the only question at issue, as are also the acts of Dowman since his rights attached on October 24, 1890, to which the defendant also devotes a great deal of evidence.

A careful examination of all the evidence in this case has been made, the testimony alone comprising nearly seven hundred pages of type written matter. This shows the facts in the case to be substantially as follows: The land involved in this controversy lies in the first school district of Cook county, State of Minnesota. This county is a very large one, being fifty miles long east and west, and eighteen miles wide north and south at the east end, and fifty miles wide north and south at the west end. The northern line of the county is the southern line of Canada. The land in controversy lies in the northern central part of Cook county, near the Canadian line. To use a description made by Miss Moss, the defendant,

the land was situated in the wildest and most unbroken wilderness, without roads, or even foot trails through Minnesota for the settlements, distant by rail from Duluth over nine hundred miles. The nearest post office is fifty miles away and telegraph nearly one hundred miles distant.

Richard Dowman, the settler and contestant in the case, had lived for a number of years in Grand Marais, the county town of Cook county, distant fifty miles southeast of the land, and in the same school district. He was a member of the first district school board, a county commissioner, was unmarried, and his occupation, beside the two county offices, appears to have been that of an explorer and guide for parties going through that country. The evidence does not show that he had any other visible means of support or possessed much money.

Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years it was entered and relinquished every six months. Dowman, according to his own testimony, knowing the land had been thus entered and relinquished a number of times without any of the entrymen attempting to make settlement thereon, went on the land September 19, 1890, and began the construction of a house, which he finished October 10, following. From that time he made the land his home, actually living there continuously until November, 1890, with the one exception of a trip to the county town for provisions, which he made October 19, 1890, returning October 24, 1890, the day Doran's relinquishment was filed.

From November 1, 1890, to the date of the hearing he has been temporarily absent for days at a time in Grand Marais, the county town

of Cook county, a village of one hundred and twenty inhabitants, but which although fifty miles distant, lies in the same school district as does the land in controversy.

This absenteeism appears owing largely to the fact that Dowman was a member of the school board and a county commissioner, two distinct offices, and to fulfil the duties of which was compelled to go to the county town. The county town was also the nearest point at which provisions could be obtained. Owing to the distance, the absence of transportation, and the difficulties of the route, it required two days to make the trip, and Dowman appears to have on occasions been absent quite a number of days at a time from his claim. But this does not necessarily imply bad faith, and the Department always presumes temporary absences to be for good reasons, and before a contrary reason will be accepted facts must be disclosed which prove it. In this case no such facts have been produced, and nothing to show Dowman had any other home than that on the land in controversy, beyond a room, over the store of a friend, which he occupied in the county town on these visits.

Moss was a school teacher in Grand Rapids, Michigan, and had taught school in cities for a period of twenty years. She was unmarried, about forty years of age, and had \$4,000 in cash and a farm in Dakota yielding an income of from \$100 to \$250 per annum, while her salary was \$60 per month. She bought the relinquishment of the land solely on the representations of her Dakota agent, from Doran, who, as previously shown, had been erroneously allowed to make entry of the land. Without knowing anything of the land except from her agent, and without ever having been nearer than one hundred and sixty miles on air line and nine hundred miles by rail, she paid \$1,000 for the relinquishment. The evidence shows that at that time Dowman was a settler living upon the land.

Returning to Grand Rapids, Michigan, over one thousand miles from the land by the nearest route, although she had sworn she made entry of the land with the purpose of making settlement thereon, Moss continued to teach school until the latter part of March, five months after her entry, and after she had been served with a notice of Dowman's contest. The following month she made the trip to the land, arriving there two days before the expiration of the first six months after her entry. Pitching a tent within sight of Dowman's house in which he was living, she began the erection of improvements so near to Dowman's cabin that the clearings joined, erecting a residence that cost \$700, and adding all the furniture and conveniences that money could buy to make it comfortable for a woman to reside in. All this expenditure and improvement were made in the face and with a knowledge of Dowman's claim and prior settlement, and therefore made at Moss's own risk, and it would appear, for the purpose of defeating his claim, if possible, by means of superior improvements, in spite of the long established and well-known ruling of this Department in such cases.

The character or value of Moss's improvements gives her no advantage. Because she had more money than Dowman to expend on improvements does not detract from his rights.

In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this Department, the settler Dowman's right attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry. Your office decision is therefore reversed, and you will cancel Moss's entry, and allow that of Dowman.

RAILROAD GRANT—ACT OF AUGUST 5, 1892.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. STICKNEY.

The act of August 5, 1892, does not provide for relinquishment and selection in case of an entry under which the claim was not initiated prior to January 1, 1891.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (F. W. C.)

I am in receipt of your office letter of November 17, 1894, requesting instructions as to whether the St. Paul, Minneapolis and Manitoba Railway company should be called upon to release its claim to the NE. $\frac{1}{4}$ of Sec. 9, T. 130 N., R. 38 W., Fargo land district, North Dakota, in favor of Francis W. Stickney, under the provisions of the act of August 5, 1892 (27 Stat., 390).

Said act provides for the release of lands within the limits of said company's grants, as extended into the Territory of Dakota, which had been disregarded in the previous disposition of the lands and the administration of the grants under which said company claims.

Upon such release the company is granted a correlative right of selection within the boundaries of certain States therein named, but the protection is limited to those persons whose claims were initiated prior to January 1, 1891.

From the statement contained in your office letter it appears that on April 14, 1892, Stickney was permitted to make homestead entry for the land before described, upon which final certificate issued May 24, 1893, and due to inadvertence, said entry was passed to patent on November 16, 1893.

Upon an examination of Stickney's papers I find that he makes no claim to the land prior to his entry on April 14, 1892, and his entry could not, therefore, furnish a basis for relinquishment and selection of other lands under the provisions of the act of August 5, 1892.

The fact that your office inadvertently issued a patent upon said entry in disregard of said company's grant, and the willingness of the company as expressed in your office letter to release the same, if permitted, under the provisions of said act, in no wise affects the question submitted for the consideration of this Department.

RAILROAD GRANT—INDIAN RESERVATION.

NORTHERN PACIFIC R. R. CO. v. EBERHARD.

At the date of the grant to the Northern Pacific company the lands in the Bitter Root valley "above the Loo-lo fork" were included in the Indian reservation created by the treaty of April 18, 1855, and therefore excepted from the operation of said grant.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (J. I. H.) (G. C. R.)

On February 9, 1888, Cyrus Eberhard made pre-emption cash entry No. 2973 for lots 1, 2 and 3 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 3, T. 11 N., R. 20 W., Missoula, Montana, having made final proof therefor October 3, 1886.

This land is within the limits of the grant to the Northern Pacific Railroad Company, as shown by the map of definite location, and also within the limits of the withdrawal for said company upon general route, which became effective February 21, 1872.

On July 21, 1887, the company, through its attorney, made application to your office for the cancellation of Eberhard's filing, together with other similar cases, but it appears no action was taken thereon.

On February 9, 1887, the company filed in the local office at Helena list No. 211, being an application to select among others, the tract in question. This application was rejected for the reason that the same was "within the boundaries of the Flathead Indian reservation."

The company appealed, and your office by decision of December 2, 1891, affirmed the action of the register and receiver, and held Eberhard's entry for approval.

It is insisted:

1. That the reservation of this land for the Flathead Indians at the date of the grant would not *per se* except it from the grant to the company.
2. That this land formed no part of the fifteen townships of valley land reserved by the act of June 5, 1872, and ordered thereby to be surveyed and sold.
3. That the land was public land of the United States, free from other claims or rights July 6, 1882 (date of definite location), and therefore passed to the railroad company under its grant.

If at the date of the grant to the company (July 6, 1864, 13 Stat., 365), the lands were reserved for the Flathead Indians, they did not pass by the grant. *Phelps v. Northern Pacific Railroad Company*, 1 L. D., 368; *Dellone v. Northern Pacific Railroad Company*, 16 L. D., 229; *United States v. Grand Rapids and Indiana Railroad Company*, 17 L. D., 420.

Article XI of the treaty with the Flathead Indians (12 Stat., 975), ratified April 18, 1855, provided that—

The Bitter Root valley above the Loo-lo fork shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted

to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root valley above the Loo-lo fork shall be opened to settlement until such examination is had, and the decision of the President made known.

Here is a reservation of "the Bitter Root valley above the Loo-lo fork."

On November 14, 1871, the President issued an order reciting that the Bitter Root valley above the Loo-lo fork, having been carefully surveyed and examined in accordance with the eleventh article of the treaty of 1855, had proved, in his judgment, not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty. Deeming it unnecessary to set apart any portion of said Bitter Root valley as a separate reservation for Indians, referred to in said treaty, he directed that all Indians residing in said valley be removed as soon as practicable to the reservation provided for in the second article of said treaty.

On June 5, 1872 (17 Stat., 226), Congress passed an act for the removal of the Flathead and other Indians from the Bitter Root valley to the Jocko reservation provided for in the treaty of 1855.

The 2nd section of that act provides as follows:

That as soon as practicable after the passage of this act, the surveyor-general of Montana Territory shall cause to be surveyed, as other public lands of the United States are surveyed, the lands in the Bitter Root valley lying above the Lo-Lo fork of the Bitter Root river; and said lands shall be opened to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of settlement, or of the passage of this act. The sixteenth and thirty-sixth sections of said lands shall be reserved for school purposes in the manner provided by law. Town-sites in said valley may be reserved and entered as provided by law: *Provided*, That no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act: *And provided further*, That none of the lands in said valley above the Lo-Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States. An account shall be kept by the Secretary of the Interior of the proceeds of said lands, and out of the first moneys arising therefrom there shall be reserved and set apart for the use of said Indians the sum of fifty thousand dollars, to be by the President expended, in annual instalments, in such manner as in his judgment shall be for the best good of said Indians, but no more than five thousand dollars shall be expended in any one year.

The 2nd section of the act of February 11, 1874 (18 Stat., 15), extended the benefit of the homestead act to all settlers in the Bitter Root valley, "who may desire to take advantage of the same."

It will be noticed that the act of 1873 (above quoted) provides that "no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act," and it is insisted that since the tract in question is not a part of the land so directed to be surveyed and sold by that act, it cannot be classed as of the lands

so reserved, being beyond and to the west of the fifteen sections so surveyed.

The fact that no more than fifteen townships of land in the Bitter Root valley above the Loo-lo fork were deemed by Congress in 1872 to be subject to the provisions of the act, does not by any means change the conditions as to the locus of the reservation prior to the act. The sole question therefore is, whether the land in question is a part of the reservation made by the treaty of 1855, being "the Bitter Root valley above the Loo-lo fork."

The lands of "The Bitter Root valley above the Loo-lo fork," while under the designation of "valley" lands, are not all "bottom" lands. Arising from this valley on each side of the Bitter Root river, and approaching the mountains, may be rough hills, and the surveyor would probably in running the exterior lines of the townships and sections across such hills describe them as "mountainous timber lands;" while in fact the whole scope of the country, from mountain to mountain, on each side of the river, would be properly designated as "valley" lands.

A careful examination of the plat books of your office shows that the land in question is about a quarter of a mile south of the Loo-lo fork, and about one mile west of the Bitter Root river; being in such close proximity to these rivers, and "above the Loo-lo fork," I think it is beyond question that the lands were in said valley, and therefore reserved by the treaty of April 18, 1855 (*supra*).

With the limited information contained in the records of your office, as to the exact boundaries and extent of the "Bitter Root valley above the Loo-lo fork," and the difficulties which may be met in the future in settling property rights, dependent upon such information, you will, as soon as practicable, take such steps as may be necessary to define the limits of that valley.

The decision appealed from is affirmed.

RAILROAD GRANT—FORFEITURE—MORTGAGE SALE.

GULF AND SHIP ISLAND R. R. CO.

(On Review).

Under the railroad grant of August 11, 1856, to the State of Mississippi, to aid in the construction of railroads in said State, the right to sell the lands along forty miles of the located line was conferred upon the company on completion of the first twenty miles of the road; and, under the laws of said State, a mortgage placed on said lands would operate as a sale thereof, in case of default on the part of the mortgagee, and take the lands so sold out of the operation of the forfeiture act of September 29, 1890.

Secretary Smith to the Commissioner of the General Land Office, December 20, 1894. (F. L. C.)
(J. I. H.)

A motion has been filed for review of departmental decision of March 3, 1893 (16 L. D., 236), in the case of the Gulf and Ship Island Railroad.

Said decision was rendered in connection with the adjustment of the grant of August 11, 1856 (11 Stat., 30), to the State of Mississippi, to aid in the construction of railroads in said State, and was pursuant to the provisions of the forfeiture act of September 29, 1890 (26 Stat., 496).

The particular road here in question was one to be built from Brandon to the Gulf of Mexico. The grant was of every alternate section of land designated by even numbers, for six sections in width on each side of said road. And in case it should appear when the line or route of said road was definitely fixed, that the United States had sold any of the sections or parts of sections thus granted, or that the right of pre-emption had attached to the same, the State was authorized to select from the lands of the United States, not farther than fifteen miles from the line of the road, so much land in alternate sections or parts of sections as would equal the lands sold or otherwise appropriated by the United States, or to which the right of pre-emption had attached as aforesaid.

The lands falling within the probable limits of the grant were withdrawn in 1856, and on February 2, 1857, the State by act of its legislature accepted the grant, and an act approved December 3, 1858, conferred the same upon the Gulf and Ship Island Railroad Company.

It appears that the line of road was definitely located, and the location accepted December 3, 1860.

Section 4 of the granting act provided:

That the lands hereby granted to the said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any continuous twenty miles of either of said roads is completed, then another like quantity of land hereby granted, not exceeding one hundred and twenty sections for such road may be sold; and so from time to time until said roads are completed; and if said roads are not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.

The forfeiture act of September 29, 1890 (26 Stat., 496), contains in section 1 the following provision:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

By the 7th section of said act the Gulf and Ship Island Railroad Company was allowed a postponement of the forfeiture of a specified part of its grant for one year on certain conditions named in the section. Said conditions were accepted by the company, but it failed to comply with them by building the road.

Only twenty miles of the road had been completed at the date when the forfeiture became effective. The company's contention has been

and is, that having been authorized under the provisions of section 4 of the granting act to sell the granted lands along twenty miles of its line after definite location and prior to construction of any part of its road, and upon the completion of twenty miles of road to sell the lands along an additional twenty miles, it is entitled under the grant, and by virtue of its having built twenty miles, to the granted lands along forty miles of its line as definitely located, notwithstanding the forfeiture of 1890, especially as it had mortgaged said lands, which, under the laws of Mississippi, was equivalent to a sale; that having thus sold, the lands do not fall within the purview of the forfeiture act.

The decision under review, after a full recital of the facts, held that the measure of the grant in its adjustment under the forfeiture act of September 29, 1890, is the granted land that lies opposite to and coterminous with the *completed* portion of the road; that the mortgage of the lands in question did not, in the absence of foreclosure, constitute a sale under the laws of Mississippi, nor place it beyond the power of Congress to declare a forfeiture thereof, and that therefore the act of 1890 operated upon them.

The motion for review assigns error in said holding as follows:

1. Holding that the mortgage executed by said company is not a sale of the lands within the meaning of the granting act.
2. Holding that said mortgage did not give a power of sale to the trustees, within the meaning of the decision in *Tucker v. Ferguson* (22 Wall., 527).
3. Holding that the courts of Mississippi hold that the existing statute of said State provides for a vesting of the title to mortgaged property in the trustees upon foreclosure only.
4. Holding that the company is not entitled to select both odd and even sections under existing law.

Counsel ask permission to postpone argument of the fourth specification until your office shall have acted on a list now pending before it.

My predecessor, Secretary Noble, in the decision under review, said, on page 241:

If they (the lands selected for preliminary work) had been actually sold, and disposed of in accordance with the authority of the fourth section of the granting act, which is quoted hereinbefore, then they must, in my opinion, be held beyond the reach of the grantor to declare a forfeiture thereof, and consequently, are not affected by the act of September 29, 1890.

But he held, as already indicated, that the execution of an ordinary mortgage *not* foreclosed did not constitute a sale of the lands covered thereby, within the meaning of the granting act in question, or under the laws of the State of Mississippi.

This holding is strenuously combatted by counsel for the company. Counsel recite in part the sixth condition of the trust mortgage to show that, upon default for ninety days in payment of any semi-annual installment of interest on the bonds secured by said mortgage, after

due presentation and demand, then the whole principal sum so secured shall forthwith become due and payable, and the lien may be at once enforced. They then state as a record fact, that none of the interest coupons have been paid, and that therefore the default contemplated by the mortgage condition actually occurred and has continued since 1887. Though they do not assert that there was "presentation and demand" at the place of payment in New York, they cite cases to show that neither of these acts was necessary to legal proceedings.

The sixth condition in the mortgage further provides that upon failure as aforesaid to pay semi-annual interest within ninety days after it becomes due and payable, the trustee

May institute and maintain foreclosure proceedings in any court having jurisdiction, and cause the mortgaged property to be sold and conveyed under the direction of the court, and from the proceeds shall pay the said bonds.

The company contends that this provision constituted the instrument a mortgage with a power of sale, and that the case is ruled by the decision of the supreme court in *Tucker v. Ferguson*, 22 Wall., 527; and, further, that said decision should govern, even if it be held that the mortgage does not contain a power of sale, because the court laid no stress whatever upon the power of sale in the trustee, embodied in the mortgage in that case.

The primary question to be determined here is, whether the trust mortgage was, within the meaning of the grant, a sale of such lands as the company had a right to sell. If this be answered affirmatively, then the lands in question were beyond the reach of the forfeiture act, and were not affected thereby. This was conceded by Secretary Noble in the original decision. Of the right to sell there can be no doubt. The company had completed twenty miles of road, and by the terms of section four of the grant it was then authorized to sell the granted lands along an additional twenty miles of its line. It gave a trust mortgage to secure bonds issued and sold to raise money necessary for the construction of the road.

To determine whether this was a sale, it is of first importance to examine the laws of the State of Mississippi on the subject.

The statute of that State provides (Sec. 1204, Code of 1880; Sec. 2449, Code of 1892):

Before a sale under a mortgage, or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee after breach of the condition of such mortgage or deed of trust.

This statute speaks of the "property conveyed in such mortgage," thus in terms treating a mortgage as a conveyance, and then provides specially that the legal title "shall be deemed" in the mortgagor, "except as against the mortgagee and his assigns." This is, in effect, saying that as between the mortgagor and mortgagee the title is in the latter—that there has been a transfer, a sale.

Section 1207 of the Code of 1880 provides that:

Payment of the money secured by any mortgage or deed of trust shall extinguish it and revest the title in the mortgagor as effectually as a reconveyance would.

This is incorporated in section 2452, Code of 1892. Here the words "revest" and "reconveyance" plainly import that in the State of Mississippi a mortgage is an alienation of the property mortgaged, and takes the title out of the mortgagee conditionally. This is quite closely allied to the common law rule, as phrased by Lingrey on Mortgages, Sec. 10, as follows:

If the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was gone forever. But if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises.

The statute of the Mississippi, as above quoted, was the law of that State in 1887, when the trust mortgage was executed, and is the law today. It follows that it is applicable to the case at bar, for the right to sell the lands in question was in the railroad company, and there had been default in the payment of interest on the mortgage bonds prior to the forfeiture act of September 29, 1890.

In this connection, it will not be amiss to examine the decisions of the supreme court of the State of Mississippi and see what has there been held with relation to mortgaged property.

In *Heard v. Baird et al.* (40 Miss., 799), it was held that:

After a breach of condition (in a mortgage) the legal title shall not be deemed to be in the mortgagor, or grantor, as against the mortgagee, or trustee, but the latter shall be regarded as the legal owner.

This decision was rendered in 1866, when the State law was substantially as it was at the date of the mortgage and is now. See Article 12 of Chapter 36, Section 111, of the Code of 1857, and Section 2295 of Code of 1871.

In *Pickett v. Buckner* (45 Miss., 226), the court say:

A mortgage in fee serves a complex purpose; it is a security for a debt, and at the same time a conveyance of the estate.

It transfers the estate to the mortgagee upon the condition that if the debt is paid on the day named, it shall be void. If default is made, the estate which before was conditional has become absolute. . . . Article 12 Revised Code (of 1857, cited *supra*,) is nothing more than a legislative declaration of the rule which had already been incorporated into the jurisprudence of this State.

In *Clarke v. Wilson* (53 Miss., 119), it is said:

The mortgagee after condition broken becomes owner of the estate, is invested with the legal title, and may at law have a certain redress predicated on his legal right.

See also *Myers v. Estell*, 48 Miss., 372; *Graham v. Fitts*, 53 Miss., 307; *Butler v. Lee*, 54 Miss., 476; *Elson v. Barrier*, 56 Miss., 394; *Bowman v. Roberts*, 58 Miss., 126; *Gabbert v. Wallace*, 66 Miss., 618.

The text book writers, treating of the law as above announced by statute, and construed by the courts of the State, lay down the following: Under the head "Mississippi" Pingrey, in his work on Mortgages, says, in section 56:

Upon the maturity of the debt and default the legal title vests in the mortgagee, who has then the right of possession. But equity looking to the original design of the parties in creating the mortgage as only a security for the debt, will not permit the mortgagor nor the mortgagee to enjoy a legal right to the prejudice of the other.

Jones on Mortgages, Sec. 38, states the doctrine as follows:

In Mississippi, upon breach of the condition of the mortgage, the legal title becomes absolute in the mortgagee, who thereupon becomes entitled to the possession of the property as an incident to the title.

My predecessor based his decision adverse to the company and the mortgagee largely upon the cases of *Carpenter v. Bowen* (42 Miss., 28), and *Buckley v. Daley* (45 Miss., 338). But an examination of those cases shows that the rights of third parties were directly involved in the suit, and, as already stated herein, the code (Sec. 1204, Code of 1880,) provided that before a sale under a mortgage, or deed of trust, the mortgagor shall be deemed the owner of the legal title of the property conveyed in such mortgage, except as against the mortgagee and his assigns, after breach of condition of such mortgage.

The court in using the language quoted by my predecessor from *Carpenter v. Bowen*, had under consideration the rights of said third parties. But even then it recognized an estate or the equivalent of an estate in the mortgagee, for it said,

the assignment of the debt will draw the land after it, (and again,) it (the mortgage) is considered as real property, to enable him (the mortgagee) to maintain ejectment for the recovery of the possession of the land mortgaged.

And further, in the same case, the court say:

As between the mortgagor and mortgagee, the fee of the estate passes to the mortgagee at the execution of the deed. This is necessary to enable him to guard and protect his security. But as between the mortgagor and other persons, he is considered as having the legal title in himself, and the power of conveying it to a third person subject to the incumbrance of the mortgage.

As has been said, the statute of Mississippi (section 1207, Code of 1880), provides that, payment of the money secured by a mortgage shall extinguish it, and revest the title in the mortgagor as effectually as a reconveyance would. In other words, a formal reconveyance is not necessary, but Sec. 1206 of the same code requires the mortgagee at the request of the mortgagor to enter satisfaction upon the margin of the record of such mortgage, in the clerk's office, which entry shall discharge and release the same, and revest title.

The supreme court of Mississippi on this point said, in *Stadaker v. Jones* (52 Miss., 729): "It is only by virtue of the statute that the entry of satisfaction on the record supersedes the necessity of a

reconveyance," thus emphasizing the fact that in Mississippi a mortgage is regarded as a conveyance.

It thus appears on authority that the title to the lands in question has passed from the grantor under the act of 1856, so as to place them outside of and beyond the operation of the forfeiture act of 1890. Reason and equity lead to the same conclusion. The mortgage was given and the bonds were issued on the faith of the grant, which immediately, upon location, gave a vested right to the granted lands along twenty miles of the road, and upon construction of twenty miles gave a vested right to the granted lands along twenty miles additional of said road. The right to sell the lands along forty miles of the line was thus by the act of Congress placed in the company. It mortgaged the lands, and issued its bonds secured by said mortgage. The holders of those bonds were justified by the terms of the grant in relying upon its plain provisions relative to the security which lay behind the bonds, and they should not now be made to suffer loss, unless the plain mandate of the law requires it.

After a full consideration I am constrained to conclude that the departmental decision of March 3, 1893, was error, and should be revoked, except as to that part thereof which holds that the right of indemnity selection is under existing law restricted to even numbered sections. That question is reserved for consideration in connection with a list now said to be pending in your office.

The decision under review is modified to meet with the views herein expressed, and you will proceed with the adjustment accordingly.

OKLAHOMA LANDS—SECOND HOMESTEAD ENTRY.

WILLIAM T. DICK.

The fact that a person has commuted a homestead entry does not disqualify him from making a homestead entry within the Public Land Strip.

*Secretary Smith to the Commissioner of the General Land Office, August
(J. L. H.) 18, 1894. (J. L. McC.)*

Your office, by letter of June 17, 1893, transmitted the papers in the matter of the appeal of William T. Dick from the decision of your office, dated December 16, 1892, holding for cancellation his homestead entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 6 N., R. 26 E., Beaver land district, Oklahoma Territory.

The ground of the action was that the entryman had previously made a homestead entry in Kansas, which had commuted February 7, 1887, and for which he had received patent November 25, 1887.

The appeal alleges that your office was in error "in its construction of the act of May 2, 1890, and especially of section twenty of said act." Said section 20 reads as follows (26 Stat., 91):

That the procedure in applications, entries, contests and adjudications in the Territory of Oklahoma shall be in form and manner as prescribed under the homestead laws of the United States, and the general principles and provisions of the homestead laws, except as modified by the provisions of this act; and the acts of Congress approved March first and second, eighteen hundred and eighty-nine, heretofore mentioned, shall be applicable to all entries made in said Territory.

That Beaver land district is a part of "said Territory" is shown by section 4 of the same act (page 83), which, in dividing the Territory of Oklahoma, provides:

The seventh county shall embrace all that portion of the Territory lying west of the one hundredth meridian, known as the Public Land Strip, the county-seat of which shall be at Beaver.

It will be sufficient for the purposes of this present case to examine into the provisions of the act of Congress approved March 2, 1889 (25 Stat., 1005). Section 12 of that act reads as follows:

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers under the homestead laws only, except as herein otherwise provided (except that section 2301 of the Revised Statutes shall not apply); and provided further, that any person who, having attempted, but for any cause failed, to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

This proviso, that a person who has "made entry under what is known as the commuted provision of the homestead law" shall be qualified to make a homestead entry, is by section 20 of the act of May 2, 1890, made "applicable to all entries made in said Territory," and by section 4 of the last-named act Beaver county (the "Public Land Strip") is expressly named as a part of "said Territory." Hence I conclude that the fact that a person has heretofore commuted a homestead entry does not disqualify him from making a homestead entry on the "Public Land Strip."

The decision of your office holding the entry for cancellation because of the commutation of a former entry is therefore reversed; and if no other objection appears, the entry now under consideration will be allowed to remain intact.

I find nothing in the record to show whether at the date of his application, the applicant was "seized in fee simple of one hundred and sixty acres of land in any State or Territory." It may not be amiss to direct attention to the fact that if such was the case he was not qualified to make the entry. (See last paragraph of said section 20 of said act of May 2, 1890, 26 Stat., 91.)

RAILROAD LAND—SECTION 3. ACT OF SEPTEMBER 29, 1890.

COOPER v. WALSH.

Joint possession of railroad land included within a common enclosure does not confer a right of purchase under section 3, act of September 29, 1890, if such possession is without license from the railroad company.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1894. (I. D.)

D. J. Cooper, the plaintiff in the case of *D. J. Cooper v. Thos. Walsh*, appeals from your office decision of June 13, 1893, wherein you dismiss his contest and hold Walsh's homestead entry intact for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 29, T. 2 N., R. 15 E., The Dalles land district, Oregon, being lands of the Northern Pacific Railroad company forfeited by the act of September 29, 1890.

The affidavit of contest charges:

That the said Thos. Walsh has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making his said entry and that said tract is not settled upon and cultivated by said party as required by law, but I have had the said tract of land fenced since the year eighteen hundred and eighty-one with a view of purchasing the same from the Northern Pacific railroad company.

This affidavit was insufficient so far as any claim of right to purchase by the contestant is concerned, but as no question was raised as to the sufficiency of the affidavit the whole case will be considered.

The evidence shows that from 1881 plaintiff in connection with several others had a tract of some eight hundred acres, including the tract in question, under one fence, and they used the lands for pasture.

The defendant made homestead entry for the one hundred and sixty acres in question on April 6, 1891, and soon afterward built a house and broke about twenty acres, and has continued to make his home on the land and farm it ever since.

There is no evidence of any abandonment, and the only question is whether Cooper has such possession as gave him the preference under section three of the act of September 29, 1890 (26 Stat., 496).

Under said section three any preference right Cooper can have must arise under one of two classes: first, those who "are in possession of any of the lands affected . . . under deed, written contract with, or license from, the State or corporation;" . . . second, "or where persons may have settled said lands with *bona fide* intent to secure title thereto, by purchase from the State or corporation when earned," etc.

The evidence shows that Cooper, with others, had possession of this tract, together with other lands, under one common fence, but shows that he never settled on the land, and does not show that the possession of this land was by virtue of any license, or even with the knowl-

edge of the railroad company. There is no claim made that the possession was under any such license.

If he claims under the second clause, the testimony shows that he never professed to make settlement on the land. In the case of Jas. C. Daly (17 L. D., 498) it was held:

The right to purchase from the government forfeited railroad lands, accorded by section three, act of September 29, 1890, to those "who may have settled said land with *bona fide* intent to secure title thereto by purchase from the State or corporation," can not be exercised by one who has not established his residence on such lands.

The contestant fails to make a case by either showing abandonment by Walsh, or by bringing himself within the provisions of either of the classes named in section three. In addition to this failure to prove his contest charges, the evidence shows that the possession of the eight hundred acres was by several persons in common, and was such that any of the men claiming an interest in that body of land might with equal propriety have claimed such possession to be his for the purposes of purchase.

Your office decision is affirmed; the contest dismissed, and Walsh's homestead entry held intact.

PRACTICE—MOTION FOR REHEARING—DILIGENCE.

HARTMAN v. WARREN ET AL. (ON REVIEW).

An affidavit in support of a motion for a rehearing, on the ground of newly discovered evidence, must show that the evidence was unknown to the party, not merely to his counsel; and the affidavit of counsel is insufficient without that of the party.

It must be shown, in support of a motion for rehearing on the ground of newly discovered evidence, that the testimony could not have been discovered by due diligence, and the facts relied on to show such diligence must be set forth in the motion.

A new trial will not be granted on the ground of newly discovered evidence, where such evidence is expected from a witness who was called and examined on the trial, it being the duty of counsel to question the witness, when upon the stand, as to all matters pertinent to the case.

Secretary Smith to the Commissioner of the General Land Office, December 21, 1894. (C. W. P.)

These are motions, on the part of the contestant for review and rehearing of departmental decision of July 20, 1894, in the case of Emil Hartman against James H. Warren and others (19 L. D., 64), involving lot 7 and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 30, T. 63 N., R. 11 W., Duluth land district, Minnesota.

On the motion for review it is unnecessary to say more than that when the case was before the Department many voluminous briefs had been filed; that it was orally argued at great length; that all the matters recited in the motion and complained of in it, were carefully

considered by the Department in deciding the case. Moreover, every proposition embodied in the motion was fully argued by counsel and no new question of law or fact is presented by it. I see no reason for changing the conclusion then reached.

The motion for rehearing is on the ground of newly discovered evidence, and there are several objections to granting it.

1. The petition does not show, or even state, that the contestant, Emil Hartman, did not know of the testimony prior to the trial, nor is his affidavit filed with the motion, or any reason given for not filing it. The only affidavit to the point is that of D. P. Dyer, Esquire, one of the contestant's counsel.

An affidavit in support of a motion for a new trial must show that the evidence was unknown to the party, and not merely to his counsel. (*Fikes v. Bentley*, Hemp., 61), and the affidavit of counsel is insufficient without that of the party (*Hillard on New Trials*, page 515, Sec. 37).

2. It must be shown that the testimony could not have been discovered by due diligence, and the facts relied on to show due diligence should be set forth in the motion (16 Encyclopædia of Law, 567; *Sutton v. Abrams*, 7 L. D., 136). The affidavit of Mr. Dyer sets forth simply that the affiant "only became aware of the existence of the facts, and could not by due diligence have discovered them sooner."

3. Then on the merits: The evidence upon which the motion is based, consists of the testimony of James H. Warren, who was examined at the trial for the contestant, and of one John B. Warren, who swears that he is a brother of the said James H. Warren.

Two affidavits of James H. Warren are filed with the motion—one sworn to on the 5th of September, 1894, the other, on the 8th of September, 1894. In his first affidavit, he swears that he exercised his right as a citizen of the United States, by voting for Fremont for President in 1856, and later, for other candidates for the Presidency. But that did not answer, as the treaty was made in 1854; so another affidavit was procured, in which he swears that he voted in the year 1844 in Illinois, and in the year 1852, in California. In his deposition taken for the contestant, and read at the trial, he had sworn that his residence in California was only such as was incident to his religious work as a missionary, and in that sense temporary; that he never had any plans as to whether his absence from his tribe should be temporary or permanent, and that he never had any thought of severing his tribal relation, whether absent or not; on the contrary, that his connection with the Old Chief Buffalo, whom he visited at La Pointe, "the home of his aged mother," took on the nature of family pride, not to be given up by voluntary absence from the tribe. But now he swears that he voted in California from the year 1852, down to 1892.

Why did he not so testify when he was examined before the hearing? and why did not the contestant's counsel interrogate him to the point?

In the fifth cross-interrogatory he was asked whether or not, prior to the 30th day of September, 1854, he had taken out naturalization papers under the Constitution and laws of the United States, and he replied, No. But no question was asked by the contestant as to whether he had voted in California in elections prior to 1854. That question certainly was pertinent to the inquiry, even according to the limited view which Hartman's counsel say they took of the issue. If Warren voted in California from the year 1852 down to a time long subsequent to the year 1854, it was, to say the least, a very important fact for the contestants to bring out at the hearing (*Jacobs on Domicile*, S. 435; *Sheldon v. Tiffi*, 6 Howard U. S. R., 163).

A new trial will not be granted on the ground of newly discovered evidence when the evidence is expected to be proved by a witness who was called and examined, it being the duty of counsel to question the witness, when upon the stand, as to all matters pertinent to his case, *Fanning v. McCraney* (1 Mon., Iowa, 398); *Houston v. Smith* (2 Smed & M., Miss., 577). In *Wright v. Alexander* (11 Smed & M., Miss., 411), it is said, "If the witness omitted to tell all he knew from inadvertence, or because he was not interrogated thereto, that would not be good ground for a new trial." In *State v. Ginger* (46 N. W. Rep., 657), it was held that it was not error in the trial court to refuse a new trial on the ground of newly discovered evidence when the evidence consisted of a fact that one of the respondent's witnesses omitted to testify to when examined at the trial. "It is enough to say of this, say the court, "that the court, no doubt, was of opinion that the omitted fact should have been called out by the examination of the witness." In *Houston v. Smith*, *supra*, it is said, "The failure to examine the witness to the omitted point shows, upon its face, a want of diligence." In *The People v. Miller* (33 Cal., 99), the defendant and one Ellen Quinlan were indicted together for the crime of larceny, of which the former was found guilty, and the circumstances which transpired at the time of the alleged larceny, as detailed by the witnesses at the trial showed plainly that the defendant had good reason, if innocent of the crime herself, to believe that Ellen Quinlan was guilty, and she had an opportunity, in order to exculpate herself of the charge, to examine Ellen in relation to the matter. It was held that the defendant not having availed herself of the opportunity afforded her at the trial, could not then say that the evidence she sought to obtain could not have been discovered by the exercise of due diligence and the supreme court refused a new trial. These are only a few of the many cases which lay down the law that a new trial will not be granted under such circumstances.

The evidence contained in the affidavit of John B. Warren would not change the result. All that he swears to which would tend to change it, is merely hearsay, and would be inadmissible at the hearing.

The motions for review and rehearing are denied.

SOLDIERS' HOMESTEAD—DISHONORABLE DISCHARGE.

CYRUS A. PAYNE.

A record of dishonorable discharge from the military service disqualifies the soldier for the exercise of the soldiers' homestead right; but when by special act of Congress the record is changed, and an honorable discharge directed, the soldier may exercise said homestead right.

Secretary Smith to the Commissioner of the General Land Office, December 21, 1894. (P. J. C.)

The land involved in this appeal is Lots 4, 5 and 6, Sec. 3, T. 10 N., R. 10 W., Santa Fe, New Mexico, land district.

The record shows that Cyrus A. Payne filed soldier's declaratory statement for said tract January 11, 1892, and that the same was rejected for the reason that said lands were covered by the homestead entry of one Raphael Chavez, which was then being considered in your office. That case was finally disposed of by the departmental decision of February 15, 1892 (L. & R. No. 236, p. 73); whereupon your office, by letter of March 9, 1892, directed the local office to allow Payne to make entry.

The local office transmitted his application to your office for its consideration March 28, 1892, and on June 20, 1892, the register and receiver forwarded to your office the application of Elias Chaves for said tract, together with his appeal from their rejection of the same.

After consideration of Payne's application, your office, by letter of October 6, 1892, decided that his application should be rejected, for the reason that

information furnished this (your) office by the Record and Pension Division of the War Department shows that Payne was mustered in as First Lieutenant of Co. I, 18th New York Cavalry October 25, 1863, and was dishonorably discharged from the service as Lieutenant November 1, 1864. Payne's application is made under sections 2304 and 2306, R. S., which provides that an additional homestead application may be made by "every private soldier and officer who has served in the army of the United States during the recent rebellion for 90 days, and who was honorably discharged."

Whereupon Payne prosecutes this appeal.

There can be no doubt as to the correctness of your said office decision, as the record then stood, but by act of August 8, 1894, Congress passed a law removing the disability under which Payne then labored, as follows:

That the President of the United States be, and is, authorized to cause to be revoked and set aside so much of "Special orders, numbered three hundred and ninety-eight, War Department, Adjutant-General's Office, November fifteenth, eighteen hundred and sixty-four," as confirms so much of "Special orders numbered two hundred and ninety-six, Headquarters Department of the Gulf, New Orleans, November first, eighteen hundred and sixty-four," as dismissed Lieutenant Cyrus Payne, Eighteenth Regiment New York Cavalry, for perpetrating frauds upon the government, and then to cause to be revoked and set aside so much of "Special orders, numbered two hundred and ninety-six, Department of the Gulf, New Orleans, November first, eighteen hundred and sixty-four," as dismissed said First Lieutenant

Payne, Eighteenth New York Cavalry, and to cause to be issued to said Lieutenant Payne a certificate of honorable muster out of the service as of the date of the twenty-seventh day of May, eighteen hundred and sixty-five. And said Cyrus Payne shall not, by reason of this act, be entitled to any pay or allowance subsequent to said last-named date.

Inasmuch as this act seems to relieve him from the odium of a dishonorable discharge, I see no reason why his application may not be allowed. It is so ordered, and your office judgment is reversed.

The application of Chavez, together with accompanying affidavits, I herewith return to your office for such further action as you may deem proper in view of this decision.

PRACTICE—CONTEST—SETTLEMENT RIGHTS—SCRIP LOCATION.

MCDONALD ET AL. v. HARTMAN ET AL.

A question heard and finally determined by departmental decision is *res judicata*, and will not be again considered on behalf of the same parties in a subsequent case involving the same land.

A case, arising on a claim of alleged priority of settlement right, as against a scrip location, and wherein each party pays his own costs, is not a "contest" within the intent and meaning of the act of May 14, 1880, by which a preferred right of entry can be secured.

A homesteader who claims priority of right, by virtue of an alleged settlement, must comply with the settlement laws, and can not defer the establishment and maintenance of residence until the allowance of his application to enter.

The fact that an application to enter has been tendered and rejected can not operate to deprive the claimant of his right to again present his application for proper action thereon.

It is no objection to an application to enter that it is tendered prior to business hours in the local office where said application is retained by the local officers and duly acted upon during the business hours of that day; nor does the fact that said application bears the date of the day previous impair its validity, when it was presented on said date and refused because filed out of business hours.

An application to enter embracing non-contiguous tracts may be allowed to stand, as to the contiguous tracts, on the applicant's relinquishment of the non-contiguous subdivision.

The departmental instructions of March 30, 1893, with respect to the reservation of land covered by a canceled entry, for the exercise of the contestant's preferred right, are only applicable to contests prosecuted under the act of May 14, 1880.

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

The right to make a soldier's additional entry is a personal right, and can only be exercised in behalf, and for the benefit of the soldier entitled thereto.

A Valentine scrip location is not rendered invalid by the fact that the name of the assignee is inadvertently omitted from the written assignment of said scrip, where it is apparent from the record that the locator is in fact the lawful possessor of said scrip, with full authority to locate the same in his own name.

In determining priority of applications the statements of the local officers, contained in their report made in the ordinary course of business, are entitled to due weight and consideration.

Secretary Smith to the Commissioner of the General Land Office, December 21, 1894. (J. I. P.)

The land here involved is located in the Duluth, Minnesota, land district, and is described as follows: lots 3, 5 and 6, and the SE. $\frac{1}{4}$, NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, of Sec. 30, T. 63 N., R. 11 W.

The history of the case, as gleaned from one of the most voluminous records probably ever transmitted to the Department, is briefly as follows:

Prior to the beginning of this controversy, said tracts were covered by certain Sioux half breed scrip locations, made by one Frank W. Eaton, as the attorney in fact of Orille Stram, which locations, by reason of conflict with pre-emption claims asserted by Angus McDonald and Thomas W. Hyde, were held invalid by this Department, February 18, 1889. Not only did said decision (unreported) hold said scrip locations invalid, but it also held the pre-emption claims of Hyde and McDonald to be invalid, and cleared the record of all conflicting claims to said land, as revealed by that case, in the following language:

This disposes of all the claims and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

That decision, on motion for review, was re-affirmed January 28, 1891 (12 L. D., 157), with the single modification that the Department declined to pass on the claim of Hyde and McDonald that, as successful contestants, they were entitled to the preference right to enter said land, the language of the decision on that point being as follows:

Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right, and it ought not to be decided prior to that time. *Saunders v. Baldwin* (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

The departmental decision of February 18, 1889, *supra*, was promulgated by your office on February 19, and was received by the local office at Duluth on the evening of February 22, a national holiday. On the morning of February 23, prior to nine o'clock, a crowd of men, some of whom had been there for several hours, was gathered in the hall or lobby in front of the door of the local office. At nine o'clock the door was opened from the outside by a clerk of the local office, and the crowd rushed in. In a very brief space of time a number of applications for different subdivisions of the lands in question were presented to the receiver. The applications made by the parties hereto being the only ones presented for consideration herein, were as follows:

Emil Hartman:

Lot 6, with Porterfield warrant No. 74; SE. $\frac{1}{4}$, NW. $\frac{1}{4}$, with Valentine scrip, E. No. 117; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, with Porterfield warrant No. 1; and the additional Hd. application of Thos. Reed for lots 1 and 2, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, all said lands being in said Sec. 30.

Chas. P. Wheeler, by his attorney Warren N. Draper, offered to file on SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Valentine scrip E. No. 259; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Valentine scrip E. No. 270; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Porterfield warrant No. 98. Also as attorney in fact of one David Moyer, Wheeler, by said Draper, presented soldier's additional homestead certificate for lots 3, 5 and 6 of said Sec. 30; also, as attorney for Warren Wing, Wheeler, by the said Draper, presented soldier's additional homestead certificate for lot 2 of said Sec. 30.

Reuben E. Lawrence: by Samuel C. Brown, his attorney in fact, filed soldier's additional certificate for lot 6, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said Sec. 30, and

William M. Stokes: by said Brown, as attorney in fact, filed soldier's additional certificate for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 30.

William Alden and Houghton E. James, by J. K. Person, their attorney, presented homestead applications, the former for lots 3, 5 and 6, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ (lot 2), and the latter for lots 1 and 2, and the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 30—both of said applications having been presented and rejected on February 19, preceding, of which reference will be made later on.

Daniel C. Sullivan and Carroll M. Mauseau, during the afternoon of February 23, filed homestead applications, the former for lots 3, 5 and 6 and the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, alleging settlement thereon February 22, 1889, and the latter for lots 1 and 2 and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, alleging settlement thereon February 22, 1889.

The question as to the priority of the applications presented at the opening of the office on the morning of the 23d was taken under advisement by the local officers until later in the day. Some time during the afternoon they gave their decision, awarding to Emil Hartman all the lands applied for by him as above set forth, and to David Moyer, the two forty acre tracts applied for by him, as above stated, and rejected all the other applications made for conflict with the allowed claims of Hartman and Moyer. From this action of the local officers various appeals were taken. Pending those appeals, however, a motion to review the departmental decision of February 18, 1889, was filed by Hyde and McDonald, which was finally disposed of by the decision of January 28, 1891, *supra*.

In closing out that case (the motion to review) and upon consideration of the appeals above referred to, your office, by letter "H" of March 13, 1891, ordered a hearing to be had, in order that all the parties to the controversy might have an opportunity to present their claims and evidence in support thereof.

The hearing was set for June 8, 1891. Prior to that date, however, viz: on April 2, 1891, Hyde made homestead application for lots 5 and 6, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section, claiming the same by virtue of his alleged preference right of entry, and by virtue of his settlement made on the last-named tract August 20, 1884, and his subsequent residence thereon. On the next day (April 3) McDonald made homestead application for the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 30, claiming the same on the same grounds asserted by Hyde—viz: preference right of entry and settlement, residence and improvement.

On the day of the hearing (June 8, 1891,) Hyde filed a petition to amend his homestead application of April 2, 1891, by omitting therefrom the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 30, asserting, however, that he did not intend thereby to abandon his claim to that tract, but that he would at the proper time assert his claim thereto. His petition was allowed and the application amended as requested.

The hearing before the local office, which extended over a period of nine or ten months, resulted in the following decision by that tribunal: it rejected the claims of Hyde and McDonald, and Mauseau and Sullivan, and held that the lands were open to disposal under the public land laws from the date of the Secretary's decision, viz: February 18, 1889; that the applications of Alden and James were properly and legally presented February 19, 1889, and awarded to James the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 30, the remaining tracts applied for by him having been inadvertently patented to Reed on his soldier's additional certificate, and hence taken out of the jurisdiction of the land department. To Alden was awarded lots 3, 5 and 6, excluding the other tract applied for, because it was not contiguous to the other tracts embraced in his application. To Wheeler was awarded the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said Sec. 30, upon the finding that his application was prior to that of Hartman.

Upon appeal, your office, by its decision of September 8, 1893, concurred in the decision of the local office in its rejection of the claims of McDonald and Hyde and Sullivan and Mauseau, but reversed it as to Alden and James, holding that said lands were not subject to disposal under the public land laws until the Secretary's decision, regularly communicated through the General Land Office, was received at the local office, or at most from the date of the promulgation of the Secretary's decision by the Commissioner of the General Land Office. Said decision then awarded to Wheeler, on the finding that his application was first in point of time on the morning of February 23, 1889, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said Sec. 30, and held Hartman's three scrip locations for cancellation. As to lots 3, 5 and 6, embraced in the additional homestead application of Moyer, application to contest said entry had been filed by one Billson and subsequently by one Monahan, alleging, in substance, that Moyer was dead on February 23, 1889. Your office letter "H" of March 13, 1891, *supra*, ordering a hearing, directed Billson and Monahan "to attend the hearing and present their testimony." Your office decision held that they failed to

present any testimony, and that hence their applications to contest were still pending, subject to future consideration on the determination of this case. And it was further declared that should that decision become final, Moyer's entry would be made to cover the land originally applied for on February 23, 1889, as shown by his homestead application.

An appeal by the parties adversely affected by said decision brings the case to this Department. Taking them in the order presented at the trial and in the arguments and briefs of counsel, the first requiring consideration are the claims of Hyde and McDonald.

At page 23 of their brief, they declare that "they do not claim the land in controversy by virtue of any settlement or pre-emption rights," and at the bottom of page 24 of said brief they assert that "the question of these pre-emption rights is not in the case." Notwithstanding these statements, however, there is in the record (1) their homestead applications, containing, as stated, an express claim to these lands by virtue of settlement thereon August 20, 1884, and subsequent residence and improvement; (2) a great amount of testimony with reference to said settlement, residence and improvement, said settlement, etc., being the same on which they based their preemption right to said lands.

If there ever was a question to which the doctrine of *res judicata* applied it is that of the settlement and pre-emption rights of McDonald and Hyde to the lands embraced in Orille Stram controversy, a part of which is included in their homestead application of April 2, and 3, 1891.

There must of necessity be somewhere an end to controversy. Their settlement and pre-emption rights to these lands involved in the controversy concerning the Sioux half breed scrip locations of Orille Stram were fully considered, and finally determined by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891 (12 L. D., 157), and the introduction into the record of this case of the evidence referred to can not resurrect and revitalize that dead issue.

In your office letter "H" of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that—

should they set up any claim as preferred contestants in regard to lots 5 and 6 and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and be heard with others.

This clearly limited the inquiry, so far as they were concerned, to their "claim as preferred contestants" as to their alleged preferred right to enter the lands described in said office letter "H." The local office so treated it, and in its decision denied them a preference right to enter said lands, holding, as stated, that they are not contestants under the act of May 14, 1880. Your office, on appeal, affirmed the decision of the local office in that respect, and their appeal here from

your office decision brings before me for consideration, so far as they are concerned, that single question and none other.

To entitle them to a preference right of entry it must appear that their action against the Stram scrip locations was a contest under the act of May 14, 1880.

The proceedings against the Stram scrip locations were separately instituted by Hyde and McDonald on October 9, 1884. At that time the lands were unsurveyed. The papers or pleadings by which the proceedings were begun, are, with the exception of names and description, identical. After averring the invalidity of the scrip locations, each pleader proceeds in the exact language of the law to state his qualification as a pre-emptor. He then states the date of his settlement on said land, that it was made with a view of inhabiting and cultivating it for his own exclusive use and benefit, and that as soon as the township plat was filed in the local office, at Duluth, he intended to file his pre-emption declaratory statement for said land.

It will at once be seen that those pleadings asserted the superiority of the pre-emptor's title over that of the scrip locator, that it brought the two titles squarely in conflict, necessitating a judgment as to which was the better. And that the litigation following was a contest between conflicting claims. There is no intimation in the pleadings themselves that the proceedings are instituted under the act of May 14, 1880, and they certainly bear no resemblance whatever to the familiar affidavits of contest under that act. It is shown by the evidence in this case that on the trial of that case before the local office, a question as to who should pay the land office fees arose, and that the suggestion was made that McDonald and Hyde, as the contestants, should pay the fees. Thereupon, their attorney declared that the proceedings were not contests under the act of May 14, 1880, but contests between conflicting claims, and hence not within the rule requiring the contestant to pay all of the land office fees, but that the fees should be apportioned between the parties, each paying their own fees, and that the matter was adjusted in that way.

Again, it is apparent that if those proceedings were instituted by Hyde and McDonald for the purpose of securing a preference right of entry to the lands covered by the scrip locations, they would have exercised that right within thirty days from the date of notice of the decision of February 18, 1889. But, instead of that, they each filed a motion to review and reverse that opinion, and thereby assumed a position utterly inconsistent on the part of intelligent persons, seeking a preference right to enter the lands involved in that controversy. Their every act has been that of persons consistently endeavoring to assert and establish their title under the pre-emption laws, and, incidentally, to clear from the record the Orille Stram scrip locations, which were, in effect, a cloud on their pre-emption title.

The claim of a preference right to enter these lands as successful contestants evidently was an afterthought that came to them when casting about for some means by which to extricate themselves from the wreck in which the decision of February 18, 1889, involved them.

There is no theory presented by this case in any of its manifold aspects, by or under which the status of Hyde and McDonald, in the controversy with Orille Stram, *et al.*, could be construed to be that of contestants under the act of May 14, 1880. And the decision of your office, rejecting their applications to enter the lands embraced in their respective homestead applications and denying them a preference right to enter the same, as alleged successful contestants, is in that respect hereby affirmed.

The next claim to be considered in the order adopted, are those of Carroll M. Mauseau and Daniel C. Sullivan. As the facts in each case are in effect identical, they will be considered together. These men, under the guidance of one F. B. Spellman, who was familiar with the lands, went upon the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 30, on February 22, 1889. They arrived there about 10 o'clock, and between that hour and 1:30 they (Mauseau and Sullivan) working together, built the form or frame of a log house, fourteen by sixteen feet, and about five logs high, on the first tract described above, which was claimed by Mauseau, who also blazed a tree near the house, and wrote thereon that he claimed said NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, together with the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and lots 1 and 2, the last three tracts not being involved in this controversy. They then went upon said SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and built a similar structure for Sullivan, blazed a tree and marked thereon that Sullivan claimed that tract, together with lots 3, 5 and 6 of said section 30. They completed that work soon after four o'clock. They then left the land, and the next day (February 23) presented their homestead applications at the local office, some time after noon, for the land claimed by them, as above described. Their applications were rejected, for conflict with other claims filed that day, as herein stated. It was shown at the hearing that neither of them has been on the land since February 22, 1889, and has never made any other improvements thereon than those made on that day. Their excuse for not establishing their residence on the land is, that their attorney advised them that it was not necessary until their homestead applications had been allowed.

Their claim of priority, by reason of their settlement, is based on section three of the act of May 14, 1880 (21 Stat., 140), which placed settlers desiring to acquire the land settled on, under the homestead law, on the same basis as pre-emption claimants, and allowed his rights, when application was made, to revert back to the date of his settlement.

Without entering into any discussion of this question, I simply cite

the case of *Hall, et al. v. Stone* (16 L. D., 199), in which the Department held, where this same question arose:

That a homesteader who claims priority of right by virtue of an alleged settlement, must comply with the settlement laws, and cannot defer the establishment and maintenance of residence until the allowance of his application to enter.

This, without further argument, disposes of the claims of Mauseau and Sullivan, and your office decision rejecting their claims, is in that respect affirmed.

The cases of Alden and Janies present the most interesting legal question involved in the case. It appears that on the evening of February 18, 1889, about the hour of five, as stated by their attorney, Alden and James appeared before the register of the land office at Duluth, with their homestead applications for the land hereinbefore described, and were sworn to the affidavit attached to each application, by the register, who, however, declined to accept their applications then tendered for the reason that the office was closed for business.

On the next morning (the 19th) they again appeared before the local officers between 8:30 and 9 p. m. and again offered said applications for filing and acceptance. The local officers again declined (verbally) to accept said applications, for the reason that they conflicted with the uncanceled scrip locations of Orille Stram, covering the same land. The applications were then left with the local officers, who, some time during the day noted their action rejecting said applications, in writing on the back of each for the reasons above stated.

On the morning of February 23, 1889, at one minute after 9 o'clock they again, through their attorney, called up said applications from the files of the local office, where they had been left, and reoffered them for filing and acceptance, with a tender of the land office fees. Expressly reserving in said applications all rights acquired, by their applications tendered on February 19, 1889. The local officers noted on the back of said application, "Refiled and application renewed February 23, 1889, at one minute past 9 o'clock a. m.", and again rejected them in writing on the back thereof for conflict with the entries of Reed, Hartman and Moyer that day allowed. From the rejection of their applications tendered February 19, and 23, they appealed.

The claim of these applicants is based on the proposition that the departmental decision of February 18, 1889, *supra*, took effect at the date of its rendition, and that the lands covered by the scrip locations canceled thereby, were at once restored to the public domain, and became subject to disposal under the public land laws.

Before going into the merits of the question presented, counsel opposed to these claimants attack the applications on technical grounds. It is urged that said applications are invalid, and confer no rights on these claimants, because their presentation on the evening of February 18, 1889, and the morning of the 19th were, respectively, after and

before the hours, when by law the land office was open for the transaction of public business.

But in point of fact the applications of Alden and James were left with the local officers on the morning of the 19th when tendered, and were considered by the local officers later in the day between nine and four o'clock as then tendered and were rejected by them for conflict with the Orille Stram scrip location, as above stated.

The fact that the applications were tendered on the 18th and rejected could not operate to deprive these claimants of the right to again present their applications for proper action thereon. On the 19th the papers were again tendered before nine o'clock A. M., and rejected for this reason, orally, but they were retained by the officers and during the day were marked rejected, because of conflict with the scrip location of Orille Strain. This action on the papers by the local officers treated them as tendered during office hours. And to hold that those applications then presented, because of the action of the register on the evening previous, should be rejected because the affidavits were dated the day before, would be unwarranted by a proper administration of the law.

It is further contended that said lands were not subject to disposition until February 23, 1889, when the cancellation of the scrip entries were noted on the records of the local office, and that therefore the affidavits of Alden and James were invalid because executed before said lands were open to disposal. That proposition, which is related to, and dependent on, the principal question involved herein, will be considered further on in this opinion.

It is also asserted that the application of Alden was one which the local officers could not have allowed, for the reason that the tracts embraced therein are not contiguous, and reference to a number of authorities is made to sustain that position. Three of the tracts embraced in said application are contiguous. It is shown that another and contiguous tract was intended to be embraced in said application, and that including the non-contiguous tract therein, was a clerical error of the draughtsman who prepared the application. A motion to amend said application, so as to exclude the non-contiguous, and include the contiguous tract originally intended to be included in the application, was denied, because adverse rights had intervened to said contiguous tract. Alden then, in effect, filed a disclaimer, or relinquishment to the non-contiguous tract, by electing to stand on his application as to the three contiguous tracts, viz: lots 3, 5 and 6.

In the case of Douglas Randall (11 L. D., 367), the entryman was given the privilege of relinquishing such non-contiguous tracts as he might elect, with the right to amend his entry so as to embrace other contiguous land, in lieu of that relinquished. This right of amendment was evidently given him in order that he might obtain the full one hundred and sixty acres allowed under the homestead law, and make his

entry complete in that respect. It was not necessary for the purpose of making said entry complete, as to the contiguity of the land embraced therein, because it was perfect in that respect as soon as the relinquishment was filed, as the tracts remaining were contiguous to each other. Here, the amendment can not be allowed because of the presence of adverse claims to the tract sought to be substituted for the non-contiguous tract.

There is, however, no law to prevent Alden from at any time relinquishing, as to the non-contiguous tract, which he has in effect done, by electing to stand on his application as to the three contiguous tracts, and it leaves his application, so far as the contiguity of the tracts embraced therein is concerned, a perfect one.

In the case of Wesley Pringle (13 L. D., 519), where the application contained two non-contiguous tracts, the applicant was permitted to elect which of the tracts he would include in his entry, and that too, in the presence of an adverse claim to each of said tracts. True, the application was a soldier's additional, but the principle of contiguity is the same there as in an application for an original homestead entry.

In view of the liberal policy of the Department in matters of this kind, as indicated by the cases above mentioned, Alden's election to stand on his application as to the three contiguous tracts therein, is sustained, and his application in that respect held intact.

It is further asserted by counsel opposed to Alden and James, that the departmental instructions of March 30, 1893, (16 L. D., 334), prohibited the local officers from receiving their applications when tendered. Those instructions upon the point involved, are as follows:

That in cases where an entry is canceled by reason of a contest, the land covered by the same is to be reserved from entry for the period of thirty days from due notice to the contestant of his preference right of entry thereof.

That rule is based on the act of May 14, 1880, *supra*, and is intended to apply to contests initiated under that act, for the purpose of obtaining a preference right to enter the land embraced in the entry contested.

It has been held herein, and was so contended by counsel who cite this rule, that the contest of Hyde and McDonald was not such a one as is contemplated by that act, and that they obtained no preference right of entry thereby. No argument is necessary, therefore, to show that as the reason for the rule is wanting, the rule itself cannot apply to this case. A further reason why it could not have affected the action of the local officers, with reference to said applications is, that it was promulgated about four years after said applications were presented.

Another objection urged by the same counsel is, that the local officers, at the time Alden and James presented their applications, were prohibited by Rule 53 of Practice, from accepting said applications. That rule provides that after the local officers have transmitted

a record to the General Land Office on appeal, they shall "thereafter take no further action affecting the disposal of the land, until instructed by the Commissioner."

This Department has held, in effect, that the prohibition imposed on the local officers by the rule invoked, is removed when the decision of your office cancels the entry. That such a decision is final, so far as your office is concerned, and renders the land subject to disposal under the public land laws, from the date of its rendition. And that during the time allowed for appeal from that decision, applications to enter should be received and filed, subject to said right of appeal. John H. Reed (5 L. D., 563); Henry Gauger (10 L. D., 221).

And it has been further held that an appeal from a judgment of cancellation by your office suspends that judgment, and operates to reserve the land involved from further disposition, until the final decision upon the appeal. *Patton v. Kelley* (11 L. D., 469).

Now, at the time the applications of Alden and James were presented on the 19th of February, 1889, the "final decision upon appeal" had been rendered in the case of Hyde and McDonald against the Orille Strain scrip locations. And if that decision had the effect to remove the reservation created by the appeal, and to render the lands affected thereby subject to entry under the public land laws, from the date of its rendition, then it is apparent that the applications of Alden and James, when presented, should have been accepted, and that brings us to the vital question involved in the case of those applicants.

The grounds upon which Alden and James base their claim have been stated, and it is further contended by them that the case of *Perrott v. Connick* (13 L. D., 598) is decisive of the question.

It is contended by opposing counsel that prior to *Perrott v. Connick* the undoubted rule was that a decision of the Secretary, operating to restore lands theretofore segregated, to the public domain, did not take effect until said decision had been transmitted by the Commissioner of the General Land Office to the local officers, and had been received by them.

The cases relied upon to sustain that contention, are:

Crystal v. Dahl (Copp's Land Laws, (1875) 363,

Eno v. McDonald (Copp's Land Laws, (1875) 363,

Jayne v. Gowdy (Copp's Land Laws, (1883) 652,

Cox v. Gilliland (Copp's Land Laws, (1883) 368,

Pomeroy v. Wright (2 L. D., 164),

Ryan v. Conley (4 L. D., 246).

The facts in the first case cited are, that before the controversy between the parties thereto arose, the land involved therein was covered by the homestead entry of one Andreas Nelson, which was "adjudged forfeited" by your office December 6, 1870, for abandonment, on the recommendation of the local office. The judgment contained an order directing the local officers to "make proper notes accordingly on

your records, reporting to this office the fact that you have given notice of forfeiture."

The facts in *Eno v. McDonald* are almost identical with those above stated. The homestead entry of one Shafer, with others, was "adjudged forfeited" by your office, July 20, 1872. Sixty days were allowed for appeal; none was taken, and on October 16, 1872, your office rendered a final judgment of cancellation, and directed the local office to so note on its records.

The facts in the case of *Cox v. Gilliland*, so far as I have been able to discover them, from the records of your office, correspond with those above, with the exception that the entryman in that case relinquished his entry in February, 1872, and I am fully persuaded that the judgment of cancellation, if found, would disclose an order to the local officers to note the fact on their records, as that seems to have been the form of procedure in your office at that time, in such cases.

The facts in *Jayne v. Gowdy* also correspond with those in the last case stated. The homestead entry of Lorenzo Gowdy, with others, was canceled by your office, on relinquishment May 18, 1878, the judgment of cancellation containing an order to the local officers "to please note the cancellation on your records, and thereafter promptly advise us of the fact."

In all of the cases above referred to, the entries were canceled *ex parte*. In each instance, the judgment of cancellation contained an order to the local officers to note the cancellation on their records. It was a part of the judgment intended to clear the record, and in such a case the judgment could not take effect until notice thereof was received at the local office, and the decision of the Secretary to that effect, in said cases was eminently correct.

But the case at bar is not an *ex parte* case. No order has been issued to the local office "to note the cancellation" of these scrip locations on their records. Hence the rule deduced by counsel from the decisions above considered, (without conceding it to be as stated) cannot be held to apply to this case.

The case of *Pomeroy v. Wright* does not apply here. The questions in that case were, when does an entryman, whose entry is contested, lose his rights to the lands involved, and when does the right of the successful contestant attach? The Department held that the rights of the entryman were lost, and those of the contestant attached at the date of the judgment of cancellation, and not when the act of cancellation was performed at the local office. That decision clearly supports the principle here contended for by Alden and James.

The case of *Ryan v. Conley* also supports that principle. It holds that the failure of the *act* of cancellation to follow the *judgment* in that case cannot affect Ryan's right under the judgment.

Crystal v. Dahl was decided April 30, 1872. *Jayne v. Gowdy* was decided October 4, 1880, and *Pomeroy v. Wright*, December 17, 1883.

Admitting, for the sake of argument, that the cases cited down to Pomeroy *v.* Wright, established the rule as claimed by counsel; that case evidently made an innovation on that rule. That innovation was followed by Ryan *v.* Conley, November 19, 1885. March 1, 1888, the case of John H. Reed (6 L. D., 563) declared the rule to be:

That when a final judgment of cancellation is rendered by the Commissioner of the General Land Office, the entry is thereby canceled, and the land opened to appropriation, without waiting for the expiration of the time allowed for appeal from such judgment.

That case was followed May 19, 1888, by Barclay, *et al. v.* The State of California (6 L. D., 699), in which it is held that a judgment cancelling a selection of certain lands made by the State "was a valid judgment, binding from its date." August 9, 1888, the case of Anderson *v.* Northern Pacific Railroad Company, *et al.* (7 L. D., 163) was decided, in which it was held that:

The cancellation of an entry, by the order of the Commissioner of the General Land Office takes effect as of the date when the decision is made: and the fact that such order was not noted on the records of the local office until after the definite location of the road, though made prior thereto, would not operate to defeat the operation of the grant.

The entry in that case was canceled by judgment of your office December 14, 1871. The definite location of the St. Paul Railroad was made December 19, 1871, but the cancellation not noted on the records of the local office until after the last named date.

The question in that case, as in this, was, when did the judgment of cancellation take effect. And the decision was in the language above quoted, holding in effect, that the tract there involved reverted to the public domain, and became subject to appropriation from the date of the judgment of cancellation, and not from the time notice thereof was received by the local officers, or noted on their records.

So that the rule, as contended for by counsel for Hartman and Wheeler, which they contend was *stare decisis*, and a rule of property at the date these applications were presented, was in effect abrogated by the decision last above mentioned, six months before these applications were presented, and was therefore not a rule of property at that time recognized by this Department.

The Anderson case was followed by Dahlstrom *v.* St. Paul, Minneapolis and Manitoba Railway Company, January 16, 1891, (12 L. D., 59), and by Perrott *v.* Connick November 24, 1891, (13 L. D., 598), which declared the rule to be:

That a judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

It is urged, however, by counsel for Hartman and Wheeler, that the decision of Perrott *v.* Connick is *obiter dictum*, and hence not authority.

In that case, Perrott made application to purchase the tract there involved, under the act of June 3, 1878, (20 Stat., 89). That application was made two days after the Department had canceled an entry covering said tract, and before notice thereof was received at the local office. The application was rejected by the local officers, for conflict with the entry then uncancelled on their records. On the day the local office received notice of the departmental decision, and after the notice was received, Perrott again applied to purchase said tract, which application was again rejected for conflict with an application made by Connick, a few days before. Perrott appealed from the rejection of both applications.

Your office held that the first application should have been received, and held to await the final judgment of the Department on the entry then pending before it, and reversed the action of the local office thereon, without passing on the appeal from the rejection of the second application. On appeal by Connick, this Department modified the decision of your office with reference to Perrott's first application, by holding that when it was made, the Department had two days prior thereto, rendered final judgment on the entry then before it. That said judgment took effect from the date of its rendition. That said tract was then and thereby restored to the public domain, and that Perrott was the first legal applicant therefor. Concerning the second application, it held that it was not an abandonment of the first, and that the controversy of Connick, that the Department's decision did not take effect until noted upon the records of the local office, even should it prevail, would avail him nothing, as Perrott was the first applicant after that was done.

It is contended that said decision is *obiter dictum* for the reason that, "without changing the decision, the particular thing stated, might have been decided either way." In other words, that however the Department may have held with reference to his first application, the decision must nevertheless have been in Perrott's favor, under his second application.

That the question as to when the decision of the Department cancelling the entry, took effect, was not a controlling question in the case, and that any decision thereon was mere *dictum*.

A careful examination of that case has convinced me that Perrott's rights were under his first application, under the rule laid down in the Anderson case, *supra*. That had he abandoned that application, he would have been cut out by Connick's application, filed three days before Perrott's second application. For Connick, under the rule laid down in the Anderson case, would have been the first applicant. Perrott's rights under his first application was the vital issue in the case, and the question as to when the judgment of cancellation took effect, was the controlling one. The contention that had the decision been based on the second application, it would have been in harmony

with the rule laid down in *Crystal v. Dahl*, etc., is of no force, as that rule is shown to have been abrogated and overturned by the decision in the *Anderson* case, *supra*.

It is also urged that the decision is *obiter*, because the language thereof was not "needful to the ascertainment of the rights of the parties," that the case did not call for its "expression," and that it was not "necessary" to be determined. To all of which I respectfully dissent, and hold that under the issues, as framed and presented in that case, the converse is true.

I have examined with care the numerous objections urged, and authorities presented for the purpose of destroying *Perrott v. Connick* as an authority. A discussion of the latter is impracticable in this decision, already of great length. A careful examination of those authorities however, discloses their inapplicability to that case, because of the impregnable fact that the decision in that case was upon the vital question directly presented by the issues. Besides, for several years that decision has been approved and followed by this Department as an authority. *Lough v. Ogden, et al.* (17 L. D., 171), and the recent case of the *Hastings and Dakota R. R. Co.*, decided June 19, 1894.

I therefore hold that the decision in *Perrott v. Connick* is authority, and that it correctly announced the rule recognized by this Department at the date of its rendition, and for several years prior thereto, upon the question involved.

It is contended that a dispatch sent by the Commissioner of the General Land Office on February 20, 1889, to the local officers, directing them to disregard any letter of his promulgating the decision in the *Stram* case, until received by regular mail, shows conclusively that that officer must have had a different opinion concerning the time when said decision took effect, from that held by Alden and James.

The question here is, when did the decision of the Secretary take effect, and it must be apparent to any rational mind, on reflection, that no opinion which the Commissioner of the General Land Office might hold, could in any way affect the legal effect of a judgment of this Department. Hence I hold, that the telegram sent by the Commissioner of the General Land Office, as stated, has no bearing or influence whatever on the question here involved.

The decision of Secretary Vilas, rendered February 18, 1889, cancelling the *Stram* scrip location, took effect on that date. And as that decision declares—

This . . . leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

When Alden and James appeared at the local office on February 19, 1889, they were the first qualified entrymen to apply for the land. Their applications, accompanied with the proper land office fees, should, when tendered, have been received, and filed to await information from

the Land Department, of the final decision in the case of Hyde and McDonald *v.* Stram, and when that information was received, said applications should have been placed of record. When those applications were tendered, supported by proper affidavits and accompanied with the necessary fees Alden and James had done all that the law required them to do to initiate a claim to said land under the homestead laws. The retendering of their applications on February 23, 1889, with an express reservation of their rights under their applications of February 19, was not an abandonment of that application. (*Perrott v. Connick*, *supra*.)

The fact that those applications were rejected by the local officers cannot deprive Alden and James of their rights thereunder as said applications to enter are equivalent to actual entry, so far as the rights of the applicants are concerned, and while pending, reserves the land from any other disposition. (*Goodale v. Olney*, 12 L. D., 324; *Coder v. Lotridge*, 12 L. D., 643).

It follows, therefore, that the subsequent entry, allowed by the local officers, for the lands embraced in the applications of Alden and James were erroneously allowed, and conferred no rights on the entrymen.

Lots 3, 5 and 6 in said section 30, applied for by Alden, are therefore hereby awarded to him, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section 30 applied for by James is awarded to him, the other three tracts embraced in James' application being covered by the Reed patent, now in litigation, and beyond the jurisdiction of this Department.

The conclusion reached, obviates the necessity of considering any of the claims initiated on February 23, 1889, to the tracts herein awarded to Alden and James, and leaves for further examination only the claims of Hartman, Wheeler and Lawrence, initiated February 23, 1889, to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section thirty.

The claim of Lawrence was initiated by S. C. Brown, as his attorney in fact, on February 23, 1889, by the tendering of an application to enter said tract as a soldier's additional homestead. It is contended on behalf of this claim, that all the applications presented for this tract on the morning of February 23, were simultaneous, and that therefore the tract should be sold to the highest bidder.

An examination of the record shows that there was an interval of time, although in some cases very brief, between the presentation of the different applications upon that morning. Hence they were not simultaneous. *Benschoter v. Williams* (3 L. D., 419); *King v. Ardell, et al.* (13 L. D., 190).

It is also shown by the testimony of Brown himself that the soldier's additional scrip, on which the application of Lawrence was made, was purchased by Brown in the market, and that at the time said application was made, was owned by him, with others, and that as a matter of fact, the application to enter said tract was not made for the benefit of Lawrence, but was made for the benefit of Brown and those inter-

ested with him. This of itself renders the application invalid, as the right to make a soldier's additional entry is a personal one, and can only be exercised in behalf, and for the benefit of the soldier entitled. George A. Morris (17 L. D., 512 at 514); John M. Walker (10 L. D., 354); Selden *v.* Mathews, *et al.* (14 L. D., 205).

This, together with the fact that R. D. Mallet, under a power of attorney from Lawrence, authorizing him so to do, did, on July 17, 1891, dismiss all proceedings instituted by Brown, with reference to said tract, and the further fact that it is clearly shown by the record that Lawrence's application was subsequent to both Hartman's and Wheeler's, leads me to the conclusion that there is no merit in said claim, and I so hold.

This brings me to the last stage of the case, viz: the controversy between Hartman and Wheeler. Each of these parties claim to have been the first to present his application for said tract on the morning of February 23, 1889. There is no doubt whatever but that one of them was the first applicant. Wheeler, however, contends that whether he was first in point of time or not, he was nevertheless the first legal applicant, for the reason that the Valentine scrip E., 117, with which Hartman attempted to locate the tract in question, was not legally assigned to him, in that the name of the assignee was left blank in the written assignment of said scrip, that therefore he derived no rights by virtue thereof, and that said location was consequently invalid. If this proposition be correct, it is obvious that an examination of the question of actual priority would be unnecessary. So that it is logically the first question to be considered.

Your office, by letter of June 17, 1874, instructed the local officers throughout the United States that Valentine scrip was to be located in the same manner as military bounty land warrants. (1 C. L. O., Ed. 1874, page 69).

By circular of October 17, 1853, to the local officers throughout the United States, your office called attention to the fact that military bounty land warrant had been forwarded there, in which the blank in the assignment was not filled with the name of the assignee. After enjoining them to see that warrants in the future be in every respect perfected, the instructions state that "In all the instructions herein enumerated . . . the mere statement of the defect carries with it the requisite knowledge of the method of amendment, viz: *by supplying the omission.*" Lester's Land Laws, 592-93.

In the case of Michael Callaghan (1 L. D., 301), where the name of the assignee was left blank in an assignment of scrip, it was returned by your office to the local office, "in order that the party in interest may have an opportunity to perfect said assignment."

The same thing was done in the case of Mark L. Elkins, Jr., (2 L. D., 430). The practice of the Department to allow "the party in interest" to "supply the omission" in such cases seems to be well settled.

Hartman is here "the party in interest." There is no question but that on the morning of February 23, 1869, he was lawfully in the possession of that scrip, with full power and authority to locate said tract therewith in his own name. The omission to insert his name as assignee in the assignment was a mere inadvertence, that, in my judgment, would not for an instant affect his substantial rights in a court of equity, and should not do so here. Supplying the omission in said assignment would not make him any more the owner of said scrip, nor give him any more authority over it than he had before.

This scrip, so far as the government is concerned, is nothing more nor less than its obligation which it has promised to pay with public lands. When, therefore, one having the authority to do so, tenders one of those obligations for redemption, and it is accepted, the discovery thereafter that the instrument itself does not disclose that authority, will not cause the government to refuse payment, until the applicant has been offered an opportunity to supply the omission, or show his authority *aliunde*, and has failed to do so.

But it is contended that to allow Hartman to supply the omission, in the assignment, would be a violation of the rule prohibiting the amendment of an application or entry, after adverse rights have intervened. I do not think so. An examination of the cases on which that rule is based, as to the amendment of entries, shows that in every instance, the proposed amendments sought to include in the entry, lands not theretofore embraced therein, and to which other adverse rights, either by settlement or by entry, had attached. There is nothing of that kind here, and hence that rule does not apply. It has always been the policy of the Department to not allow substantial rights, where they exist, to be defeated by mere technicalities. In the case of *Banks v. Smith*, 2 L. D., 44, it was held that an application, defective in form, returned for correction, should take effect from the time it was first received at the local office, even though an adverse claim had intervened in the interim.

The circulars and instructions of your office have for years directed that applications to make entries under the homestead, timber culture, and other laws, shall contain the name and post-office address of the applicant. These regulations have the force and effect of law, when not in conflict therewith. In the case of *Browne v. Ryan*, 3 L. D., 468, the timber culture applicant omitted his post-office address. It was returned to him by the local officers for correction. Before it was again received at the local office, another applicant, who tendered a complete application, was allowed to enter the land. The Department held that the application of the first applicant was in proper form, and that notwithstanding the omission therein, his rights would date from the time his application was first filed in the local office.

Conceding, for the sake of argument, only, that the assignment of the scrip in question, was a part of the application to locate, we have sub-

stantially the same question presented by the omission of the name of the assignee, that was presented in the case last above mentioned. The omission here is of no more importance than in the case cited. The assignment is only *prima facie* evidence of the transfer of the scrip, and is important to the government only in the sense that it furnishes the information as to whom patent should issue. If, where the name of the assignee is wanting, the evidence of title and the information as to whom patent should issue is furnished *aliunde*, the substantial rights of the applicant are preserved, and the government in no wise injured.

I am so thoroughly convinced of the soundness of this conclusion, that a multiplication of arguments or precedents seems to me a waste of time, and I therefore hold that the omission of Hartman's name as assignee in the assignment of said scrip, in the light of the information contained in the record, did not affect the legality of his application, and if presented first in point of time, the tract located by said scrip was located thereby. And that brings me to the concluding question in the case.

Both the local office and your office found that Wheeler's application was first tendered, and the rule is here invoked "that where the evidence is conflicting, the concurring decisions of the local office and the General Land Office, on a question of fact, will not, as a rule, be disturbed." It is not contended that said rule is mandatory, or that it in any manner abridges the power of the Secretary of the Interior to examine and pass on any or all the questions of law or fact presented by the record. And in this case, the unusual earnestness and ability with which every phase and issue has been contested, and the apparent desire of all parties that I do so, has caused me to go into the whole record, and to examine the questions of fact, as well as of law, presented thereby.

Upon the question of who was the first applicant, Hartman or Wheeler, the evidence is conflicting and voluminous. Without attempting to discuss the testimony of each witness in detail, it is sufficient to say that both Wheeler and Hartman had each eight witnesses to testify to the priority of their respective applications. It is admitted that Hartman was the first to enter the office after the door was unlocked at 9 o'clock on the morning of February 23. But the theory of Wheeler and of his witnesses is, that the force behind Hartman, exerted by the surging crowd in front of the door, was so great that when the door was opened, Hartman was shot as from a catapult across the room and past the receiver, but that the same force operated upon Draper (Wheeler's attorney), who held and presented his application, in such a way as to throw him at a tangent against the counter and directly in front of the receiver, to whom he presented his application before Hartman could recover himself. Of the witnesses who testify for Wheeler, one is his attorney (Draper), one is himself, two, Sellwood and Chandler, are stockholders in the corporation owning the scrip which Draper tendered on that morning, and Boggs, who appeared as

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the attorney for Draper, and were hence directly or indirectly interested in the result of the case. Of the remaining witnesses, Derby, McComber and Adams, the latter did not sustain the theory of the effect of the force mentioned, on Hartman and Draper. He testified that Hartman ran in and got up to the counter before Draper went in. That he did not see Hartman's papers until the receiver had them, and that he heard the receiver ask the crowd not to jam, that he would mark the papers according as they came, and that he said Mr. Hartman's were No. 1, Mr. Draper's No. 2, and that he (Adams) could not recollect who was No. 3. Of the remaining two witnesses, Derby was the attorney for Manseau and Sullivan, and was interested in having the applications of both Hartman and Wheeler rejected.

So that without any intention of reflecting in any way upon the gentlemen who testified for Mr. Wheeler, the indisputable fact remains that the only strictly disinterested witness was Mr. McComber.

The witnesses of Hartman to whom the charge of interest might attach, are himself, Gonska, his clerk, and Mallett, his partner. The remaining six, including John McGinnis, whose deposition was taken at Chicago, had no interest in the result of the proceedings, unless it was Presnall, who was himself an applicant for a portion of said lands on that morning.

The testimony of all these witnesses is in effect, that Hartman was the first to enter the room and present his application to the receiver, so that the weight of disinterested testimony is in Hartman's favor. But in addition to this, there is in the record the report of the local officers who were in charge on that morning, concerning the proceedings at that time. That report contains the sworn statements of the register and receiver, and their clerk, John McGinnis. Their statements say that Hartman was the first to enter the room on that morning and present his application to the receiver. That the applications received on that morning were numbered in the order in which they were presented. That Hartman's was numbered 1, Draper's 2, Presnall's 3, and so on. The envelopes in which the applications were enclosed, and on which those numbers were placed, and still remain, are in evidence, and are mute but eloquent witnesses of the truth of Hartman's contention. It is contended with vigor that these statements can not be considered as evidence, that they are mere ex parte affidavits, etc. They are in the sworn report of officers sworn to discharge their duty, a report made in the ordinary course of business and the discharge of their official duties; it is legitimately in the record, and is entitled to due weight and consideration.

The receiver and the clerk testified at the trial, and their evidence was a corroboration of their statements in the report mentioned. These men were dispassionate witnesses of what occurred on that morning. They were not in the surging and excited mob around the door, but were where they could see and know who was the first to enter and

present his application, and their statement is of great force and assistance in arriving at the truth in this matter.

From all the facts presented by the record, I am convinced that Hartman was the first to enter the land office and to present his application on the morning of February 23, 1889, and is therefore entitled to locate the tract in question, viz: the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 63 N., R. 11 W., and the same is hereby awarded him.

The finding in favor of William Alden as to lots 3, 5 and 6, in said section thirty, obviates the necessity of a consideration of the claim of David Moyer to said lots, 3 and 5, which was instituted on February 23, 1889, by the filing of soldier's additional application No. 1421, which was allowed as to lots 3 and 5. The rejection of Moyer's claim, because in conflict with the prior claim or entry of Alden, carries with it the application of Billson and Monahan, to be allowed to contest Moyer's entry as to lots 3 and 5; on the allegation that he was dead on the date when his application was made, viz: February 23, 1889, which applications to contest, your office held, were still pending, and subject to future consideration.

The finding in favor of Alden and James, respectively, also obviates the necessity of considering the question as to the genuineness of Porterfield scrip 74, R. and R. 1, located by Hartman on said lot 6, and of Porterfield scrip, R. and R. 2, located by him on the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section thirty, both of said locations having been made February 23, 1889, after the rights of Alden and James, respectively, had attached to said tracts.

The effect of the foregoing findings and conclusions is, to reject the claim of Thos. W. Hyde and Angus McDonald, of Daniel C. Sullivan and Carroll M. Mauseau, of Reuben E. Lawrence and William M. Stokes, of David Moyer and of Chas. P. Wheeler, to any portion of the premises in dispute. And to reject the applications of W. W. Billson and Thos. J. Monahan to contest Moyer's entry.

And the further effect of said findings and conclusions is, to award to William Alden lots 3, 5 and 6, of Sec. 30, T. 63 N., R. 11 W.; to Emil Hartman the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 30, and to Houghton E. James the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 30, T. 63 N., R. 11 W.

The outstanding, uncancelled patent, inadvertently issued to Thos. Reed, for lots 1 and 2, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 30, deprives the Department of jurisdiction to extend the effect of this decision to those tracts.

Your office decision of September 8, 1893, is therefore modified as above stated.

MINING CLAIMS—PLACER LOCATION—DISCOVERY.

FERRELL ET AL. v. HOGE ET AL. (ON REVIEW).

It having been held herein that a placer location of one hundred and sixty acres, by an association, requires a discovery of mineral on each twenty acres, opportunity will be given the locators for a further showing, as, under the rulings in force at the time of location, a single discovery was considered sufficient.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (F. W. C.)

I have considered the motion forwarded with your letter of April 11, 1894, for the review of departmental decision of February 12, 1894 (18 L. D., 81), in the case of Ferrell *et al.* v. Hoge *et al.*, involving mineral entry No. 209, on unsurveyed land (designated as lot No. 40), made by Hoge *et al.*, and known as the Horse Shoe Placer, on January 6, 1890, at Helena, Montana.

Said decision held that:

There must be a discovery of mineral on each twenty acres in a placer location of one hundred and sixty acres made by an association; and such a location of that amount, based upon a single discovery, is void except as to the twenty acres immediately surrounding said discovery. (Syllabus.)

The motion alleges nothing new, except reference is made to the decision of the supreme court of Montana in the case of McDonald *et al.* v. Montana Wood Company (35 Pac. Rep., 668), in which it was held not to be necessary to make a separate discovery on each twenty acres embraced in a placer claim made by an association of persons covering one hundred and sixty acres.

From a careful examination of said decision I see no reason to disturb the holding made in the case under review, and the same is therefore adhered to.

In said decision it was held that Farrell *et al.* were not adverse claimants such as would defeat the mining claim, if authorized by law.

In the motion for review it is asked that opportunity be afforded the locators to make further showing, if deemed necessary, as, under the rulings in force at the time of the location, proof of a single discovery within the limits of the claim was considered sufficient.

I can see no objection to granting this request, and the previous decision is so far modified as to allow the locators to make an additional showing at a hearing ordered for that purpose.

RAILROAD GRANT—SETTLEMENT EIGHT—OCCUPANCY.

HUDSON v. CENTRAL PACIFIC R. R. CO.

A settlement claim, that will defeat the operation of a railroad grant, must be of a character capable of being asserted by the party in possession under the settlement laws.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (C. W. P.)

The land in controversy is lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 3, T. 2 S., R. 2 W., San Francisco, California.

The history of the case previous to this appeal, will be found in the case of James W. Hudson *v.* Central Pacific Railroad Company (15 L. D., 112).

By departmental decision of July 29, 1892, (15 L. D., 112), a farther hearing was ordered, which was had before the local officers, who found for the railroad company.

From this decision Hudson appealed. Your office affirmed the judgment of the local officers, holding "that so far as shown, the land in question passed under the railroad grant."

Hudson appeals to the Department.

I have read the testimony taken at the further hearing, as well as that taken at the original hearing, and I can come to no other conclusion than that the residence upon the land by George Tisdale, under whom Hudson claims, cannot be deemed such a use and occupancy as would except the land from the grant.

If Tisdale's testimony taken at the original hearing, is to be believed, and surely, there could have been no better witness, he was not on the land with an intention to claim it under the land laws. He then swore that he "did not set up a claim to the land;" that he "went there and lived on it, you know, hunted;" that he "hunted right on the land."

In no part of his testimony does he say that he asserted, or intended to assert, any claim to the particular tract in controversy. He says Haines owned the improvements, and that he (Tisdale) asserted no claim to them, or to the land.

Tisdale died before the farther hearing, and it is true that there is some evidence that he had made statements which contradict his testimony under oath. But I do not find any facts brought out in the proof which discredit his testimony.

A claim that will defeat the operation of the grant, must be a claim capable of being asserted by the party in possession under the settlement laws of the United States. But the testimony of Tisdale shows that he had no intention of claiming the tract under the settlement laws. He simply lived in the house on the land, by the permission of Haines, who claimed the improvements, and he asserted no claim to the land. See Northern Pacific R. R. Co. *v.* Potter (11 L. D., 531); Northern Pacific R. R. Co. *v.* Therriault (18 L. D., 224).

The judgment of your office is accordingly affirmed.

APPLICATION TO ENTER—PRELIMINARY AFFIDAVIT.

BOYD v. MALEY.

The rule that holds an entry invalid if based upon papers executed while the land is not subject to such appropriation, is not applicable to lands that have been restored to the public domain by act of Congress, but not formally declared open to entry by the General Land Office at the date of the execution of the papers.

Secretary Smith to the Commissioner of the General Land Office, December 15, 1894. (I. D.)

The plaintiff in the case of *John Boyd v. The Heirs of Howard C. Maley*, deceased, moves for a review of departmental decision of August 8, 1894, wherein the homestead entry of said Maley, deceased, for the SE. $\frac{1}{4}$ of Sec. 25, T. 49 N., R. 10 W., Ashland land district, Wisconsin, is held intact and Boyd's contest dismissed.

The grounds stated were carefully considered before the decision complained of and no new point is presented, except the fourth, which is that this Department erred "in not considering the fact (which is a matter of record) that the affidavits were executed at a time when the land was not subject to entry, being within the grant to the Wisconsin Central Railroad and not restored to entry and filing until three days after the affidavits were executed."

The record shows that this land was forfeited by act of September 29, 1890 (26 Stat., 496), and by instructions from the General Land office, was opened for entry at the local land office February 23, 1891. Maley was a settler on the land on September 29, 1890, and lived thereon until his death. He was sick and unable to go to the land office to make entry on the date fixed for receiving applications for entry, and knowing that fact, on February 21, 1891, he made the necessary affidavits and forwarded them, with his application to enter, to the local office.

The point that this affidavit on which entry was made was premature and made before the land was subject to entry, was not raised in the case until it is made in this motion for review. It was not one of the grounds of the contest, nor was it ever referred to before this motion.

These lands were restored to the public domain by the act of September 29, 1890, and were subject to appropriation by settlement from the passage of said act. Hence, the rule announced in *Smith v. Malone* (18 L. D., 482), that "An application to make entry of public land cannot be allowed if based on preliminary papers executed prior to the time when said land is legally subject to such appropriation," is not applicable to this case.

The motion for review is denied.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

THORNTON v. RHEA.

The preferred right of entry accorded by section 2, act of September 29, 1890, to actual settlers in good faith on railroad lands forfeited by said act, defeats the right of a subsequent settler to purchase said lands under section 3 of said act.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (J. I. H.) (J. L.)

I have considered the case of Hiram M. Thornton against Columbus A. Rhea, upon the appeal of the latter from your office decision of May 18, 1893, reversing the decision of the local officers, and deciding that Rhea's cash entry, No. 2606, be held subject to the superior right of Thornton.

The land involved is the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 7, T. 1 S., R. 24 E., Willamette Meridian, The Dalles land district, Oregon.

On April 8, 1891, Rhea made cash entry, No. 2606, under the act of September 29, 1890, (26 Stat., 496) for said tract of land. In his application and affidavit he stated:

That he settled on said tract on the fourth day of February, 1889; that he had been in full and peaceable possession of all of the said tract of land ever since, and to the then present time; that he settled upon said tract with the expectation of purchasing the same from the Northern Pacific Railroad Company, if they should obtain title to the same; that he had the entire tract under fence; that he raised a crop on it for the year 1890; and that he had it in crop at the then present time.

On June 1, 1891, Thornton presented his application to make homestead entry (under said act of September 29, 1890) of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 7, T. 1 S., R. 24 E., W. M., containing one hundred and sixty acres. In his homestead affidavit he alleged:

That he began settlement and actual residence on said land on March 1, 1885, and had resided upon said tract, and made it his actual residence ever since; and claimed his time for said actual residence.

At the same time, Thornton filed his application to make final proof under his homestead entry aforesaid.

On June 24, 1891, the local officers rejected said application as to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 7 aforesaid, for being in conflict with cash entry No. 2606, made April 8, 1891, by Columbus A. Rhea.

Thornton appealed, and applied for a hearing to determine the relative rights of himself and Rhea; and on January 13, 1892, your office directed a hearing to be had.

After the hearing, on May 4, 1892, the local officers rendered the following decision:

1. From testimony presented, it appears that the land embraced in said cash entry No. 2606 has been purchased, under act of September 29, 1890, by the defendant, who,

2. We believe, from the testimony, had in equity the best right to purchase or enter the tract.
3. We are therefore of opinion that said cash entry No. 2606 should not be canceled.

The local officers sent notice of their decision by letter dated May 4, 1892, addressed to Thornton at Heppner, Oregon, instead of Ione, Oregon, which was his post office address of record. Thornton received the notice on May 31, 1892, and on the same day forwarded to the local office his appeal to the General Land Office, in the following words:

To the Hon. Register and Receiver, U. S. Land Office: You will take notice that H. M. Thornton, the contestant in the above and foregoing matter, hereby appeals from your decision therein, to the Hon. Commissioner of the General Land Office.

H. M. THORNTON, *Contestant.*

No specification of errors was filed, and no notice of appeal was served on Rhea.

On May 18, 1893, your office reversed the decision of the local officers, and decided that Thornton had the prior and superior right to the land in contest, and that Rhea's cash entry be held subject thereto.

Rhea appealed to this Department, specifying errors, in substance, as follows:

1. That Thornton filed no specification of errors with his appeal to your office.
2. That no notice of Thornton's appeal was served on Rhea.
3. That it was error for your office to assume that Rhea waived his objections to the insufficiency of Thornton's appeal, and either understood or consented that a decision be had upon the entire record.
4. That the case should have been considered under Rules of Practice 48 and 49.
5. and 6. That the findings of your office were erroneous in fact and in law.

Rhea did not file any brief or argument before your office. The brief found in the files before me was filed March 14, 1892, before the local officers. Your office erred in "concluding that it is understood by the parties interested that a decision is to be had upon the entire record." Thornton's alleged appeal should have been ignored.

The only fact found by the local officers was the fact that Rhea purchased the land, and that appeared of record. The rest of their decision was merely opinion,—inference from the testimony. It therefore became the duty of your office to consider the entire record, including the testimony, under Rules of Practice 48 and 49.

The tract of land in contest was forfeited to the United States under the act of September 29, 1890, (26 Stat., 496). At that date Thornton was, and for more than five years had been, an actual settler in good faith on said tract, actually residing thereon with his family. Under the second section of said act, and the amendment thereto, approved February 18, 1891, (26 Stat., 764), he was entitled to a preference right to enter said tract as a homestead at any time within six months from the

date of the promulgation by the Commissioner of the General Land Office of the instructions to the local officers, for their direction in the disposition of said land. He tendered his homestead application on June 1, 1891; it was rejected June 24, 1891; and his appeal and application for a hearing was filed July 2, 1891; all within the period of six months aforesaid. His preference right was thereby perfected.

The decision of the local officers was contrary to existing laws. Your office decision is hereby affirmed. Rhea's cash entry No. 2606 will be cancelled, and Thornton will be permitted to make homestead entry of said tract of land.

Omar Phillips 89-93

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

PHILLIPS v. BREAZEALE'S HEIRS.

A soldier's additional homestead entry, suspended after the lapse of over two years for the investigation of the original entry, and released from suspension prior to the passage of the act of March 3, 1891, is confirmed by the proviso to section 7 of said act, and is not subject to contest.

Secretary Smith to the Commissioner of the General Land Office, December 24, 1894. (P. J. C.)

The record in this case shows that Benjamin T. Breazeale made original homestead entry No. 5055 of 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. 5, T. 42, R. 3 E., Booneville, Missouri, land district, February 6, 1868, and final entry thereof November 8, 1876, certificate No. 2462.

It seems that this entry was held for cancellation by your office letter "C" of March 16, 1888, to the extent of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, for conflict with a prior entry on which a patent had been issued. By letter "C" of November 6, 1890, the entryman having taken no action, the entry was canceled as to this forty acre tract. This left forty acres of his original entry intact.

On May 5, 1892, Breazeale made additional homestead entry, under section five of the act of March 2, 1889 (25 Stat., 854), of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the same section, township and range, "as an additional to my homestead No. 5055."

Meantime, on November 15, 1875, Breazeale made soldier's additional entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, T. 29 S., R. 26 E., M. D. M., Visalia, California, land district. This entry seems to have been perfected January 11, 1882, and final certificate No. 1398 issued. Further action seems to have been suspended on this entry, pending the result of the investigation as to the original entry, which was terminated by said letter of November 6, 1890.

On July 3, 1893, Omar Phillips filed an affidavit of contest against the last mentioned entry, alleging that it was not made for the exclusive use and benefit of the entryman, but for some other person or persons;

that the entry was fraudulent and void; that the entryman made another additional homestead entry in Booneville land district, Missouri, upon which final certificate had issued; that the entryman died in the year 1893; on information and belief it is charged that Breazeale did not regard the Visalia entry as valid, but as illegal and void; that the records of the county in which the land is situated does not show any transfer of the land.

By letter of August 5, 1893, your office refused to order a hearing, on the ground "that the entryman is entitled to patent for the tract involved under the seventh section, act of March 3, 1891, but that patent could not issue therefor until the original entry was patented." It was also decided that the quantity of land embraced in the three entries being in excess of one hundred and sixty acres, the heirs "will be required to elect which subdivision they prefer to relinquish." Whereupon Phillips prosecuted this appeal, assigning as errors (1) in holding and deciding that the entry in controversy was confirmed by the act of March 3, 1891; and (2) in holding that Phillips did not have a legal right to have a hearing ordered on the allegations contained in his affidavit of contest.

Under the proviso of section seven of said act of March 3, 1891, this entry should be confirmed. It reads as follows:

That after the lapse of two years from the date of issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

It will be borne in mind that this entry was finally completed in 1882. By order of your office it was suspended, not because of any defect in it, but for the reason that the original, to which the entry in controversy was additional, was under investigation. That suspension was removed in 1890, prior to the passage of said act, and, as corrected as to the acreage only, the original homestead entry was ready for patent. This action on the part of the government could not be construed as a "pending contest or protest" against the validity of the entry herein involved, and as more than two years had elapsed since the issuance of the receiver's receipt, I think it comes clearly within the confirmatory provisions of the statute quoted. Therefore it is not subject to contest, the land having passed out of the jurisdiction of the Department. (*Nawrath v. Lyons et al.*, 16 L. D., 46; *Radabaugh v. Horton*, 17 L. D., 48.)

The judgment of your office is therefore affirmed.

RAILROAD LANDS—TIMBER CULTURE ENTRY.

JAMES M. DEWAR.

Section 2, act of September 29, 1890, should not be construed as limiting the disposition of the forfeited lands to the homestead law alone, and consequently prohibiting a timber culture entry of said lands. Departmental circular of December 24, 1890, should be modified in accordance with this view.

A timber culture entry, erroneously allowed of land reserved for the benefit of a railroad grant, may stand as of the date when such reservation was removed.

Secretary Smith to the Commissioner of the General Land Office, December 24, 1894. (J. I. P.)

By letter "G" of March 13, 1893, your office transmitted here the appeal of James M. Dewar from its decision of January 17, 1893, holding for cancellation his cash entry No. 4787, for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 3, T. 6 N., R. 36 E., Walla Walla, Washington, land district.

It appears that the odd sections of said Twp. 6 were within the grant to the Northern Pacific Railroad Company, act of July 2, 1864 (13 Stat., 365). That said company filed its map of general route August 13, 1870, upon which withdrawal was made October 17, 1870. That on February 23, 1871, one J. B. Stafford filed declaratory statement No. 561 for the lands above described, together with the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 4, said township and range, alleging settlement thereon November 28, 1870.

October 4, 1886, this defendant made timber culture entry No. 2837, which he commuted to cash entry No. 4787 December 12, 1891, in accordance with the provisions of the act of March 3, 1891 (26 Stat., 1095).

The tract in question was restored to the public domain by the forfeiture act of September 29, 1890 (26 Stat. 496).

By letter "G" of December 13, 1892, your office called on the local office for its authority for allowing said entry. By letter of December 23, 1892, that office replied that the officers then in charge of the office had evidently allowed Dewar's timber culture entry under the impression that Stafford's pre-emption filing had excepted the land from the operation of the grant, and that when cash entry No. 4787 was made the right of the entryman, as against the company, was not considered, as the original entry had remained undisturbed for five years.

Your office then held that Stafford had never proved by a hearing that his right to the land antedated the receipt of notice of withdrawal at the local office, as provided by the act of April 21, 1876 (19 Stat., 35).

That by virtue of section 2, act of September 29, 1890, *supra*, said lands were subject to entry, within six months thereafter, by actual settlers thereon, under the homestead law only, and that though now public lands, the lands, of which the tract in question is a part, are not subject to disposal under the timber culture act. That therefore the

commutation of timber culture entry No. 2837, on December 12, 1891, must be held to have been irregularly allowed, and that the original entry was erroneously permitted; and on these conclusions, based on the premises above stated, cash entry No. 4787 is held for cancellation.

The first section of said act declares a general forfeiture of granted lands opposite the unconstructed portions of land grant railroads.

The second section is as follows—

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

In the circular of instructions issued by this Department with reference to said act, December 24, 1890 (11 L. D., 625), the following construction of section two thereof is found—

It is clear that the first clause of the section allows the actual settler, if qualified, to make a homestead entry of the tract upon which he has made settlement, and this is a preference right to be exercised within six months after the passage of the act. While the language of the second clause is somewhat ambiguous, I have concluded that the language authorizing "a second homestead entry" refers only to those persons who had theretofore made a homestead entry but failed from any cause to perfect the same. The object is to allow any one qualified who had not theretofore secured a piece of land under the homestead law to obtain a tract of these forfeited lands under that law, and at the same time to take these lands out of the operation of the pre-emption law.

This construction, to my mind, is a reasonable one, so far as it goes with the exception of the phrase, "and at the same time to take these lands out of the operation of the pre-emption law." That phrase is erroneous, in my judgment, not only in what it states, but in what it implies. The implication to be gathered from the construction quoted, with the objectionable phrase appended, is that the disposition of said lands was confined to the homestead law alone; that they were excluded from the operation of any or all of the other public land laws.

I have not been able to find in the section quoted, nor in the act as a whole, any expression that would indicate any such intention on the part of Congress. Had such been its intention, it would certainly have so expressed it in clear, plain and unambiguous terms.

Had the act paused after section one, there would, of course, have been no room for controversy. The lands therein forfeited to the public domain would have been subject to segregation under any of the public land laws by any qualified entryman. But there were settlers on those lands at the date of the passage of said act, whom Congress deemed it proper to protect. Hence they were given the privilege of a

preference right of entry, under the homestead law, upon the terms stated. Those who, for any reason, had failed to perfect title under the homestead law were given the privilege of making a second entry under that law; and all those who had never had the benefit of the pre-emption or homestead law were given the privilege of making entry under the homestead law.

It will be observed, however, that none of the classes upon whom these privileges were conferred are prohibited from entering said lands under the other public land laws, and that persons, other than those included in the classes mentioned, are not prohibited from acquiring said lands under any of the public land laws.

Therefore, the construction of said section which limited the disposition of said lands to the homestead law alone is erroneous, and the decisions of your office and this Department, based on that construction, are likewise erroneous, and said circular, so far as in conflict here-with, is modified.

It follows, therefore, that although the timber culture entry of Dewar was improperly allowed, because the tract covered thereby was then reserved by the grant to the railroad company, yet that entry will be allowed to stand, in the absence of any adverse claim, as having attached at the date when the reservation was removed from the lands involved. (*Thunie v. St. Paul, Minneapolis and Manitoba R. R. Co.*, 14 L. D., 545; *Richard Griffin*, 11 L. D., 231.)

Should your office, on consideration of Dewar's commutation proof, find as a fact that he had for four years prior to the offering of said proof cultivated said land as required by the timber culture law, and it is otherwise regular, you will pass said proof to patent.

Your decision is accordingly modified as above set forth.

UMATILLA INDIAN LANDS—ACREAGE OF PURCHASE.

JAMES A. MARSTON.

The right to purchase Umatilla lands under section 2, act of March 3, 1885, is limited to two hundred acres and, "no more"; hence, if a person makes an additional entry, under the proviso to said section, the amount that he may afterwards purchase, under the body of said section, is diminished to the extent of the acreage embraced within the additional entry.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (P. J. C.)

August 19, 1889, James A. Marston made homestead entry for lot 7 and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 2 N., R. 32 E., La Grande land district, Oregon, and commuted the same to cash entry on January 13, 1890.

March 19, 1891, he made Umatilla cash entry as additional to the above entry, for lot 4, SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$

of the same section, containing 116.53 acres. This entry has been affirmed by the Department (James A. Marston, 15 L. D., 340).

April 24, 1891, the first payment was made on lots 4 and 5 and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 32, T. 3 N., R. 33 E., untimbered, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 16, T. 2 S., R. 34 E., timbered, making a total of 199.36 acres under this purchase.

Final payment and certificate issued on August 15, 1892, under act of Congress of March 3, 1885, (23 Stat., 340). The total amount of land embraced in the above entries under said act amount to 315.89 acres.

Your office decision of January 21, 1893, suspended the said Umatilla cash entry, for the reason that the tracts entered under said act were in excess of the amount allowed by the act. Section 2 of the act is in part as follows:

That as soon as the report of said commission in respect to the new boundaries of said reservation shall be approved, the residue of said reservation lands not included in said new lines shall be surveyed, if not already surveyed, or if the stakes and monuments, if surveyed, have become so obliterated that the lines cannot be ascertained, and the same shall be appraised and classified into timbered and untimbered lands; and in case where improvements have been made by an Indian, or for the United States upon such lands, such improvements shall be separately appraised, and if the same belong to an Indian, such Indian shall be reimbursed the value of such improvements, in money; but no lands shall be appraised at less than one dollar and twenty-five cents per acre. The said lands, when surveyed and appraised, shall be sold at the proper land office of the United States, by the register thereof, at public sale, to the highest bidder, at a price not less than the appraised value thereof, such sale to be advertised in such manner as the Secretary of the Interior shall direct. Each purchaser of any of said lands at such sale shall be entitled to purchase one hundred and sixty acres of untimbered lands and an additional tract of forty acres of timbered lands, and no more. He shall pay one-third of the purchase price of untimbered lands at the time of purchase, one-third in one year, and one-third in two years, with interest on the deferred payments at the rate of five per centum per annum, and shall pay the full purchase price of timbered lands at the time of purchase. And where there are improvements upon the lands purchased which shall have been separately appraised, the purchaser shall pay the appraised value of such improvements at the time of purchase, in addition to the amounts hereinbefore required to be paid.

Each purchaser shall, at the time of making his purchase, make and subscribe an oath or affirmation that he is purchasing said lands for his own use and occupation, and not for or on account of or at the solicitation of any other, and that he has made no contract whereby the title thereto shall, directly or indirectly, inure to the benefit of another. And if any conveyance is made of the lands set apart and allotted as herein provided, or any contract made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract, or lien shall be absolutely null and void. And before a patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation. No patent shall issue until all payment shall have been made; and on the failure of any purchaser to make any payment when the same becomes due, the Secretary of the Interior shall cause said land to be again offered at public or private sale, after notice to the delinquent; and if said land shall sell for more than the balance due thereon, the surplus, after deducting expenses, shall be paid over to the first purchaser: *Provided*, That persons who settled upon or acquired title under the pre-

emption or homestead laws of the United States to fractional subdivisions of lands adjacent to the lines of said reservation, as now and heretofore existing, and at the time of the sale herein provided for, are residing on such fractions, and have been unable to secure the full benefit of such laws, by reason that the lands settled upon were made fractional by the boundary line of said reservation crossing such subdivision, shall have a right, at any time after advertisement and before sale at public auction, to purchase, at their appraised value, so much of said lands as shall, with the fractional lands already settled upon, make in the aggregate one hundred and sixty acres; and no additional residence shall be required of such settler, but he shall take and subscribe the oath required of other purchasers at the time of purchase. All controversies between settlers and purchasers in respect to settlement and the right of purchase, shall be heard and determined, upon their priorities and equities, by the like officers, and in the same manner as like contests are heard and determined under existing pre-emption laws.

The question raised by the appeal is, whether the applicant, having made the additional entry of March 19, 1891, has the further right to purchase two hundred acres more? The decision appealed from held that the additional entry of 116.53 acres should be deducted from the 199.36 acres which he purchased under the body of the section.

The purpose of the act in question was to regulate the sale of ceded lands. The essential points of the enactment, in this respect, are that the lands are (a) to be sold at public sale (b) at not less than the appraised value (c) to the highest bidder, (d) who may thus purchase two hundred acres and (e) no more. No qualifications are required of the purchaser, and any one may purchase, provided he be the highest bidder at or above the appraised value.

But he can only purchase two hundred acres and "no more." Here the language of the act is exact, mandatory and prohibitory as to the quantity. It seems to me that this clear mandate must dominate the provisions of the act, unless there be an exception or clear implication to the contrary. There is no express exception, but it is asserted that there is an implication to the contrary in the first proviso to the second.

The purpose of this proviso is to enable former entrymen to purchase sufficient land to bring deficient entries up to one hundred and sixty acres.

The office of a proviso generally is to except something from the purview of the act, or to qualify its generality; in other words, it carves special exceptions out of the act. Its construction must be in harmony with the general scope of the act, and a construction making it repugnant to the body of the act is inadmissible.

To hold that an entryman purchasing under the proviso and the body of the act, may buy more than two hundred acres is violative of the prohibitive mandate, which must dominate the whole act, and is utterly repugnant thereto, and would adopt a construction which is not to be tolerated in the absence of expression or clear implication. As said before, there is no such expression; a necessary implication does not arise because the proviso and the mandate are in no manner

conflicting, but can easily stand and be administered together, by holding that the two purchases must not exceed the maximum amount fixed by law. It is therefore my opinion that no one person can, under any circumstances, become the purchaser of more than two hundred acres.

The judgment of your office is therefore affirmed.

FANNIE D. LAKE.

Motion for the review of departmental decision of June 18, 1894, 18 L. D., 580, denied by Secretary Smith, December 26, 1894.

REPAYMENT—RAILROAD LIMITS.

STOCKARD W. COFFEE.

There is no authority for the repayment of double minimum excess, erroneously charged for land settled upon by the entryman prior to withdrawal under a railroad grant.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (J. L. McC.)

Stockard W. Coffee has appealed from the decision of your office, dated June 24, 1893, rejecting his application for repayment of one dollar and twenty-five cents per acre, excess paid by him on his pre-emption entry for the N.W. $\frac{1}{4}$ of Sec. 10, T. 3 S., R. 9 E., Stockton land district, California.

Coffee filed declaratory statement for the tract November 16, 1865, and made final proof and payment September 22, 1868.

The tract is part of an even-numbered section within the primary limits of the grant for the benefit of the Central Pacific (now Western Pacific) Railroad Company. Coffee settled thereon prior to the date of the withdrawal of the odd-numbered sections for railroad purposes. He should therefore have been charged, at the date of his entry, only one dollar and twenty-five cents per acre.

The appellant contends that your office, after acknowledging that "the local officers have overcharged the entryman \$1.25 per acre," ought in all consistency to have decided that repayment should be made, and insists that the act of June 16, 1880 (21 Stat., 287,) so demands.

The trouble with this contention is that your office has no discretion in the matter, and repayment can not be made except in cases expressly authorized by law. The law cited by the appellant provides 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 land-grant, the excess of one dollar and twenty-five cents per acre shall be . . . repaid to the purchaser thereof.

As the land in the case now under consideration is within the limits of a railroad grant, the act cited does not apply. (C. W. Aldrach *et al.*, 13 L. D., 572.) The appellant fails to cite any law that authorizes repayment under such circumstances. His case is in its essential features similar to that of Joseph Brown (5 L. D., 316), wherein the Department held that, although the land was improperly sold at the double-minimum price, yet your office had no discretion in the premises in the absence of express statutory authority providing for such repayment.

The decision appealed from is correct, and is hereby affirmed.

SUTPHIN *v.* GOWER.

Motion for review of departmental decision of June 18, 1894, 18 L. D., 527, denied by Secretary Smith, December 26, 1894.

SWAMP LANDS—INDEMNITY CLAIMS—PROOF.

STATE OF ILLINOIS (COOK COUNTY).

In the examination of swamp land indemnity claims the testimony of the witnesses should accompany the report of the agent, but in the absence of any regulation to such effect, the failure of the agent to send in the proofs with his report, should not in itself invalidate proofs taken in his presence.

All testimony in support of such claims should be taken in the presence of the agent, who should also be present when the proof is signed and sworn to.

Secretary Smith to the Commissioner of the General Land Office, December 22, 1894. (G. C. R.)

Isaac R. Hitt, agent for the county of Cook and State of Illinois, has appealed from your office decision of August 4, 1893, holding for rejection the claim of said county for indemnity, on the proof furnished by the State of the swamp character of twenty tracts of land of forty acres each, all lying in Sec. 8, T. 37 N., R. 13 E., 3d P. M., and sections 19, 20 and 30, T. 35 N., R. 15 E., 3d P. M., Cook county, Illinois.

It appears that Special Agent J. C. Walker was detailed by your office to make the examination in the field and to take the testimony of such witnesses as might be presented by the State.

Walker transmitted his report August 3, 1881. It appears to have reached your office three days later. The report bears date July 29, 1881, and contains the following statement:

After a full and thorough examination of each of said tracts and the testimony of the witnesses on part of the State, I have come to the following conclusions as to the character of each tract. The following list of tracts marked "A" attached to and made a part of this report, are now and without a doubt swamp and overflowed lands. Also those tracts marked "B" are arable lands; said list is also made a part of this report.

His report contained a description of the twenty tracts marked "A" upon which he based his opinion that they "are now and without doubt swamp and overflowed."

On October 3, 1881, Isaac R. Hitt transmitted the proofs relied upon to show the character of the lands. These proofs consisted in the depositions of Alex. Wolcott, aged sixty-seven years, and Andrew H. Dolten, aged fifty-eight years, and shown by the affidavit of Isaac R. Hitt to be reputable men and entitled to credit, each having resided in Cook county for many years and each having held offices of trust. There were twenty of these joint depositions, each relating to a forty acre tract, fully described. The officer's jurat as it appears upon each of these twenty depositions reads as follows:

Sworn and subscribed to before me by Alexander Wolcott and Andrew H. Dolten to me well known to be respectable and credible citizens of said county, this 15th day of September, 1881. In testimony whereof, witness my hand and seal of office.

WILLIS M. HITT,

Notary Public in and for Cook County, Ill.

Following this jurat is the following:

The foregoing testimony was taken in my presence, and the witness was examined by me.

J. C. WALKER,
Special Agent General Land Office.

Your office rejected this proof because the depositions were sworn to (September 15, 1881,) more than a month after the special agent had completed his investigation of the claim and had prepared and regularly filed his final report; the report having reached your office August 6, 1881; also because Mr. Hitt had failed to give a satisfactory explanation of the seeming irregularity, after having been called on for that purpose, and that Mr. Walker made no supplementary report, and that from the records of your office "it would seem that he (Walker) was engaged in examining the claim of Lawrence County, Illinois, on the date on which the jurat shows the witnesses were sworn in Chicago."

The chief difficulty in considering the testimony presented by the State consists in the fact that the witnesses were sworn to their depositions about six weeks after the agent made his report to your office.

The regulations adopted by your office, August 12, 1878 (afterwards approved by this Department), in regard to the proof required in claims for indemnity under the act of March 2, 1855 (10 Stat., 634), provide that an agent be appointed to make an examination in the field of each tract in the list upon which indemnity is claimed by the State; that upon the completion of such examination, notice be given the State of the time and place when testimony would be received as to the character of the lands, and the agent is required to attend for the purpose of examining witnesses touching the character of the lands. The evidence offered by the State must be the testimony of at least two respectable and disinterested persons having knowledge of the land, etc.; these witnesses must state facts, not opinions, their testimony to

be full and complete; ex parte affidavits will not be considered, and all testimony "must be taken in the presence of the agent of this office."

Two witnesses to prove the character of each tract are sufficient when the agent is satisfied from a previous examination that the tracts are of the character contemplated in the swamp land act.

The regulations further require that:

"After the testimony is taken the agent will make a full report to this office upon each of the tracts upon which testimony is taken, together with his opinion as to the real character of each of said tracts.

The regulations do not require that the testimony of the witnesses accompany the agent's report; to avoid the imputation of fraud, this should in all cases be done. This requirement not having been made in the then existing regulations, the failure of the agent to send in the proofs with his report should not of itself invalidate those proofs. The principal requirement is that all the testimony shall be taken in the presence of the agent. The agent, Mr. Walker, says this was done, and that he examined those witnesses.

While the regulations do not require the agent to be present when the proof is actually signed and sworn to, it is certainly a better practice that he should be, and in the future he should be so instructed.

The records of your office as to the whereabouts of Walker, the agent, on September 15, 1881, do not show that he was then in Cook county. Whether in fact he was or was not present when the witnesses were sworn, it can not certainly be determined. In the absence of specific requirements that he should have been present, I do not think the State, after the lapse of thirteen years, should be subjected to the trouble and expense of producing other witnesses, unless there are plain indications on the face of the proof that the evidence has been changed or modified since the same was taken, it having been taken in the presence of the agent as required by the regulations.

On examination of these proofs, I find some discrepancies in the report of the agent as based on the proof taken. In this connection, you will note the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 37, R. 13; NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 30, T. 35, R. 15, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 19, T. 35, R. 15.

The action of your office rejecting the proof, for the reasons stated, is reversed, and the case is returned for examination and settlement upon its merits, as disclosed by the report of the agent and proofs presented by the State.

PRACTICE—REVIEW—AMENDED RULE 114.

SANDERS *v.* PARKER (ON REVIEW).

A decision rendered on an incomplete record will be set aside, where, on application for relief under amended rule 114, it appears that such action is required by the completed record.

Secretary Smith to the Commissioner of the General Land Office, December 24, 1894. (A. E.)

On April 16, 1894, this Department rendered a decision in the above entitled cause against the application of Parker to purchase the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8, Tp. 35 N., R. 4 E., Seattle, Washington, because Parker had not published the notice at the time required by the timber and stone act under which he claimed (see 18 L. D., 449).

On June 15, 1894, Parker, by attorneys, filed a motion for review under amended rule of practice number 114, and leave to file argument was granted him on June 23, 1894. On July 30, 1894, Parker made written request that action be suspended on said motion so made by him under rule 114, until he could obtain evidence that the notice required had been duly published in accordance with law, and for the absence of which in the original record Parker's claim had been rejected, as stated.

On September 5, 1894, Parker furnished proof that the notice had been published as required by law, but that the same had not been filed with the record through negligence on the part of the claimant to purchase.

On October 20, 1894, Parker, by his attorneys, filed proof of service of the papers filed by them after the decision of April 16, 1894.

It now appearing that said Sanders has shown no cause why the application of Parker to set aside the decision of April 16, 1894, should not be granted, and it appearing that the decision of April 16, 1894, was rendered on an incomplete record, and that the completion of the same entitles Parker to a judgment in his favor, it is now ordered, on motion of Parker, that the judgment rendered in the above entitled cause on April 16, 1894, be annulled, set aside, and held for naught, and that Parker be allowed to purchase said land in accordance with the provisions of the act under which he claims.

ELLIS *v.* SNEED.

Motion for review of departmental decision of June 18, 1894, 18 L. D., 547, denied by Secretary Smith, December 29, 1894.

SCHOOL LANDS—INDEMNITY—RESERVATION.

STATE OF CALIFORNIA.

Sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891, do not authorize school indemnity selections in lieu of surveyed school sections that are subsequently included within the boundaries of a forest reservation.

Secretary Smith to the Commissioner of the General Land Office, December 27, 1894. (J. I. H.) (F. L. C.)

I am in receipt of your office letter of September 29, 1894, transmitting for my consideration and action certain questions in connection with an application on behalf of the State of California to be allowed to select the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 26, T. 16 S., R. 7 E., M. D. M., in lieu of land in Sec. 36, T. 7 S., R. 29 E., M. D. M.

The tract mentioned as basis for the selection falls within the boundaries of the Sierra forest reservation, as established by executive order, dated February 24, 1893 (27 Stat., 1059).

Said section 36 was surveyed prior to the date of the order making the reservation, and the question is, whether in such case the State can be permitted to make indemnity selection in lieu of surveyed school sections thus embraced in a public reservation, made pursuant to a law of the United States, thereby waiving and releasing all right and title to the land so used as a basis.

On November 27, 1893, your office submitted for departmental consideration a letter of instructions to the register and receiver at Los Angeles, California, relative to certain school indemnity selections in their land district. Said instructions, among other things, directed "that selections upon the basis of surveyed school sections within the said forest reservations will not be allowed." Said instructions were on December 19, 1893, 17 L. D., 576, returned to your office, with the statement that there appeared to be no objection thereto, and they were accordingly promulgated.

Counsel for the State ask a modification of said instructions so as to permit the State to select indemnity for all school sections within a forest reservation, surveyed as well as unsurveyed, contending that such is the right of the State under existing law.

Your office letter of September 29, 1894, recognizes this contention as sound and expresses the opinion "that under the provisions of the act of February 28, 1891 (26 Stat., 796), amendatory of sections 2275 and 2276 of the Revised Statutes, the State of California is authorized to select indemnity for sections sixteen and thirty-six in townships within the forest reservations in said State, whether surveyed or unsurveyed, the selection of such indemnity lands being a waiver on the part of the State of all right to the land in place, as in said act provided;" and concludes with the statement that but for the former decision of your office, taking a contrary view, which decision was submitted to and approved

by this Department, your office would have no hesitation in accepting the State applications referred to.

The general rule of law, well established in this Department and in the courts, has been that the title to school sections in place, if free at date of survey, then vests in the State absolutely. 6 L. D., 412; 7 L. D., 459; 9 L. D., 408; 14 L. D., 681; 15 L. D., 273; *Cooper v. Roberts*, 18 How., 173; *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U. S., 634.

The question before me, therefore, is whether sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891, change the rule and authorize the view expressed in your office letter, as above stated.

Amended section 2275 reads as follows:

Where settlements with a view to pre-emption or homestead, have been or shall hereafter be made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Counsel for the State contend that the law as above quoted clearly gives the right of indemnity selection in lieu of any school sections included within any reservation, and authorizes the Secretary of the Interior to recognize and approve such selections. After a careful reading of the section, I am not convinced that such right or authority exists. I should be glad to be able to conclude that the right does exist, for the contrary view must necessarily result in great inconvenience, both to the State and the United States.

It seems clear to me, however, that in reading and applying section 2275, *supra*, the date of survey is the point of time to be kept in view throughout. The words "before the survey" are specifically used in the first sentence which relates to school sections found to be settled upon prior to survey, and the remaining sentences are, as I construe the section, to be read as if the words "before the survey" appeared in each. Congress apparently deemed repetition unnecessary and redundant, and to avoid tautology used them but once in said section.

I apprehend the State would most likely take this view, if, under the second sentence of the section, a sixteenth or thirty-sixth section should long after survey be found to contain valuable mineral, and the government should for that reason dispose of or attempt to dispose of said land as mineral land, and remand the State to the selection of indemnity therefor, and in doing so it would be sustained by the decisions of this Department and of the courts.

Much stress is laid upon the word "entitled" as used in the proviso in said second sentence, it being urged that "entitled" means having title, and as the State has no complete title until after survey, that said proviso must have reference to surveyed lands. Such contention, if accepted, proves too much, for while indemnity would in such view be provided for surveyed school sections found to be mineral or in a reservation, there would be no provision for indemnity where such sections are reserved or found to be mineral prior to survey. In other words, it would provide for taking from the State that to which it has by survey acquired complete title, and granting indemnity therefor, while the same thing would not be done while the right of the State is a mere float awaiting survey to give it definiteness and fixity.

Of course, Congress did not intend such a result. The word "entitled" as used in said proviso is defined by the word "right" used in the closing words of the same proviso, and refers not to the absolute title, but to such right or title as exists prior to survey.

This view is further sustained by the last sentence of said section 2275, which provides for the protraction of surveys over reservations for the purpose of ascertaining the number of townships therein, and thus the number of school sections for which indemnity may be selected.

But we are not left to the act of February 28, 1891, which contains the section above discussed, in order to ascertain the mind of Congress with relation to lands occupying the status of those hereunder consideration.

The executive reservation herein referred to was made pursuant to the provisions of section 24 of the act of March 3, 1891 (26 Stat., 1095), passed only three days subsequent to the approval of the act of February 28, 1891. Said section reads as follows:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservation and the limits thereof.

It is to be observed that this section provides for the reservation of "public lands." Under the decisions cited herein, school sections, surveyed and unincumbered at the date of survey, are not public lands, but are the property of the State, and the act of March 3, 1891, or any proclamation thereunder could not operate upon them. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*, 98 U. S., 761.

In *Wilcox v. Jackson* (13 Peters, 513), the supreme court say:

That whosoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it; although no reservation were made of it.

See also *Hastings and Dakota Railroad Company v. Whitney*, 132 U. S., 357.

The foregoing citations show, first, that surveyed school sections, free from claim or reservation at date of survey, are not public lands, and can not be disposed of by any subsequent law or proclamation; and, second, that Congress did not by the act of March 3, 1891, purport to provide for the reservation of any but *public lands*, and consequently there is no reservation made, or intended by said act to be made, of the school sections here in question.

There is therefore no proper basis for the selections made by the State, and they can not be allowed.

For the reasons given, I am unable to concur in the views expressed in your office letter of September 29, 1894, but must adhere to the instructions of your office, dated October 10, 1893, and approved by the Department December 19, 1893.

PENCE *v.* GOURLEY ET AL.

Motion for the review of departmental decision of April 5, 1894, 18 L. D., 358, denied by Secretary Smith, December 24, 1894.

RAILROAD RIGHT OF WAY—FORFEITURE PROCEEDINGS.

FREMONT, ELKHORN AND MISSOURI VALLEY RY. CO.

Judicial proceedings should be instituted by the government to secure the forfeiture of a railroad right of way, where the grantee fails to construct any portion of its road, and such action is necessary for the protection of a constructed road whose right of way, as approved by the Department, is, in part, identical with that located by the former company.

Secretary Smith to the Attorney General December 28, 1894.

(J. I. H.)

(C. W. P.)

I transmit herewith copy of a letter from the Commissioner of the General Land Office, dated November 17, 1894, wherewith is submitted a petition, filed in that office April 18, 1894, by the Fremont, Elkhorn

and Missouri Valley Railway Company, alleging that the Black Hills and Wyoming Railroad Company, to which certain rights of way were approved by the Secretary of the Interior, under the act of March 3, 1875 (18 Stat., 482), in South Dakota in 1887, had not completed any part of the road for which such rights of way were granted; and asking the Commissioner to take the proper steps for the forfeiture of said rights of way, in accordance with section four of the above act.

It appears from the petition that the petitioner has, also, a grant of right of way under the said act, and that the two rights of way are, in part, identical in location on the ground—which facts are also shown by the records of the General Land Office. It appears further that the petitioning road has constructed, and is now operating its road over its said right of way, and that the Black Hills road has instituted a suit to eject the petitioner therefrom.

It further appears that on May 14, 1894, the General Land Office instructed the local officers at Rapid City, South Dakota, to advise the Black Hills Company of the purport of said petition, and to allow sixty days for it to show cause why the Commissioner should not recommend to the Department that proceedings be instituted for the forfeiture of its right of way.

Prior to the expiration of the time allowed, the Black Hills Company requested an extension of time, and an additional sixty days were allowed; at the expiration of which time, the local officers reported, transmitting the papers filed by the company. Subsequently Messrs. Robertsons and Harmon, of New York city, counsel for the Black Hills Company, asked for further time for a hearing and for filing briefs. On November 7, 1894, they were informed by the Commissioner of the General Land Office that no further time would be allowed; but that any papers filed in the case before it was taken up in due course of business, would receive consideration; but nothing more was heard from them.

With the petition the Elkhorn Company filed two affidavits in support of its averments.

It appears that the Black Hills Company does not claim to have completed any portion of its road, and the Elkhorn Company requests in its said petition, that appropriate proceedings may be taken by the government in the courts to cancel and forfeit the asserted right of the Black Hills and Wyoming Railroad Company to right of way under its map as approved by the Secretary of the Interior, upon the ground of its failure to build any portion of its road as described in its said map, in accordance with the requirements of the proviso contained in the fourth section of the said act of March 3, 1875, *supra*, which is in these words:

Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The question on the petition is, should the Department recommend a suit by the United States, as requested in the petition under consideration, as to the right of way over the public lands.

That the right of way granted by the act in question is a mere easement can not be questioned, for the fourth section provides that "thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way."

If Congress had the power to declare that any corporation by an omission of duty or default as to limitations imposed should forfeit all right acquired under such grant, without the intervention of the courts, there would be no necessity for any action on the part of the government, for the reason that the Elkhorn Company could successfully defend the suit brought against it by the Black Hills Company by showing that the last named company had failed to complete its road within the time required, and had no longer any rights under the statute which they invoke, but, in view of the decision of the supreme court, in the case of Schulenberg *v.* Harriman, 21 Wal., 44, holding that a failure to perform a condition subsequent does not forfeit the rights conferred by a grant, and that no one can take advantage of the default or complain of it, except the government making the grant and imposing the condition, it may at least admit of a doubt whether the road receiving the later grant can defend against an action for trespass brought by the former grantee, so long as the grant remains unforfeited, either by the act of Congress or the courts. As the latter road was induced to build its road by the action of the Department accepting and approving its maps of definite location, I think it is the duty of this Department to recommend that suit be brought by the United States to forfeit the grant to the Black Hills Company, in order to preserve the rights of the Elkhorn Company under its grant.

I therefore submit said petition for your consideration, and request that suit may be instituted to forfeit the rights of the Black Hills Company under its grant of right of way, if in your judgment such suit is necessary and advisable.

LA CHAPELLE *v.* ROSS.

Motion for review of departmental decision of May 21, 1894, 18 L. D., 490, denied by Secretary Smith, December 26, 1894.

WAGON ROAD GRANT—ACT OF JUNE 22, 1874.

ROBERTS v. OREGON CENTRAL MILITARY ROAD CO.

The certification of lands under a Congressional grant that does not provide for a patent operates to pass the title to the lands so certified, and remove such lands from the jurisdiction of the Department.

The act of June 22, 1874, providing for the relinquishment of granted lands and the selection of lands in lieu of those released, while in terms applicable only to railroad grants, is remedial in character, and may be treated as applicable to wagon road grants.

Secretary Smith to the Commissioner of the General Land Office, December 27, 1894. (F. W. C.)

I have considered the appeal by Emmit I. Roberts from your office decision of April 21, 1893, holding for cancellation his pre-emption cash entry covering the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 31, T. 37 S., R. 21 E., Lakeview land district, Oregon, on account of the prior appropriation of the said land under the grant made for the Oregon Central Military Road company.

By the act of July 2, 1864 (13 Stat., 355) a grant was made of odd sections for three miles in width on each side of a wagon road, to be built from Eugene City, Oregon, to the eastern boundary of the said State, which grant contains no indemnity provision.

The State, to whom the grant was made, conferred the same upon the Oregon Central Military Road company.

By the act of December 26, 1866 (14 Stat., 374), the right to select indemnity from the odd sections within six miles of the road was granted.

The lands in question fall without the three miles and within the six miles limits of said grant, and were selected on account thereof May 7, 1869, which selection was approved May 21, 1871 by the Secretary of the Interior.

Notwithstanding this certification it appears that the local officers, for some reason not given, permitted Roberts to make pre-emption cash entry No. 1502 for this land, but, upon considering the facts relative to the allowance of said entry, your office decision finds that there is nothing in Roberts' proof, nor in the records, showing the land in question to have been excepted from the withdrawal made on account of said grant, or that it was not subject to selection by the company for indemnity purposes at the time of said selection and approval, and in view thereof you hold that the land was not subject to Roberts' entry, it having been appropriated to the grant by said approval; and for that reason Roberts' entry is held for cancellation.

The appeal urges that said list of approval purports to be granted lands and that although the tract in question is included in said approval list, yet there has been no designation of a loss as a basis for such selection, and further, that the company failed to respond at the

time of the offering of proof by Roberts upon which his cash entry was allowed.

It might be noted that by the act of July 18, 1874 (18 Stat., 80), provision was made for the issuance of patents to the lands granted said company, upon payment of the necessary expenses thereof by it (the said company). No patent appears to have issued for this land but as there was no provision for the issuance of patent on account of this grant, at the time of the certification of the land in question, it must be held that by said certification, which appears to have been a proper one, the land being within the limits and free from adverse claim at the time of approval, said land passed beyond the jurisdiction of this Department, and while the company might receive a patent upon payment of the necessary expenses for the issuance thereof, yet its failure can in no wise affect its right to the land in question, under its grant and certification, as before stated.

The land having been legally appropriated prior to the allowance of the entry by Roberts, the same was improperly allowed. The failure of the company to respond to Roberts' notice of intention to offer proof can in no wise affect its right to the land in question.

In answer to the objection that the company never specified a basis for the selection of this land, it is sufficient to state that prior to the issue of the circular of November 7, 1879, a specification of losses as a basis for indemnity selections made on account of railroad or wagon-road grants was not required by this Department.

From the papers forwarded in the case, it appears that on June 19, 1893, Messrs. Britton and Gray, attorneys for the California and Oregon Land Company, transferees of the Oregon Central Military Wagon Road Company; reported that they were authorized to say that the company is willing to relinquish the land in question in favor of Roberts, provided it be held entitled to select other lands in lieu of said tract under the act of June 22, 1874 (18 Stat., 194).

Under date of June 24, 1893, your office advised the company that the act of June 22, 1874, *supra*, did not apply to wagon road grants but related only to grants to aid in the construction of railroads, and for that reason held that it could not be entitled to select other lands in the event of the reconveyance of the tract in question under said act, but that you would forward the letter in which the proposition was made for the consideration of this Department, in connection with Roberts' appeal.

While it is true that the act of June 22, 1874, *supra*, specifically refers to railroad land grants, yet its scope and purpose would seem to have equal application to grants made to aid in the construction of wagon roads. Said act offers inducement to the amicable adjustment of controversies arising from the erroneous acts of the local officers in permitting parties to make entry of land for which a previous grant had been made, the rights under which had attached prior to the allowance of such entries.

Hoover

The grants to aid in the construction of railroads and wagon roads are, in all material matters, the same, and being a remedial statute, it would seem to have equal application to grants for both railroads and wagon roads. The fact that the words "railroad land grants" were specifically named in the act, should not be held to control, the act being a remedial act and the purpose of the legislators being apparent, viz., the protection of the settler who was at the mercy of the grantee company.

I must, therefore, hold that upon a proper reconveyance of the tract here involved to the United States, accompanied by an abstract showing that title to be clear and unencumbered, Roberts' entry may be passed to patent and that the company shall be deemed entitled to select other lands within the limits of the grant, of the character contemplated thereby and upon the conditions therein named.

You will call upon the company, advising them of this action and allowing them ninety days within which to make reconveyance as stated. Should they fail to make reconveyance, however, Roberts' entry must be canceled.

Your office decision is accordingly modified.

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